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THE
FEDERAL REPORTER.

VOLUME 108.

CASES ARGUED AND DETERMINED
IN THE
CIRCUIT COURTS OF APPEALS AND CIRCUIT
AND DISTRICT COURTS OF THE
UNITED STATES.

PERMANENT EDITION.

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FEDERAL REPORTER, VOLUME 108.

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² Assigned to Northern District under act approved January 22, 1901, to take effect July 1, 1901.

³ Appointed June 13, 1901, under act approved January 22, 1901, to take effect July 1, 1901.

⁴ Appointed April 24, 1901, under act approved February 12, 1901.

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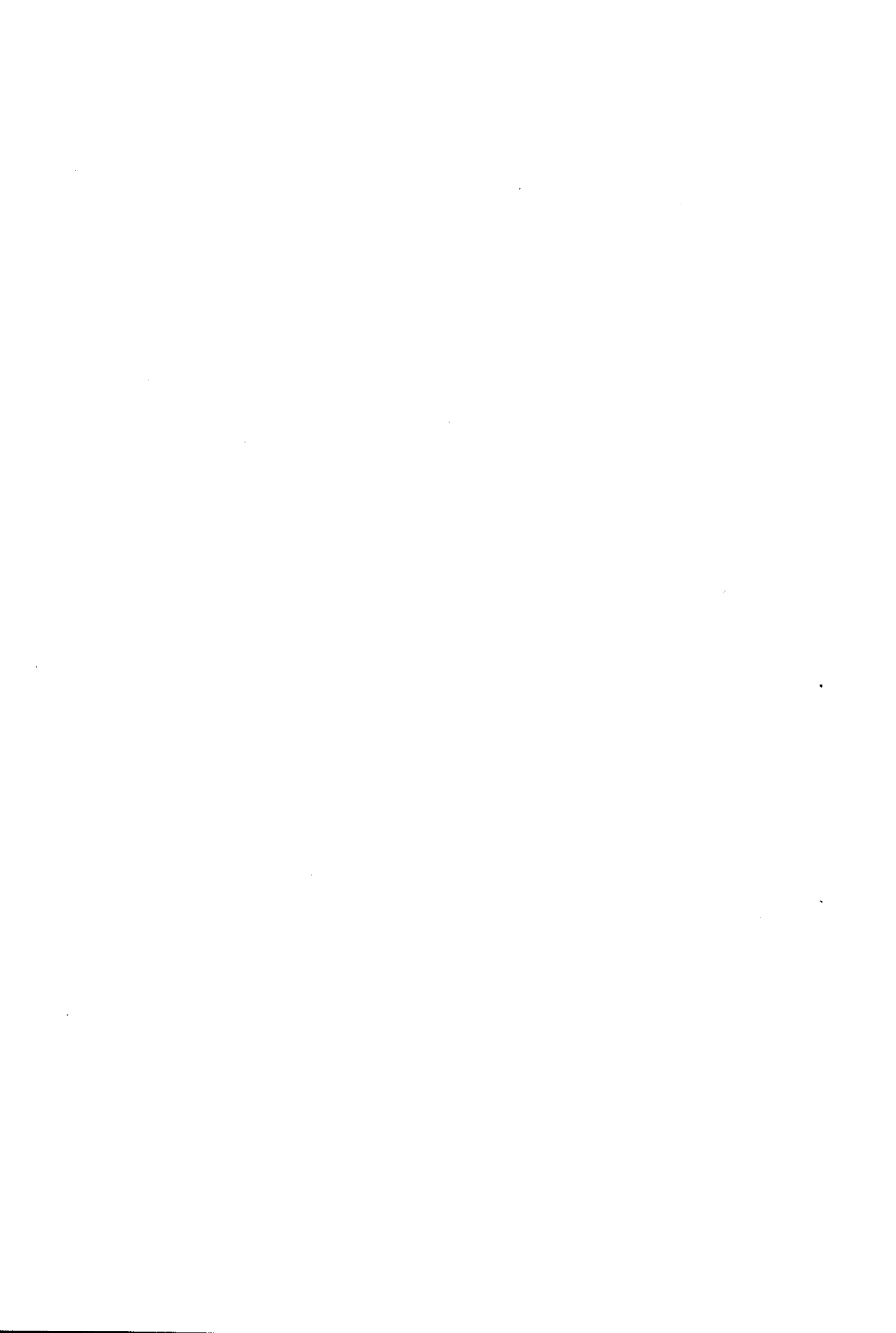
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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

CONTRACTING & BUILDING CO. OF KENTUCKY v. CONTINENTAL
TRUST CO. OF NEW YORK.

(Circuit Court of Appeals, Sixth Circuit. November 7, 1900.)

No. 773.

**1. RAILROADS—MORTGAGE—AFTER-ACQUIRED PROPERTY—SALE OR LEASE OF
LOCOMOTIVES.**

Locomotives were delivered to a railroad company on payment of a specific amount, and the execution to the builders of 12 obligations, called "lease warrants," maturing at monthly intervals, up to a specified date. The instrument evidencing the transaction was in the form of a lease; the payments made, and to be made, being called "rentals." The legal title remained in the so-called "lessor," and the contract provided that, on payment of the last lease warrant, the lessee might, at its option, purchase the locomotives for one dollar, on payment of which the lessor was to execute a bill of sale thereof to the lessee. *Held*, that the real transaction was a bargain and sale, title being retained as security for the purchase money, and that, the locomotives being property susceptible of separate ownership and separate liens, they passed, subject to the vendor's lien, under the after-acquired property clause of an existing mortgage of the railroad covering all future acquisitions of locomotives, and the lien thus acquired by the mortgagees could not be displaced by any subsequent agreement to which they were not parties.

**2. SAME—LOAN TO PAY INTEREST ON MORTGAGE COUPONS—LENDER'S RIGHT TO
PREFERENCE OVER MORTGAGE.**

That money was borrowed to pay interest on matured railroad mortgage coupons is no ground for giving the lender a preference over the mortgage; and this, though the loan was necessitated in part by the application of current income to the payment of the purchase money for locomotives which became subject to the mortgage under an after-acquired property clause.

Appeal from the Circuit Court of the United States for the Western Division of the Northern District of Ohio.

The appellant is a creditor of the Toledo, St. Louis & Kansas City Railroad Company, holding six notes, for \$10,000 each, which matured in May and June, and are renewals of notes originally made January 6, 1892, payable to the order of S. H. Kneeland, and indorsed by him. The railroad company became insolvent, and in May, 1893, a receiver was appointed by the court below, upon a bill filed by general creditors. Subsequently, and in

December, 1893, the trustees, under a mortgage securing an issue of bonds, filed their foreclosure bill in the same court. The two bills were consolidated under the title of the latter, and the receivership extended to both suits. This intervening petition was filed October, 1893, in the original case. The intervener, now the appellant, claimed preference in the payment of its demands upon two grounds: First, as the assignee of the legal title to 10 locomotives, then in the possession of the receiver; second, because the notes were given for money loaned the company to aid it in paying maturing interest upon its mortgage bonds, thus preventing default. The petition was referred to Irvin Belford, as special master, to report upon the facts and law. The master, in a very able report, denied to petitioner any lien upon the locomotive engines superior to that of the mortgage bondholders, and any preference over the bondholders, either in the income of the receivership or the corpus of the mortgaged property. This report was excepted to by the appellant, which exceptions on final hearing were overruled, the report confirmed, and a decree entered denying all preference to the intervener. From this decree this appeal has been taken.

E. D. Potter and Thomas Emery, for appellant.

Edwin T. Rice, Jr. (E. C. Henderson, of counsel), for appellee.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

LURTON, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

The claim to a lien superior to the lien of the mortgage bonds upon the locomotive engines is not well founded. The Rhode Island Locomotive Works sold to the railroad company in June, 1891, 10 locomotives, for the consideration of \$89,500. Of this, \$17,900 was paid in cash upon delivery. For the remainder, 12 obligations, called "lease warrants," were executed, each for \$5,966, which matured at monthly intervals, up to June 13, 1892. The instrument evidencing this transaction was in the form of a lease; the payments made, and to be made, being called "rentals." The legal title remained in the so-called "lessor." The contract provided that "the lessee may, at its option, at any time within one month after the maturity and payment of said last lease warrant, purchase said locomotives at the price of one dollar, and, upon payment of said sum to it, the lessor shall thereupon, by a bill of sale, convey said locomotives to said lessee." Eleven of these "lease warrants" were paid prior to June, 1892. The twelfth and last was by agreement extended to November 13, 1892. In June, 1892, S. H. Kneeland, largely interested as a stockholder in the railroad company, undertook, at the instance of the company, to raise a loan of \$60,000 to aid it in meeting interest upon its mortgage bonds. Passing over much that is immaterial, the master reported that he accomplished this by having executed to him the 10 notes, each for \$10,000, which were the originals of those in suit. Kneeland then induced the Rhode Island Locomotive Works to execute an assignment in blank of the above-mentioned lease contract, by which it assigned "all its right, title, interest, and property in and to said locomotives, and in and to all of its rights and authority under said agreement, subject, however, to said outstanding lease warrant maturing November 13, 1892, and to all securities and remedies under said contract of June 5, 1891, so far as the same may be necessary for the collection of said lease warrant." This assignment is dated June 6, 1892, and at the foot thereof the railroad company executed an assent thereto.

At this time the master reports that Kneeland was personally indebted to C. P. Huntington in an unknown amount, for the payment of which Huntington held \$36,000 of the first mortgage bonds of the railroad company, and \$500,000 in the common stock of the company, owned by Kneeland, and pledged by him to Huntington to secure a personal debt. The railroad company delivered to Kneeland the blank assignment above mentioned, together with its six notes above described, and authorized him to use them in procuring for the company the sum of \$60,000, to be applied in the payment of interest on bonds then due. Huntington then exchanged the stocks and bonds so held by him for the said notes and the assignment of the so-called "lease contract" with the Rhode Island Locomotive Works, with the understanding that Kneeland would use the securities surrendered to him in raising the money needed by the company. Kneeland did this, and paid into the credit of the company \$60,000, which was used, with other funds of the company, in paying interest coupons maturing June 1, 1892. The blank in the assignment of the lease contract was filled in with the name of the intervener and the notes of the company indorsed to it. This was done through direction of Huntington, under some unexplained plan, but all parties have treated the intervener as standing in all respects in the shoes of Huntington. At the time of the purchase of the locomotives from the Rhode Island Locomotive Works, and at the time of the assignment of the contract under which they were obtained, the entire property of the railroad company was under the recorded mortgage herein being foreclosed. This mortgage contained a full and sweeping after-acquired property clause, covering all future acquisition of locomotives or other equipment. The master reports that neither the trustees in that mortgage, nor the holders of the bonds secured thereby, were parties to this scheme for raising money to pay interest, or had any knowledge of it. Pending this intervention, the last of the "lease warrants" was paid off by the receiver herein, under direction of the court, and thereupon a bill of sale was executed by the Rhode Island Locomotive Works to the railroad company.

It is too obvious for discussion that the arrangement under which the railroad company acquired the 10 locomotives in question was no ordinary letting of property for a fixed rental, and that no such thing was really contemplated, and that the retention of title was intended as a mere mode of securing the payment of the purchase price. The real character of such transactions has been often the subject of judicial construction, and their rank in relation to the claim of creditors considered with reference to the registry laws of the states within which the property is situated. *Hervey v. Locomotive Works*, 93 U. S. 664, 23 L. Ed. 1003; *Heryford v. Davis*, 102 U. S. 235, 26 L. Ed. 160; *McGourkey v. Railroad Co.*, 146 U. S. 536, 13 Sup. Ct. 170, 36 L. Ed. 1079. The real transaction was a bargain and sale, the title being retained as security for the purchase money. Being property susceptible of separate ownership and separate liens, it passed under the after-acquired property clause of the existing mortgage, subject to the lien of the vendor; the existing mortgagees not being purchasers for value in respect of such after-acquired property. *Harris v. Bridge*

Co., 33 C. C. A. 69, 90 Fed. 322; *U. S. v. New Orleans R. R.*, 12 Wall. 362, 20 L. Ed. 434; *Myer v. Car Co.*, 102 U. S. 1, 26 L. Ed. 59; *Fosdick v. Car Co.*, 99 U. S. 256, 25 L. Ed. 339; *Kneeland v. Trust Co.*, 136 U. S. 89, 95, 10 Sup. Ct. 950, 34 L. Ed. 379. The lien thus acquired by the mortgagees could not be displaced by any subsequent agreement to which they were not parties. *Evans v. Kister*, 35 C. C. A. 28, 92 Fed. 828. It follows that the assignment of the so-called "lease contract" was unavailing, as against the antecedent mortgage lien.

2. That the money was borrowed to pay interest upon matured mortgage coupons is no ground for giving a preference over such mortgagees. In *Morgan's L. & T. R. & S. S. Co. v. Texas Cent. R. Co.*, 137 U. S. 171, 196, 11 Sup. Ct. 61, 34 L. Ed. 625, the court, speaking by Chief Justice Fuller, said:

"But if the advances could therefore be treated as having been specifically procured for, or specifically applied to, the payment of interest as such (although there is no evidence to that effect), still such payment would afford no basis for the assertion of a preference as against the bondholders. So far as disclosed, the interest coupons were paid, not purchased (*Ketchum v. Duncan*, 96 U. S. 659, 24 L. Ed. 868; *Wood v. Safe-Deposit Co.*, 128 U. S. 416, 9 Sup. Ct. 131, 32 L. Ed. 472), and cannot be set up as outstanding; and the contention is wholly inadmissible that the bondholders, because they received what was due them, should be held to have assented to the running of the road at the risk of returning the money thus paid, if the company, by reason of unrealized expectations on the part of those who made the advances, should ultimately turn out to be insolvent, and unable to go on. By the payment of interest, the interposition of the bondholders was averted. They could not take possession of the property, and should not be charged with the responsibility of its operation."

This case has not been overruled or shaken by any subsequent decision of which we are aware.

That the necessity for borrowing money to pay interest was in part a consequence of the application of current income to the payment of the purchase money for the locomotives bought from the Rhode Island Locomotive Works does not strike us as raising an equity superior to that of the mortgagees in favor of one who loaned money for the specific purpose of paying interest. The interest coupons were paid by the application of the borrowed money, and no right of subrogation to the lien of the coupon exists. The money was not used in paying off the vendor's lien upon the locomotives, and hence there can be no possible subrogation to that lien.

If a lender of money, for the express purpose of paying the current operating expenses of a railroad, and thereby keeping it a going concern, does not bring himself within the class of creditors entitled to a preference over an existing mortgage debt, as was expressly decided in *Morgan's L. & T. R. & S. S. Co. v. Texas Cent. R. Co.*, it is difficult to see the higher equity of one who lends money to pay mortgage interest to prevent foreclosure over those who were thereby prevented from asserting the lien of their mortgage. Why mortgagees, who received thereby only what was due them, should now be required to pay back the money thus paid them to those who loaned the money to the railroad company for that very purpose, is not comprehensible. The decree was right, and must be affirmed.

RHODE ISLAND LOCOMOTIVE WORKS v. CONTINENTAL TRUST CO.

(Circuit Court of Appeals, Sixth Circuit. November 7, 1900.)

No. 788.

1. RAILROADS—FORECLOSURE PROCEEDINGS—PREFERENTIAL DEBTS.

To entitle a general unsecured creditor of an insolvent railroad company, whose property has been placed in the hands of a receiver in foreclosure proceedings, to preferential payment over the mortgage creditors, it must be shown: First, that the demand is not a debt created upon the personal credit of the company, but a current operating expense incurred to maintain its property as a going concern and its railroad in condition to be used with reasonable safety for the transportation of persons and property, and with the expectation of the parties that it was to be met out of the current receipts of the company; and, second, that there are net or current earnings in the hands of the receiver applicable to the payment of such debts of the income, or that there has been a diversion of the current earnings, either before or since the receivership, which the mortgagees should equitably restore.

2. SAME—DEBTS OF INCOME—PURCHASE OF LOCOMOTIVES.

Intervener sold to defendant railroad company 12 locomotives, through a third party, who paid 80 per cent. of the price, and took absolute title, transferring the locomotives to the company under lease contracts. For the remaining 20 per cent. of the price intervener took a series of notes of the company, indorsed by one of its stockholders, payable monthly, and extending over a number of months. Subsequently the railroad passed into the hands of a receiver in foreclosure proceedings. It did not appear that the engines were necessary to maintain the road as a going concern, or to its safe operation, but they were needed to enlarge its capacity to handle its traffic. Neither was it shown that any of the current income of the company had been diverted to other uses than the payment of current expenses, nor that there were any net earnings in the hands of the receiver. *Held*, that such facts were insufficient to establish the debt as a necessary current expense, or that it was contracted in reliance on its payment from current earnings so as to entitle intervener to preferential payment over the mortgages, even if there had been net earnings of the receivership; and that the absence of such fund and proof of diversion of earnings were additional grounds for refusing the claim preferential payment from the proceeds of the corpus of the property.

3. APPEAL—ASSIGNMENTS OF ERROR.

Under rule 11 of the circuit court of appeals for the Sixth circuit (31 O. C. A. cxlvi., 91 Fed. cxlvi.), requiring assignments of error to "set out separately and particularly each error asserted and intended to be urged," an assignment that a circuit court erred in overruling "each and every of the several exceptions" of the appellant to the report of a master, none of which are set out in the assignment, is insufficient to entitle appellant to a review of the ruling upon any one of such exceptions.

Appeal from the Circuit Court of the United States for the Western Division of the Northern District of Ohio.

The appellant is a creditor of the Toledo, St. Louis & Kansas City Railroad Company, and its debt is evidenced by the promissory notes of the company executed in part payment for certain locomotives purchased by it. In May, 1893, upon the application of certain judgment creditors, by bill filed in the circuit court, a receiver was appointed, who took possession of the entire property of the railroad company, and from then until its final sale its railroad has been operated under the orders of the court. In December, 1893, a mortgage foreclosure bill was filed in the same court by the trustees under a first mortgage made by the company. The two suits were consolidated under the title of the latter, and the receivership extended to both suits. The appellant filed an intervening petition in the consolidated cause, praying that its said claim might be paid "by the receiver out of the property, income, and earnings

of said railroad, and that its debt be declared a lien and charge upon the property of said railroad, or proceeds thereof, or income therefrom, prior and superior to that of the mortgagees." The petition was answered by the Continental Trust Company, the trustee for the bondholders, and all the equities of the intervener denied. The issues thus presented were referred to Irvin Belford, as special master, with directions to report his findings of fact and law. The master, among other things, reported that in September, 1892, the railroad company purchased from the Rhode Island Locomotive Works five locomotives, through an arrangement with the New York Equipment Company, whereby the latter corporation paid 80 per cent. of the purchase price for the railroad company to the vendor, and took an absolute title; the railroad company agreeing to pay to the vendor the remaining 20 per cent. In pursuance of this plan the equipment company, under date of January 6, 1893, entered into a contract nominally leasing these engines to the railroad company for the term of 72 months for the consideration of \$12,770 in cash upon delivery and 72 monthly installments of \$909.22, running February 23, 1893, to January 23, 1899, inclusive; the property to become the property of the railroad company without further conveyance upon the payments being completed. Provisions were inserted common to such transactions touching the care and preservation of the property, and providing for the contingency of default in payment. Plates were affixed to each locomotive reciting that it was the property of the equipment company. For that part of the purchase price which the railroad company undertook to pay directly to the vendor, the latter agreed to take the promissory notes of the purchaser, indorsed by S. H. Kneeland, who was a large stockholder in the railroad company. Accordingly, eight notes, each for \$1,141.25, were executed, due, respectively, on the 22d of each month, from November, 1892, to June, 1893, inclusive. In January, 1893, seven other locomotives were purchased under an identical arrangement, and for the 20 per cent. of the price to be paid by the company another series of notes was executed, and indorsed by S. H. Kneeland. The company paid of the first series of notes the first five, and of the second series those maturing in February and March, 1893. Renewal notes were made for the notes of the first series maturing April 22, 1892, and for the notes of the second series maturing in April and May, 1893, which renewals were also indorsed by S. H. Kneeland, and further secured by the pledge of four gold debenture bonds of the company for \$1,000 each. There is now due of the principal sum of the first series of notes \$3,423.75, and of the principal sum of the second series \$10,641.68, together with interest. He further reported that the railroad company was in great need of additional locomotive equipment to handle its traffic, and that the receiver had paid, by direction of the court, the balance due to the equipment company under its contracts with the railroad company. He also reported that there was no agreement that that part of the price to be paid by the railroad company to the Rhode Island Locomotive Works should constitute any lien upon the locomotives, and that there had been no evidence offered "to show that there had been any diversion of current earnings to the payment of interest or to the purchasing of equipment or the making of permanent improvements," and that there had been no delay by the bondholders in the assertion of their lien under the mortgage, after default. As a conclusion of law, he reported that the intervener was an unsecured creditor entitled to no preference over the mortgagees. Exceptions to this report were filed, and overruled by Circuit Judge Taft, the report confirmed, and the petition dismissed so far as it sought to enforce any lien or secure any preference over the mortgagees. From this decree the Rhode Island Locomotive Works has appealed and assigned errors.

E. D. Potter and Thomas Emery, for appellant.

Edwin T. Rice, Jr. (E. C. Henderson, of counsel), for appellee.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

LURTON, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

The attitude of the appellant as a general unsecured creditor of

the railroad company is admitted. That any special lien exists upon the locomotives for the security of this part of the purchase price is not now contended. If the appellant is to obtain any relief, it must show: First, that the demand here presented is not a debt created upon the personal credit of the company, but a current operating expense incurred to maintain the property as a going concern, and its railroad in condition to be used with reasonable safety for the transportation of persons and property, and with the expectation of the parties that it was to be met out of the current receipts of the company; and, second, that there are net or current earnings now applicable to the payment of such debts of the income, or that there has been a diversion of the current earnings, either before or since the receivership, which the mortgagees should equitably restore. *International Trust Co. v. T. B. Townsend Brick & Contracting Co.*, 37 C. C. A. 396, 95 Fed. 850; *Central Trust Co. v. East Tennessee, V. & G. R. Co.*, 26 C. C. A. 30, 80 Fed. 624; *Virginia & A. Coal Co. v. Central R. & Banking Co.*, 170 U. S. 365, 18 Sup. Ct. 657, 42 L. Ed. 1068; *Southern Ry. Co. v. Carnegie Steel Co.*, 176 U. S. 257, 285, 20 Sup. Ct. 347, 44 L. Ed. 458. The acquisition of additional motive power was the addition of permanent equipment, and it is not shown that such additional equipment was at all necessary to maintain the railroad as a going concern, or necessary "to keep the railroad itself in condition to be used in reasonable safety for the transportation of persons and property," as was found to be the case in *Southern Ry. Co. v. Carnegie Steel Co.*, cited above, where a debt for steel rails was held to be a preferential debt. The most that can be said to justify so large a purchase of additional equipment is that it was necessary to the enlargement of the capacity of the railroad company to conduct its traffic. That such a great investment in permanent equipment was not deemed an ordinary current operating expense would seem to have been recognized by the circumstances of the transaction. The Rhode Island Locomotive Works contracted that 80 per cent. of the sale price should be paid to it by the New York Equipment Company, and the equipment company secured itself for the advance by taking and retaining the title until this advance should be repaid. To the extent that the vendor gave credit to the railroad company, it took care that there should not be reliance upon current earnings as a fund to meet the obligation, but that S. H. Kneeland should indorse the company's notes, and thus stand as a security to it. That by these notes the sum payable was distributed through a number of monthly payments is, of course, a circumstance to be considered in determining whether the debt was one contracted upon the expectation that it would be met out of current earnings, but it is not sufficient, in view of all of the circumstances connected with this transaction. We concur, therefore, with Circuit Judge Taft in his conclusion that this demand is not one of that limited class of debts called "debts of the income," and was not one of the class of debts included in the equity or letter of the order made with respect to debts properly payable out of the income of the receivership. In *Fosdick v. Schall*, 99 U. S. 235, 25 L. Ed. 339, and in *Kneeland v. Trust Co.*, 136 U. S. 89, 10 Sup. Ct. 950, 34 L. Ed. 379, and

in *Thomas v. Car Co.*, 149 U. S. 95, 13 Sup. Ct. 824, 37 L. Ed. 663, debts for the rental of cars were held not to be preferential debts. In *Huidekoper v. Locomotive Works*, 99 U. S. 258, 25 L. Ed. 344, a debt due as part of the purchase price of locomotives purchased, the vendor retaining the title as security, was held not to be an equitable claim upon the income of the receivership, but a general unsecured debt. That the equipment purchased added to the earning power of the railroad company, and has augmented the security held by the mortgagees, is an element to be considered in passing upon the claim; but this fact has never been regarded as in itself justifying the displacement of an antecedent mortgage. *International Trust Co. v. T. B. Townsend Brick & Contracting Co.*, 37 C. C. A. 396, 409, 95 Fed. 850, where the cases are collected and reviewed. In *Southern Ry. Co. v. Carnegie Steel Co.* the supreme court took care to avoid throwing doubt upon the earlier adjudications of that court by saying:

"We must not be understood as saying that a general, unsecured creditor of an insolvent railroad corporation in the hands of a receiver is entitled to priority over mortgage creditors in the distribution of net earnings simply because that which he furnished to the company prior to the appointment of the receiver was for the preservation of the property and for the benefit of the mortgage securities. That, no doubt, is an important element in the matter. Before, however, such a creditor is accorded a preference over mortgage creditors in the distribution of net earnings in the hands of a receiver of a railroad company, it should reasonably appear from all the circumstances, including the amount involved and the terms of payment, that the debt was one fairly to be regarded as part of the operating expenses of the railroad incurred in the ordinary course of business, and to be met out of current receipts."

The same conclusion might be reached upon the ground that it does not appear that there are any funds growing out of the receivership which remain to be applied to debts of the income or upon the mortgage debt. *Fosdick v. Schall*, 99 U. S. 235, 254, 25 L. Ed. 339. If the demand of the appellant is to be paid at all, it must be paid out of the proceeds of the sale of the mortgaged property of the railroad company at the expense of the mortgagees. But before this can be done it must be made to appear that there has been a diversion of current earnings, by which this complainant has been deprived of his equitable rights, and that the mortgagees should equitably restore to the fund liable to the payment of debts of the income the fund thus diverted. In *International Trust Co. v. T. B. Townsend Brick & Contracting Co.*, cited above, we had occasion to consider the circumstances under which the proceeds of the corpus of a mortgaged railroad might be applied to the payment of an unsecured creditor in preference to the mortgagee, and said:

"But, if there has been no diversion of the current income, either before or after the appointment of a receiver, and no 'surplus income' during the receivership, out of which unpaid debts of the income can be paid, upon what theory can the proceeds of a mortgage foreclosure sale be applied to the payment of such debts against the objection of mortgage creditors? If nothing has been diverted from the 'current debt fund,' if there has been no augmentation of the fund applicable primarily to the satisfaction of the mortgage creditors, is there any just or equitable reason for requiring a restoration where nothing has been improperly received? We think in such cases the court has no power to displace contract rights, and neither *Fosdick v. Schall* nor any of the cases

which have followed it afford any sufficient authority, when rightly understood, in opposition to this view. These 'debts of the income' are an 'equitable charge' only upon the 'current income' of the mortgaged railroad. If such debts remain unpaid when the railroad passes into the possession of a court of equity, this 'equitable charge' is continued, and attaches to the 'surplus income' arising under the receivership. If this surplus income is not applied to the payment of the debts to which it is primarily devoted, but is expended for the benefit of the mortgagee, as in payment of interest, or in the purchase of property which passes under the mortgage, or in betterments of the railroad itself, an equity arises, as a consequence of such diversion, which will justify a court of equity in requiring the mortgagees to restore to the income that which has been taken away. The power of the court to displace mortgage liens in favor of such unsecured debts of the mortgagor depends upon the fact that the current income, either before or after the receivership, has been diverted to the benefit of the displaced mortgage; and the extent to which the corpus of the mortgaged property can be called upon to pay such debts of the income is limited by the amount of the diversion."

There is nothing in *Southern Ry. Co. v. Carnegie Steel Co.*, cited heretofore, which casts any doubt upon this restoration doctrine as declared in *Fosdick v. Schall*, 99 U. S. 235, 25 L. Ed. 339, *Burnham v. Bowen*, 111 U. S. 776, 783, 4 Sup. Ct. 675, 28 L. Ed. 596, and in *St. Louis, A. & T. H. R. Co. v. Cleveland, C., C. & I. R. Co.*, 125 U. S. 658, 673, 8 Sup. Ct. 1011, 31 L. Ed. 832. Upon the contrary, the decree in that case was predicated upon the fact that there had been a diversion of income "in paying interest, sinking fund, and contract debts, and for construction and equipment, which were all for the benefit of mortgage creditors, and which, to the extent necessary, should have been applied in payment of preferential claims, including those of the Carnegie Company." 176 U. S. 294, 295, 20 Sup. Ct. 362, 44 L. Ed. 474.

The special master, who was directed to take proof and report his finding of facts, reported, among other things, "that no testimony had been offered to show that there has been any diversion of current earnings to the payment of interest, or to the purchasing of equipment, or the making of permanent improvements." An exception to this finding was overruled by the circuit judge. The only assignment of error which bears upon this finding of fact is the first, which is in these words:

"(1) The said circuit court erred in overruling each and every of the several exceptions of the said intervener to the finding and report of the special master, and in approving and confirming the said special master's findings and report."

Rule 11 of the rules of this court (31 C. C. A. cxlvi, 91 Fed. cxlvi.) requires that the assignment of errors "shall set out separately and particularly each error asserted and intended to be urged." Nine separate exceptions were filed to the report of the master. The assignment is bad as including nine separate exceptions in one assignment, none of which are set out in the assignment itself. This finding of facts constitutes, therefore, the facts upon which the decree below was founded, and upon which this court must affirm or disaffirm that decree. It follows that, if there was no diversion of income by which the mortgagees have benefited, which was applicable to the payment of the demand of the appellant, there is no basis for

any decree giving appellant precedence in the distribution of the proceeds of the sale of the mortgaged property. The decree must be affirmed.

UNITED STATES v. AGEE et al.

(Circuit Court of Appeals, Fifth Circuit. April 16, 1901.)

No. 988.

MISJOINDER OF DEFENDANTS—OBJECTIONS—WAIVER BY FAILURE TO OBJECT BEFORE TRIAL.

After a defendant files pleas to the merits, and goes to trial, and remains silent till evidence is offered which entitles plaintiff to judgment on the issues, it is too late to make an objection for misjoinder of parties defendant which he could have made before.

In Error to the District Court of the United States for the Southern District of Alabama.

Joel Bertrand Bullard was appointed postmaster at Mexia, Ala., on June 15, 1898. He gave bond in the form required by law, in the sum of \$1,500, payable to the United States, with W. P. Agee, D. A. Frye, George Staffens, and C. L. Slaughter as sureties. As such postmaster Bullard received sums of money and became indebted to the United States on his money order account to the amount of \$1,116.61. On demand made upon him and his sureties they failed and refused to pay this sum, and thereby made a breach of the bond. His account with the United States showed this sum to be due, with interest from the 2d day of December, 1898. This action was brought on the bond, against the principal and sureties, to recover the amount so due to the United States. Before the declaration was filed in court, one of the sureties, C. L. Slaughter, died. This coming to the knowledge of the United States attorney, he moved the court for leave to strike out the name of C. L. Slaughter as one of the defendants, and to add the name of Lily S. Slaughter as administratrix of the estate of C. L. Slaughter as a defendant. This motion was granted by the court, and an order made allowing the amendment, without objection. Afterwards, on the 13th of December, 1899, Lily S. Slaughter, as such administratrix, by her attorney, accepted service of the summons and complaint in the case. Service was had on all the other defendants, but no pleas were filed except by Lily S. Slaughter and W. P. Agee, who on July 9, 1899, filed joint pleas, denying that there had been any breach of the bond, and denying each and every allegation of the complaint, and denying that Bullard as postmaster had failed to account for any moneys that might have come into his hands and which belonged to the United States. Issue was joined on these pleas. On July 12, 1900, the case was tried before the court, a jury having been waived by the parties. The plaintiff offered in evidence a duly-authenticated copy of the official bond of Bullard as postmaster, which was a joint and several bond, and also a duly-certified copy of Bullard's account, showing a balance due to the United States of \$1,116.61, the amount sued for, and also a certified copy of the written demand for payment of this amount made upon C. L. Slaughter and W. P. Agee. This evidence was offered and received without objection. The defendants offered no evidence. The defendants then objected to the court's awarding judgment for the plaintiff, and moved the court to render a judgment against the plaintiff because there was a misjoinder of parties defendant. The defendants contended that C. L. Slaughter, the intestate of the defendant Lily S. Slaughter, as administratrix, having died before the commencement of the suit, his administratrix, as the personal representative of C. L. Slaughter, one of the joint obligors, could not be joined in the suit with one of the surviving obligors. This contention was sustained by the court. Judgment was entered "that the plaintiff cannot recover in this suit, and it is further considered by the court that the defendants go hence, and recover of the plaintiff their rea-

sonable costs in this behalf expended." The plaintiff duly reserved a bill of exceptions to this action of the court. The United States brings the case here on error, and it is assigned that the court below erred (1) in holding that Lily S. Slaughter, as the administratrix of C. L. Slaughter, as surety upon the bond of Bullard, as postmaster, could not be jointly sued with the surviving obligors upon the bond; (2) that the court erred in refusing to award judgment against said Lily S. Slaughter, as administratrix, for the amount of the plaintiff's demand, to be levied on the goods and chattels of the estate of the said C. L. Slaughter, deceased, in the hands of the said administratrix to be administered; and (3) that the court erred in declining to award a judgment against W. P. Agee for the amount claimed.

M. D. Wickersham, U. S. Atty.

C. J. Torrey, for defendants in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge, after stating the case as above, delivered the opinion of the court.

At common law, if the contract sued on be several, or joint and several, the executor or the administrator of a deceased obligor may be sued at law in a separate action, but he could not be sued jointly with a surviving obligor. The reason given for not permitting the joint suit is that the one is to be charged *de bonis testatoris* and the other *de bonis propriis*. 1 Chit. Pl. (8th Am. Ed.) 50. Whatever changes in this rule have been made by the legislature in Alabama are applicable in the federal courts held in that state. *Sawin v. Kenny*, 93 U. S. 289, 23 L. Ed. 926. By the Code of Alabama, when two or more persons are jointly bound by bond, the obligation is in law several as well as joint, and suit may be instituted thereon against the legal representatives of such as are dead. Code Ala. 1896, § 39. All actions on contracts survive in favor of and against personal representatives. *Id.* § 35. The death of one or more defendants jointly sued does not, as to the defendant dying, abate the suit, if the cause of action survive, but it may be revived against the proper representative of such defendant, and may proceed against such representative and the surviving defendant or defendants, jointly or severally, at the election of the plaintiff, and the judgment therein must be several; but against the personal representative, if he objects, judgment must not be rendered until after the expiration of 12 months from grant of letters testamentary or of administration. Code Ala. 1896, § 43. If the surety C. L. Slaughter had died after the declaration was filed and summons issued, that being in Alabama the beginning of the suit (*Id.* § 3268), the action could have been revived against his personal representative, under section 43 of the Code. It was contended by the plaintiff in the court below that the effect of these statutes is to authorize the bringing of a suit against the personal representative of a deceased joint obligor and a surviving obligor as co-defendants. The court below held that the statutes did not have that effect; that, although they permit the revivor of a pending suit against the personal representative of the deceased obligor and the rendition of a judgment against him, they do not authorize the institution of a suit against the personal representative of the deceased obligor and a surviving obligor. The learned judge presiding in the circuit court has discussed these statutes with much

ability, and has cited many decisions of the supreme court of Alabama construing them. He came to the conclusion that there was a misjoinder of parties in the case, and therefore declined to enter judgment in favor of the plaintiffs. *U. S. v. Bullard* (D. C.) 103 Fed. 256.

The view we take of the case makes it unnecessary to consider the question decided by the circuit court. If it be conceded that the statutes do not permit the personal representative of the deceased obligor to be joined as a defendant with the surviving obligor, we are met by the question whether or not the representative of the deceased obligor in this case raised the question properly and in time so as to entitle her to the judgment of the court. When the motion was made to amend the declaration so as to make her, as administratrix, a party defendant, she made no objection, but accepted service of the summons and complaint. She appeared in court by counsel, and joined her co-defendant in filing pleas to the merits. Issue was joined on these pleas, and the case tried. After the plaintiff had offered evidence meeting the issues joined and showing a right of recovery, the defendants for the first time raised the question of misjoinder. The question had not been raised by demurrer, motion to strike, or by plea. No information was given by the defendant that such defense would be made until the plaintiff had offered evidence and rested. The question was then raised in argument or by oral objection. If the plaintiff had failed to prove the case, this suggestion would probably have never been made, and the defendants would have obtained the benefit of a judgment in their favor. Under the statutes it is conceded that the right of action survived against the administratrix, and that she could have been sued separately. If the suit had been brought before the death of Slaughter, under the statute it could have been revived against his administrator, and it is important to note that section 43 of the Code provides that a judgment may be entered in such case against the representative of such deceased obligor and against the surviving obligor. This statute gives authority for the rendition of the two judgments in one case,—a judgment against the administrator, to be levied on the goods and chattels in his hands unadministered, and a personal judgment against the surviving obligor. As the personal representative of the deceased obligor is liable to suit on the bond, she can consent to be sued jointly with the surviving obligor. She, in effect, did so consent. She made no timely objection to the procedure.

In *Bell v. Todd*, 51 Mich. 21, 16 N. W. 304, Cooley, J., delivering the opinion of the court, disposed of a defense of misjoinder in these words:

"The question of misjoinder which is made by the defense we pass without decision. It was not called to the attention of the court below until the case was brought to a hearing on the proofs, and was then entitled to no favor."

In *Moore v. Association* (Tex. Civ. App.) 45 S. W. 974, there was a misjoinder of parties defendant, and the court of civil appeals of Texas held that the defendants were not entitled to interpose it as a defense because of delay in raising the question. Fisher, C. J., in delivering the opinion of the court, said:

"The form of the action, and seeking to make the parties liable in the way urged by the plaintiff in its petition, and joining in one action the sureties on the bonds of Moore as secretary, were all matters that could be waived by the defendants, if they so desired. The district court, by virtue of its general authority, had jurisdiction over the parties and a cause of action of this character. Because the plaintiff elected to bring the suit in the manner in which it was brought does not render it inherently bad, so that the privilege of the defendants to change the form of the action could be urged at any stage of the proceeding. They had the right to come in, if they so desired, and, by an agreement, waive the objections that they are now seeking to urge; and, if such had been the case, the trial court would not, of its own motion, have declined to try the case, because of the fact that the plaintiff was seeking to hold different sets of sureties liable on different bonds. Now, while it is true the defendants did not expressly agree to waive any objections as to the manner in which plaintiff sued them, still their conduct in delaying the urging these objections at this late day should be held tantamount to a waiver."

In *Ehret v. Railroad Co.*, 151 Pa. 158, 166, 24 Atl. 1068, the court said, in reference to a misjoinder of parties: "It should have been raised, if at all, in limine, when the petition for appointment of viewers was presented, or, at the very latest, when the issue was framed by the court." The objection was disregarded because it was not raised in time. See, also, *Wright v. Storrs*, 6 Bosw. 600; *Bensieck v. Cook*, 110 Mo. 173, 183, 19 S. W. 642; *Pavisich v. Bean*, 48 Cal. 364; *Erwin v. Ferguson*, 5 Ala. 158; *Lehman, Durr & Co. v. Greenhut*, 88 Ala. 478, 7 South. 299; *Merritt v. Bagwell*, 70 Ga. 578; *Jones v. Foster*, 67 Wis. 296, 307, 30 N. W. 697.

If it be conceded that there was a misjoinder of parties defendant (a question which we do not deem it necessary to decide), the objection came too late. When a misjoinder of defendants is apparent on the face of the declaration, it ought to be raised by demurrer. If it is not apparent on the face of the declaration, it should be raised by plea. If the defendant who could make such objection files pleas to the merits, and goes to trial, and remains silent, until evidence is offered which entitles the plaintiff to a judgment on the issues joined, it is then too late to raise the question of misjoinder. If the evidence offered and the law applicable to the case entitle the plaintiff to judgment on the issues joined, such judgment should be entered.

The judgment of the circuit court is reversed, and a judgment will be here rendered in favor of the United States against W. P. Agee for \$1,116.61, with interest from December 2, 1898, at 6 per cent. per annum (Rev. St. U. S. § 964); and a judgment for a like sum against Lily S. Slaught, as the administratrix of C. L. Slaught, deceased, to be levied on the goods and chattels of the estate of said decedent in the hands of said administratrix to be administered; judgment also against both defendants for costs. The satisfaction of either one of the judgments and costs will be the satisfaction of the other. *Parker's Adm'r v. Abrams*, 50 Ala. 35, 36. Reversed and rendered.

FARLEY v. CINCINNATI, H. & D. R. CO.

(Circuit Court of Appeals, Sixth Circuit. April 2, 1901.)

No. 899.

1. CARRIERS—RELATION OF CARRIER AND PASSENGER—HOW CREATED.

The relation of carrier and passenger, which will bring a carrier under the obligation to exercise the high degree of care and caution for the safety of a person imposed by such relation, can only be created by contract, express or implied.

2. SAME—PERSONAL INJURY—PASSENGER OR TRESPASSER.

It was the custom of a railroad company to have a mail car, which went out with a train at 8:45 p. m., supplied with gas and ice, and equipped for the run, and standing near the express station, at about 6 o'clock, where it was boarded by the mail clerk, who was to have charge of it for the run. On one occasion the train with which the car came in was late, and did not arrive until about 6:30, and the clerk boarded the car immediately on its arrival at the station, before it had been cut out from the train or equipped for the succeeding run. While it was being switched into the yards, for the purpose of being so equipped, a coupling broke, and it collided with other cars, as a result of which the clerk was thrown down and injured. *Held*, in an action to charge the railroad company with liability for the injury on the ground of negligence, there being no evidence that defendant, through any officer or agent, had actual knowledge of plaintiff's presence in the car, that he could only recover by proof of a custom of the clerks to board the car at places other than the usual one at the express station, which was known to defendant, or was so general that defendant was chargeable with notice of it, so that it must have impliedly agreed to receive plaintiff as a passenger at the time and place where he entered the car; and that evidence that plaintiff and another clerk had, on three occasions during the preceding four years, boarded the car at other places, "wherever it could be found," was not sufficient to establish such custom, it not being shown that defendant had any knowledge of such facts.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

This action was brought to recover damages for a personal injury, suffered by plaintiff in error on the 24th day of November, 1898, while in the employ of the United States as a postal clerk in the railway mail service. His work as such clerk was in a post-office car provided for the purpose, and consisted in the reception, assortment, and distribution of mail matter in said car, on what is called the "run" between Cincinnati, Ohio, and Indianapolis, Ind. This mail car, in which plaintiff in error discharged his duties, was a combination mail, express, and baggage car, with three apartments, and was carried in trains of the defendant in error operated between said cities. These trains departed from Cincinnati at 8:45 p. m., arrived at Indianapolis at 12:45 a. m., left Indianapolis at 3:45 p. m., and arrived in Cincinnati at 7:30 a. m. the next morning. Plaintiff had been in the railway mail service fourteen years before the accident, and for more than two years on the run between Cincinnati and Indianapolis. Two clerks were engaged in the service on this line, working in turns during alternate weeks. The other clerk was John B. Connor, who had been engaged in the service for a period of about fourteen years, and on this particular run about four years, preceding the accident. On the day of the accident there had been a wreck on the road, and plaintiff in error came in to Cincinnati that morning on another train. In the evening he went to the express office, about the usual hour, and inquired at the office of the defendant in error about his car, and was told that it would be in on train 41, which was due at 6 o'clock, but which was in fact 24 minutes late. When train 41 arrived in the depot with the mail car attached, plaintiff in error boarded his car immediately, and proceeded to change his clothes and

prepare for the work to be done. The car had just come in from the north as part of the train, from which it had not been disconnected at the time plaintiff in error entered. When the post-office car had been separated from the train, it was switched up into the yard for the purpose of being furnished with gas and otherwise prepared for the trip. While on this switching run the coupling which attached the car to the switch engine broke, and this car collided with other cars. As a result of this collision, it is alleged in the petition that the plaintiff in error was knocked down against a table, and upon the floor of the car, and received severe injuries on his shoulders, arms, and in his leg and spine. The action is grounded on the charge that the collision was caused through the negligence of the defendant, its agents and servants. The answer to the petition puts in issue the general charges of the petition, including the charge of negligence, and specifically denies that the plaintiff in error was, at the time of the accident, in the line of his duty as railway postal clerk, or that he was rightfully on the car, which, as the answer states, was at the time in the switching yard of the defendant.

These mail clerks were introduced by the plaintiff in error, and were the only witnesses who testified in the case. They agree in the statement that it was customary for the railway mail clerks to enter the post-office car at the platform of the express office, where mail and express matter were delivered and placed on board the car. In the ordinary course of business, when the car was boarded by the postal clerks at the express office, and at the usual time, it had already been supplied with gas, ice, and was lighted, ready for the trip, and was carried from that place to the depot, and attached to the train in proper position for the run. Although the train did not leave Cincinnati for Indianapolis until 8:45 p. m., the mail clerks, as a rule, went on duty about 6 o'clock p. m., in order to arrange the car for the first delivery of mail, which came from the post office to the express station at 7 o'clock p. m.

At the close of the plaintiff's evidence, the court, on motion, directed a verdict in favor of the defendant, to which exception was duly taken. The case was afterwards submitted to the court on motion for a new trial, and, in overruling this motion, the learned circuit judge, after making certain observations in relation to the case, not material to be now repeated, went on to say: "A well-established usage and custom, shown by the evidence, required the clerk on duty to board the postal car at the express platform in the defendant's yards at Cincinnati a few minutes before or after six in the afternoon of each day, where the mail would be delivered to them about 7 o'clock, and at 7:15 the car would be pulled over to the depot and put into the train. The car, when boarded by the postal clerk at the express platform, would be gassed, lighted, and iced, and prepared to go on the trip. It was well understood by the railway mail clerks, the post-office employes who delivered the mail, and the railroad men who assisted in placing the mail in the postal car, that the car would be at the express platform as early as 6 o'clock. Connor, in his examination in chief, testifies as follows: 'Q. Well, Mr. Connor, when you would go down there, you say you would find this car at the express office. Did it ever happen in your fourteen years, or during the four years you were on this run, that the car was not at the express office? A. Yes, sir; it happened on two occasions. Q. Two occasions, with you? A. Yes, sir. Q. Where would you find it at these times? A. One night there was a car short, and it came in on the day train, and we took it back, and I believe another time there was something the matter with one of the cars, and they substituted another car for it. Q. When the car was not at this place, where would you go? A. Well, I would go wherever I could find it. I got it in the depot on one occasion. Q. Do you know from your personal observation, in the railway mail service for fourteen years, what has been the custom on that road, in those yards, of the railway postal clerks, in that particular, as to getting on the cars when the time come to get on them? A. No, sir; I cannot answer that, any more than I would get in there wherever I would find the car. Q. Have you seen other postal clerks, as it come under your knowledge and observation on other runs than this one? A. They generally do that; yes, sir.' Plaintiff testifies, in a general way, that it was his practice to get on the postal car wherever he found it, and that in the course of his

service he got on it at other places than at the express platform, but he gives no instance of having done so, except the occasion when he was injured. The ordinary passenger boards the train at the depot, but the railway mail clerks were permitted to board the postal car at the express platform, and the practice, in that respect, had become so well established at the time of the plaintiff's injury that the employes of the post office and the clerks in the railway mail service knew it, and the officers and agents of the defendant also knew or were bound to know it. During the fourteen years these clerks had been running on the defendant's road only three instances are shown where this practice was departed from, two within the experience of Mr. Connor, and the occasion when the plaintiff was injured; although the plaintiff, as I have already said, in a general way, speaks of boarding his car wherever he could find it, and of other clerks doing the same thing. The railway mail clerks might get on the car in the depot after it was attached to the train, but there was no practice or usage which would justify them in getting on the car at any point outside of the depot other than at the express platform. The evidence fails to show any practice or usage which would put the defendant on notice that the plaintiff was in the car at the time he was injured. It was suggested by counsel that there is evidence tending to show that the railway mail clerks were always, or, at least, as a rule, in their cars at about 6 o'clock in the evening, and that, therefore, the defendant was put upon notice that the plaintiff was in this car at the time of the accident. But the evidence also shows that always, or as a rule, they got into their cars at the express platform, while on this occasion the plaintiff waited at the depot for the train from the north, to which this car was attached, and that as soon as it stopped he boarded the car before the train was dismembered or this car taken from it, and that he remained in it while it was being switched over the yard for the purpose of being gassed, iced, and prepared for the train to which it was to be attached, more than two hours later, and, in the absence of any evidence showing that the officers and servants of the defendant had actual knowledge that he was in the car, it cannot be presumed, from any practice or usage shown by the evidence, that the defendant had such knowledge. This car, because of the accident, never reached the express platform, but the one substituted for it was taken there, and the plaintiff boarded it there, and went out with the train. At the trial the court was of opinion that there was no evidence showing, or tending to show, that the plaintiff was rightfully on the car, in the line of his duty, at the time of the accident, and that his relation to the defendant was not that of a passenger, but that of a trespasser, and that the defendant owed him no duty the nonperformance of which would constitute negligence, and the jury was therefore instructed to return a verdict for the defendant, and, being still of that opinion, the motion for a new trial will be overruled." The motion for a new trial having been denied, judgment was duly entered upon the verdict, and thereupon this writ of error was sued out.

Harlan Cleveland, for plaintiff in error.

Lawrence Maxwell, Jr., for defendant in error.

Before LURTON and SEVERENS, Circuit Judges, and CLARK, District Judge.

CLARK, District Judge, after stating the case as above, delivered the opinion of the court.

The ruling of the court, on motion to direct a verdict in favor of the defendant, is assigned for error, and presents the single question on which the case is here for re-examination. It is well settled, and not controverted, that a person must be expressly or impliedly received as a passenger before the carrier comes under obligation to exercise towards such person that high degree of care and caution for his safety which is due from the carrier to the passenger. The relation between carrier and passenger is contractual, and is created only by

contract, express or implied. *Bricker v. Railroad Co.*, 132 Pa. 1, 18 Atl. 933; *Railroad Co. v. Smith*, 30 C. C. A. 58, 86 Fed. 292, 40 L. R. A. 746; *Railroad Co. v. Meacham*, 91 Tenn. 428, 19 S. W. 232; 5 Am. & Eng. Enc. Law (2d Ed.) 488; *Brown v. Scarboro*, 97 Ala. 316, 12 South. 289; *Railway Co. v. Williams*, 91 Tex. 255, 42 S. W. 855; *Gardner v. New Haven & N. Co.*, 51 Conn. 143, 150; *Railroad Co. v. O'Keefe*, 168 Ill. 115, 48 N. E. 294; *Railway Co. v. Best*, 169 Ill. 301, 48 N. E. 684.

Manifestly, this obligation does not rest on the carrier with respect to one who, without the knowledge of the carrier, boards a car knowing that the car is not ready for receiving passengers, and that it is not expected or intended that it should be entered at that time or place. The contention of plaintiff in error is that there was evidence tending to show a custom or usage on the part of these mail clerks to enter the post-office car in the switch yard, or at other places where the car might be found, at the usual time of boarding the car, and that when plaintiff in error, pursuant to this custom or practice, entered the post-office car on the occasion in question he was thereby impliedly received as a passenger, in view of the custom, and the relation of carrier and passenger created. To support this contention, it is necessary for the plaintiff in error to insist (as indeed is done) that the evidence tended to show a custom so definite and well established that the railroad company might justly be charged with constructive or presumptive knowledge of the custom. It is not claimed that the evidence shows, or tends to show, positive knowledge brought home to the railroad company of the custom or practice now asserted to have existed. Nor is it urged or suggested that the defendant in error, through any officer or agent, was, in fact, aware of the presence of the plaintiff in error in the mail car at the time of or before the collision.

The difficulty to a railroad company in exercising a high degree of care towards persons on cars in motion in its switch yards, and the increased liability from obligation to do so, are so manifest that a usage or custom relied on to create the relation of carrier and passenger, and impose on the railroad company this high duty, ought, under such conditions, upon the plainest principles of justice, to be established by evidence which shows, or strongly tends to show, a well-defined, definite, and continuous practice, from which knowledge on the part of the company may be fairly inferred.

In *Railroad Co. v. Cook*, 13 C. C. A. 364, 66 Fed. 115, 28 L. R. A. 181, this court, speaking through Judge Lurton, in reference to a switch yard, said:

"It was the place where trains were broken up, and outgoing trains made up. Engines and cars were, from the necessities of a great business, in continual motion, backward and forward, and passing from one track to another. The business of the company, the rapidity of transportation, the success with which that business should be conducted, and the dangerous character of the work required to be there done, demanded that the business of such a yard should be surrendered to the company's own uses, free from any interference, and untrammelled by unnecessary restrictions upon the manner in which its trains should be there handled."

It is apparent that the evidence, to establish a usage or practice like that here in question, would be, for all substantial purposes, sim-

ilar to that necessary to show such a use and custom as would give rise to an implied license to use the private tracks and grounds of a railroad company as a walkway or crossing. It is true there are points of difference, but the questions involved are analogous in respect of the evidence, which is sufficient to establish the custom or practice upon which the implied rights rest.

In *Felton v. Aubrey*, 20 C. C. A. 446, 74 Fed. 360, the question of implied license, and the evidence and use essential to establish such a license, were much considered. Judge Lurton, giving the opinion of the court in that case, said:

"The rule we deduce from the cases best reasoned and most consistent with sound public policy is this: If the evidence shows that the public had for a long period of time, customarily and constantly, openly and notoriously, crossed a railway track at a place not a public highway, with the knowledge and acquiescence of the company, a license or permission by the company to all persons to cross the track at that point may be presumed. *Barry v. Railroad Co.*, 92 N. Y. 289; *Byrne v. Same*, 104 N. Y. 362, 10 N. E. 539; *Railroad Co. v. White*, 84 Va. 498, 5 S. E. 573; *Davis v. Railway Co.*, 58 Wis. 646, 17 N. W. 406; *Hooker v. Railroad Co.*, 76 Wis. 542, 44 N. W. 1085; *Troy v. Railroad Co.*, 99 N. C. 298, 6 S. E. 77; *Railway Co. v. Phillips*, 112 Ind. 59-67, 13 N. E. 132; *Palmer v. Railroad Co.*, 112 Ind. 250-261, 14 N. E. 70; *Hargreaves v. Deacon*, 25 Mich. 1. Persons availing themselves of such an implied license would not be trespassers, and the railroad company would come under a duty in respect to such licensees to exercise reasonable care in the movement of its trains at points where it was bound to anticipate their presence. To establish such an implied license, it is essential that the use shall have been definite, long, open, and continuous. The mere fact that a railway track is frequently used as a walkway, or frequently crossed, and that no active steps were taken to stop them, would not justify the presumption of a license. The cases we have cited in support of the rule stated abundantly support this limitation. The practice of crossing this railway track at random, or walking upon it, should not be encouraged; and when one injured seeks to show that he was not a trespasser, and relies upon an implied license, he should be required to make out the license clearly."

This is the general doctrine of the adjudged cases. 27 Am. & Eng. Enc. Law, 740-744; *Park v. Viernow*, 16 Mo. App. 383.

The witness Connor is very clear and positive in the statement that, throughout the four years during which he had been on this run prior to the accident, the regularly established place for stationing the mail car for the reception of mail matter and the clerks had been at this express station. And plaintiff in error admits that this is so, though the fact is stated less positively, if not reluctantly, his exact language being: "The car should at that particular time stand over on what they call the 'Buck Track,' north of the express warehouse." It being shown by the plaintiff's own evidence that the regular place for receiving these mail clerks as passengers was at the express station, the difficulty attending an effort to show a usage or custom of entering the car at other places, or wherever it might be found, might be easily anticipated. And that this difficulty was recognized is entirely apparent throughout the plaintiff's own testimony, which is exceedingly indefinite, meager, and unsatisfactory in all of the particular statements cited as tending to show the practice or usage relied on to sustain the theory on which the action proceeded. No place at which the mail car was customarily or constantly boarded is mentioned or sug-

gested more definitely than the statement that it was wherever the car might be found. There is not a suggestion of any place at which the car was generally or frequently found other than the express station. If it were conceded that the evidence tended to show a practice sufficiently definite, long, or continuous to charge the carrier with constructive knowledge and acquiescence, it would still remain a question on this record whether such usage or practice could be extended to include a case like that with which we are dealing here, where the mail clerk boarded the train immediately on its arrival in the depot at the end of the trip or run, and before the mail car had been cut out or separated from the train, or moved to any place in the yards for the purpose of being furnished and prepared for another trip, and when it would seem that any person of ordinary intelligence must have known it was not intended or expected that passengers were entering the car for the purpose of going on a trip in the opposite direction. We merely suggest this phase of the case in passing, however, as we prefer to determine the larger question, and dispose of the case upon the broader ground, on which the discussion proceeded in this court and in the court below. And without extending this opinion further, or discussing the facts more in detail, it is sufficient to say that, from a careful study of the evidence found in the record, we are brought to the conclusion that the circuit court rightly directed a verdict in favor of the defendant. We conclude that there was no substantial evidence tending to show such a custom or practice as would have justified the jury in finding that the plaintiff in error had been impliedly received as a passenger, and without which it is not insisted, and, indeed, could not be, that the defendant was chargeable with the breach of any duty towards plaintiff in error. The law will not imply a contract by a railroad company to assume responsibilities for one as a passenger from such facts as are disclosed by the record in this case. Judgment affirmed.

TENNESSEE COAL, IRON & RY. CO. v. CURRIER.

(Circuit Court of Appeals, Fifth Circuit. April 16, 1901.)

No. 959.

1. PERSONAL INJURIES TO EMPLOYEES—NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE—WITHDRAWAL OF CASE FROM JURY.

If, in an action by an employé for personal injuries, there is uncertainty, on all the evidence, as to the existence of negligence or contributory negligence, whether arising from a conflict of testimony, or because, the facts being undisputed, fair-minded men may honestly draw different conclusions therefrom, the case should not be withdrawn from the jury. Neither should it be withdrawn unless the conclusion follows, as a matter of law, that no recovery can be had on any view which can be properly taken of the facts which the evidence tends to establish.

2. SAME—SAFE APPLIANCES.

Evidence showed that plaintiff was employed by a mining company to drive a tram car used in carrying coal out of a mine. When first employed, the boss driver went one trip with him, and he was instructed to sit on the car and drive as other drivers did. At a low place in the mine

he had to stoop to pass under, bending forward with his face close to his knees. After he had been at work for several weeks he was knocked off when riding as usual on a new car sent in by the company, and in use for the first time. Until then he did not notice that it was higher than the other cars, and unsafe to use in the same way. *Held*, that the company's negligence in failing to furnish him with a proper car was properly submitted to the jury.

8. SAME.

The evidence, besides, tended to show that it was necessary to ride, so as to furnish the mule light. The mule drew two cars; the high one, on which plaintiff was riding, according to custom, being in front. Moreover, it tended to show that the driveway was so obstructed that he could not have walked beside the car, and that it was impracticable for him to walk and perform his work. *Held* that, conceding that he knew that the car was higher than the others in use, he had a right to assume that its use was not dangerous, and that there was no error in a refusal to instruct that he was guilty of contributory negligence.

In Error to the Circuit Court of the United States for the Northern District of Alabama.

This action was brought by J. D. Currier, the defendant in error, against the Tennessee Coal, Iron & Railway Company, a corporation under the laws of Tennessee, the plaintiff in error, in the circuit court of Jefferson county, Ala., and was duly removed to the United States circuit court for the Southern division of the Northern district of Alabama. It is an action for damages on account of personal injuries received by Currier through the alleged negligence of the company. Currier was an employé of the company, engaged as a laborer in the coal mines. The negligence complained of was that there was a low place in the roof of the mines where Currier was at work for the company, and that he was furnished with a car too high to admit of his safe passage under the low place in the roof, and that in attempting to ride the car under the low place, as he and other employés had been accustomed to ride other cars used in the mines, he was knocked off and seriously injured. There are several counts in the complaint. Some of them are framed under the employer's liability act, and some of them are framed to charge the company as at common law. The Alabama statute, on which some of the counts are framed, is as follows: "1749 (2950). Liability of master or employer to servant or employé for injuries. When a personal injury is received by a servant or employé in the service or business of the master or employer, the master or employer is liable to answer in damages to such servant or employé, as if he were a stranger, and not engaged in such service or employment, in the cases following: (1) When the injury is caused by reason of any defect in the condition of the ways, works, machinery, or plant connected with, or used in the business of the master or employer. (2) When the injury is caused by reason of the negligence of any person in the service or employment of the master or employer, who has any superintendence intrusted to him, whilst in the exercise of such superintendence. (3) When such injury is caused by reason of the negligence of any person in the service or employment of the master or employer, to whose orders or directions the servant or employé, at the time of the injury, was bound to conform, and did conform, if such injuries resulted from his having so conformed. (4) When such injury is caused by reason of the act or omission of any person in the service or employment of the master or employer; done or made in obedience to the rules and regulations or by-laws of the master or employer, or in obedience to particular instructions given by any person delegated with the authority of the master or employer in that behalf. (5) When such injury is caused by reason of the negligence of any person in the service or employment of the master or employer, who has the charge or control of any signal, points, locomotive, engine, switch, car, or train upon a railway, or any part of the track of a railway. But the master or employer is not liable under this section, if the servant or employé knew of the defect or negligence causing the injury, and failed in a reasonable time to give information thereof to

the master or employer, or to some person superior to himself engaged in the service or employment of the master or employer, unless he was aware that the master or employer, or such superior already knew of such defect or negligence; nor is the master or employer liable under subdivision 1, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to the negligence of the master or employer, or of some person in the service of the master or employer, and intrusted by him with the duty of seeing that the ways, works, machinery, or plant, were in proper condition." Code Ala. 1896, § 1749.

The company filed four pleas. The first plea was a general denial of the allegations of the complaint. The other three pleas each alleged that Currier was guilty of contributory negligence, in this: (1) That he was negligently and improperly, or in an improper or negligent manner, riding on the car, or trip of cars, at the time of his injury, and was thereby injured; (2) that he knew of the defect or negligence complained of in each of said counts separately and severally, and after acquiring such knowledge continued in defendant's service after the expiration of a reasonable time for the remedy thereof, and was thereby injured; and (3) that he failed to get off the car on which he was riding at the time of his injury before he reached the low place at which he was injured, as it was his duty to do.

The plaintiff offered evidence tending to prove: That in July, 1898, he was an employé of the defendant company, which was engaged in operating coal mines at Pratt City, Ala. That in its business the defendant had tram cars pulled by a mule, and the plaintiff was driving the mule, carrying the tram cars loaded with coal from the entry to the deposit place at the slope. That Greenhill, an employé of the company, and the boss driver, made the first trip with the plaintiff, and ever after that the plaintiff rode the car just as Greenhill had done. That on the 19th of July, 1898, while plaintiff was engaged about his work, he was furnished a tram car four or five inches higher than the other cars which plaintiff had been handling. That this was a new car, and plaintiff did not know that it was higher than the other cars, and he did not discover the difference until after he was dragged off and injured by the overhanging rock at the low place. That at the time the plaintiff was hurt he was riding on top of the car in the same way that he had been riding the other cars, and in just the same way the superintendent, Greenhill, showed him how to ride the first day he went to work there as a driver. It was usual and customary for the driver to rake the coal back (which the plaintiff had done in this instance), and to sit on the front of the car, and he was required to sit in this position, and, when the low place was reached, to lean his body forward over his lap. It was pitch-dark in the mines, and it was necessary for the driver to sit in front, so as to throw the light ahead from the lamp on his cap. It was not customary for the driver to get down when passing the low place in the roof. The plaintiff testified: That he could have gotten off before reaching the low place, but it was somewhat dangerous to do so, as he was liable to get caught by the walls in raising up, and he could not pass by the mule then, as it would have been necessary for him to do to give light for the mule, and he would have had to walk in the water. That he knew there was some difference in the height of the cars, but, to use his own language, "I had ridden on all those cars in the mines, and hadn't been caught before, and I thought there was room for me to pass on any car in the mines;" and he had been riding cars in the same way every day for about three months. The high car from which he was thrown was a new car, and he had not been warned as to its height, nor did he know it. He further testified: "If I got off before I came to that low place, I would, as a matter of fact, have to be either behind that car, or between the loaded cars and empties. If I had not had the light of my lamp, which was on my cap in front, I would not have had any other light. My light was necessary for the work that was to be done in front of them. If I had been behind the trip with my light, it would have been of no value to the mule or any one else. The light threw out its rays only a little distance. I can't say how far. The light was for my benefit, to see how to do the work, and for the mule to see how to travel. For the benefit of myself and for the mule I should have been on the front of my trip in going out from the entry to the deposit place.

That is where the drivers ride. * * * The danger I was guarding against at that time was keeping the mule off the slope, and from getting run over by the trip on the slope. * * * The car I was on was three or four inches higher than the one behind it, judging from the way they looked to me after I was hurt. * * * If it had been my business, and I had taken special notice, I suppose I could have seen that one car was higher than the other before I was hurt. A man with a lamp light would detect it. Yes; after the accident I had nothing but a lamp light, and I detected it because I was hurt, and they were stopped there, and I had nothing else to do but notice them. They were not stopped when I hitched the mule to them. They were stopped when I coupled them together. They were stopped before I was hurt. I knew there was some little difference in the height of the cars used in that mine. There were about two hundred cars in the mines, all together. * * * Up to this time I had no difficulty in passing with any of them that I had used. I did not know the great difference that was in this car on which I was hurt. * * * It was not my duty to examine the cars, but to drive them. I was never instructed to examine the height of the cars, or by the rules required to do anything of the kind. At the low place in between the empties and the loads, if I got in behind the mule, the light on my cap would have given the light to the mule, but you can't get off the car, for the danger to yourself and to the mule, also. You couldn't get in front of the mule in time to keep him off the slope. Greenhill [the boss driver] rode on the front of the car when he was showing me, all the way through; rode under the low rock. Greenhill told me to take care of the mule, and not let her get hurt. I couldn't get off on the right-hand side without danger. There was a rock that hung over and so close to the track just as I crossed the new slope, and after I got on the side track there was water, and I could not have gotten ahead of the mule. I would have been behind the mule if I had gotten off before I reached the low place. When the mule got to the low place she turned to the right, between the two tracks, and that let her out from under the low place, and if I had gotten off on that side I would have been right behind her; and she filled the space between the loaded and the empty tracks, and I couldn't get by her, and besides, it would have had a tendency to turn her on the slope. * * * I wanted to keep the mule off the slope, to keep her from being killed by the cars coming down from the engine, which let the cars down. They came down fast, without anybody on them, and are liable to come at any time. I had no way to pull back. She had no reins. In going to the point where the low rock was, it was downhill, and there was no way for the mule to hold back. She had to trot along to keep out of the way of the car." There was other testimony offered by the plaintiff tending to show that one Meagher, the bank boss, employed the plaintiff, and that he had charge of all the men and all the machinery in the mines. Evidence was offered by the defendant conflicting in many respects with the foregoing statements. The questions of negligence on the part of the defendant and of contributory negligence on the part of the plaintiff were submitted to the jury. The jury found a verdict for the plaintiff for \$1,500, on which judgment was entered. The company sued out this writ of error to reverse the judgment. Several errors are assigned, which raise the questions considered in the opinion.

W. I. Grubb (Walker Percy, on the brief), for plaintiff in error.

A. O. Lane and F. S. White, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The contentions of the plaintiff in error, when analyzed, are, in effect, that the trial court should have instructed the jury to find for the company, because (1) the facts proved did not show negligence on the part of the company; and (2) that, if the company was negligent, the defendant was guilty of contributory negligence. In

examining these propositions we must remember that if there is uncertainty, on all the evidence, as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and is to be settled by the jury; and this is true whether the uncertainty arises from a conflict of testimony, or because, the facts being undisputed, fair-minded men may honestly draw different conclusions from them. A case should not be withdrawn from the jury unless the conclusion follows, as matter of law, that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish. *Railroad Co. v. Stout*, 17 Wall. 657, 21 L. Ed. 745; *Nelson v. Railroad Co.*, 40 C. C. A. 673, 100 Fed. 731.

The plaintiff, Currier, was at work in the coal mines of the company. He, of course, assumed the apparent risks and dangers incident to his employment. But it is clearly the duty of the employer to use reasonable care to see that the appliances, implements, and cars furnished the employé with which to work are safe and fit for the purposes for which they are intended. *Railway Co. v. Archibald*, 170 U. S. 665, 18 Sup. Ct. 777, 42 L. Ed. 1188; *Railway Co. v. Murray*, 42 C. C. A. 334, 102 Fed. 264. The evidence shows that Currier was employed to drive a tram car used in carrying coal out of the mine. When first employed, the boss driver went one trip with him. He was instructed to sit on the car and drive. There was a low place in the mine, where the driver had to stoop to pass under. He had to bend forward, with his face close to his knees. In this way he passed under safely. Currier drove in this way for several weeks. Other drivers were accustomed to drive in the same way. The company, through its agent or superintendent, furnished the cars and sent them to the slope where Currier was at work. On the 19th of July, 1898, after Currier had been at work several weeks, while driving under the low place, riding and stooping in the usual way, he was knocked off the car by the rock forming the roof of the mine. It was immediately apparent that the car on which he was riding (a new car sent in for use that day for the first time) was higher than the other cars. It was so high, in fact, that a driver sitting and stooping on it could not safely pass under the low place. The company had knowledge, or was chargeable with knowledge, of the condition and construction of its tram cars, and whether or not they were so constructed that they could be safely used in the mines. These facts, we think, to say the least, so tended to show negligence on the part of the company as to make the question proper to be submitted to the jury. *Railway Co. v. Eckman*, 42 C. C. A. 344, 102 Fed. 274.

Was the plaintiff so clearly guilty of contributory negligence as to make it improper to submit the case to the jury? It is true that he knew of the sloping or low place in the mine. He knew of the difficulties in passing under it with the cars in use. It is urged that by ordinary observation he could have seen that the car on which he was hurt was higher than the others. The evidence, or at least part of it, tended to show that it was necessary for him to ride on the car, so as to furnish the mule light from his lamp attached to his cap. The mule was drawing two cars, the high one being in

front. He was following the custom of riding on the front car. There was evidence tending to show that the driveway was so obstructed at the sides that he could not have walked at the side of the car. There was much evidence tending to show that it was not practicable to walk and perform the duties imposed on him. But, aside from this, granting that he could tell that the new car was higher than the others in use, and that he did discover the fact, we think that he had the right to assume that, although it was higher than the others, it was not so high as to make its use dangerous. The employé may assume that the employer observes reasonable care in selecting the appliances furnished. We do not think that the learned judge in the trial court erred in refusing to instruct the jury, as matter of law, that the plaintiff was guilty of contributory negligence. The judgment of the circuit court is affirmed.

ELI MINING & LAND CO. et al. v. CARLETON.

(Circuit Court of Appeals, Eighth Circuit. April 10, 1901.)

No. 1,472.

1. APPEAL—REVIEW—TRIAL TO COURT—FINDINGS OF FACT.

When a common-law action is tried to the court, its findings of fact are conclusive on appeal; and, if the facts found are sufficient in law to support the judgment, it must stand, unless the court erred in admitting or rejecting evidence over the objection of the complaining party.

2. SAME—OBJECTIONS TO EVIDENCE—SUFFICIENCY.

An objection to a question propounded to a witness, that it is "immaterial," is insufficient to support an assignment of error based on the action of the court in overruling it; such objection being tantamount to no objection at all.

3. SAME—QUESTIONS NOT RAISED BELOW.

Objections to questions propounded to witnesses not brought to the attention of the lower court, and its opinion taken thereon, cannot be reviewed.

4. SAME—HARMLESS ERROR—PROPER CROSS-EXAMINATION OF WITNESS.

In an action to recover possession of an alleged placer-mining claim, defendant was allowed to ask a witness on cross-examination if he would, as a placer miner, undertake to work the ground in question, and make it pay as a placer mine. *Held*, that the question was clearly within the limits allowable, but that, if the ruling had been erroneous, plaintiff could not complain, as the witness' answer was not prejudicial to him.

5. SAME—OBJECTIONS TO LEADING QUESTIONS.

An objection that a question propounded to a witness is leading will not be reviewed on appeal.

In Error to the Circuit Court of the United States for the District of Colorado.

Joel F. Vaile and John A. Ewing (Edward O. Wolcott and William W. Field, on the brief), for plaintiffs in error.

W. H. Bryant (C. S. Thomas and H. H. Lee, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. This action was brought by the Eli Mining & Land Company, a Colorado corporation, A. D. Searl, Mrs. F. C. Schroeder, Nellie M. Schroeder, A. S. Schroeder, John W. Schroeder, Mrs. Dora Ehlers, Mrs. Maria Dunhore, A. F. Britton, and H. J. Gray, plaintiffs in error, against S. L. Carleton, the defendant in error, to recover the possession of an alleged placer-mining claim in the California mining district, in Lake county, Colo. By written stipulation of the parties a jury was waived, and the cause tried before the court. After hearing the evidence and arguments of counsel, the court announced its conclusions in the case in the following terms:

"RINER, J. Case No. 3,846, argued yesterday. In my judgment, the evidence in this case does not show that the ground in controversy is placer ground. I think, too, the good faith of the parties making the placer location, and their grantees, may well be doubted. The location was made twenty-three years ago, and no effort has been made by them to develop and work the claim as a placer. Neither is it established as a fact by the testimony that the necessary assessment work has been performed. The views just expressed seem to be in harmony with the findings of the land department, but, if it were otherwise, it could make no difference, as the findings of that department must be held to be conclusive upon the questions of fact; that is to say, as to the character of the land, etc. A judgment will be entered in favor of the defendants."

Whether these utterances of the court are treated merely as the opinion of the court, or as a general or a special finding of facts, they present nothing for the consideration of this court. They at least constitute a sufficient general finding in favor of the defendant. The fact is found that the ground in controversy is not placer-mining ground, and this finding is fatal to the plaintiff's case. The principal error assigned is that the findings of the court are not supported by the evidence. But, when a common-law action is tried to the court, its findings of fact are conclusive on this court; and, if the facts found are sufficient in law to support the judgment, it must stand, unless the court erred in the trial of the case in admitting or rejecting evidence over the objection of the complaining party. *Hill v. Woodberry*, 49 Fed. 138, 1 C. C. A. 206, 4 U. S. App. 68; *Trust Co. v. Wood*, 8 C. C. A. 658, 60 Fed. 346; *Searcy Co. v. Thompson*, 13 C. C. A. 349, 66 Fed. 92; *Hughes Co. v. Livingston*, 43 C. C. A. 541, 104 Fed. 306; *British Queen Min. Co. v. Baker Silver-Min. Co.*, 138 U. S. 222, 11 Sup. Ct. 523, 35 L. Ed. 147.

Four errors are assigned, based on objections to questions propounded to witnesses by the defendant: On cross-examination the defendant asked a witness, "Would you, as a placer miner, undertake to work that ground and make it pay as a placer mine?" To this question the plaintiffs interposed in the lower court the objection that the question was "immaterial" only, which, as we have often held is tantamount to no objection at all. *Insurance Co. v. Miller*, 8 C. C. A. 612, 60 Fed. 254, 256; *Railroad Co. v. Hall*, 14 C. C. A. 153, 66 Fed. 868, 870; *Equipment Co. v. Blair*, 25 C. C. A. 216, 79 Fed. 896; *U. S. v. Shapleigh*, 4 C. C. A. 237, 54 Fed. 126; *Ward v. Manufacturing Co.*, 5 C. C. A. 538, 56 Fed. 437; *Insurance Co. v. Frederick*, 7 C. C. A. 122, 58 Fed. 144; *Railroad Co. v. Henson*, 7 C. C. A. 349, 58

Fed. 531, 532; *Minchen v. Hart*, 18 C. C. A. 570, 72 Fed. 294, 295. In this court various other objections to questions are set up, but these objections were not brought to the attention of the lower court, and its opinion taken on them, and for that reason this court cannot consider them. *Railroad Co. v. Henson*, supra; *Trust Co. v. Wood*, supra; *Drexel v. True*, 74 Fed. 12, 20 C. C. A. 265; *Philip Schneider Brewing Co. v. American Ice Mach. Co.*, 23 C. C. A. 89, 77 Fed. 138, 149; *Fred J. Kiesel & Co. v. Sun Ins. Office of London*, 31 C. C. A. 515, 88 Fed. 243, 247; *Grattan Tp. v. Chilton*, 38 C. C. A. 84, 97 Fed. 145, 150. Moreover, the question was clearly within the limits allowable in the cross-examination of an adversary witness. But, if the ruling had been erroneous, it would have been an error without prejudice; for the answer of the witness to the question was not prejudicial to the plaintiff, whose witness he was. A precisely similar objection was made to two other questions, to which the same answers apply. To another question the only objection made was that it was "leading,"—an objection never regarded by an appellate court. Finding no error in the record, the judgment of the circuit court is affirmed.

WESTERN UNION TEL. CO. v. BURGESS.

(Circuit Court of Appeals, Sixth Circuit. March 5, 1901.)

No. 835.

1. APPEAL—REVIEW—RULINGS ON ADMISSION OR REJECTION OF EVIDENCE.

Rulings of a trial court admitting or rejecting evidence are not reviewable on writ of error unless the objections made specifically stated the ground of objection.

2. MASTER AND SERVANT—FELLOW SERVANTS—NEGLIGENCE FOR WHICH MASTER IS LIABLE.

Although a foreman may be a fellow servant with one working under his orders for general purposes, for whose negligence resulting in injury to his subordinate the master is not liable, yet when such negligence is in the failure to discharge a positive duty which the master owes to the servant, and which cannot be delegated, the rule of nonliability is not applicable, and his negligence is that of the master, who is responsible for its consequences.

3. SAME—INJURY OF SERVANT—CONTRIBUTORY NEGLIGENCE.

Plaintiff, employed as a lineman by defendant telegraph company, was directed by his foreman to climb a pole and saw it off some 40 feet from the ground. In doing the work he held to the pole with one hand above the place where he was sawing, and when the pole was partly sawed through it broke off, causing plaintiff to fall, and he received an injury. There was evidence tending to show that plaintiff was inexperienced, and was changed from work upon the ground, to which he was accustomed, to the work of cutting down the pole, without any warning as to the danger, or instruction as to the safest mode of doing the new work. *Held*, that upon such state of facts it could not be said as matter of law that he was guilty of contributory negligence in not inspecting the pole for himself to ascertain its soundness, or in the particular method adopted for sawing off the section, but that such question was one of fact for the jury.

4. SAME—ASSUMED RISKS—FAILURE TO INSTRUCT INEXPERIENCED SERVANT.

A servant cannot be held to have assumed a risk of the employment the danger from which, owing to his inexperience, which is known to the

master, he is incapable of understanding and appreciating, and as to which he is given no warning or instruction.¹

5. FEDERAL COURTS—CONFORMITY TO STATE PRACTICE.

Rev. St. § 914, requiring the practice and procedure in the courts of the United States in actions at law to conform as nearly as may be to the state practice, does not make a provision of a state statute requiring the jury on its retirement to take with them the written instructions of the court controlling in a circuit court of the United States sitting within the state.²

In Error to the Circuit Court of the United States for the Northern District of Ohio.

This action was brought to recover damages for a personal injury sustained by the defendant in error while in the employ of the plaintiff in error as a lineman. Speaking generally, the work of a lineman consisted in stringing wires, putting up and taking down poles, digging holes, and the like. One of the methods of taking down and removing a telegraph pole was for a lineman to climb the pole, and saw it off in sections, beginning about four or five feet from the top, until the pole was cut sufficiently low to make it practicable to pull down the remainder of the pole and remove it. The defendant at the time of the injury had, pursuant to directions from his foreman, Shadd, climbed the pole, situated on a street in the city of Cleveland, Ohio, up to a distance of about 40 feet from the ground and about 5 feet from the top of the pole, the pole being about 7 inches in diameter, and was engaged in sawing off a section of the pole, supporting himself by placing his left leg around the pole, or "hugging" it with the left leg, and placing the climbing spur on the foot of the right leg in the pole. He was sawing with one hand and holding with the other just above the point at which the saw blade was cutting through the pole, and when the pole was sawed about three-fourths of the way through the top section broke off and fell, striking the defendant in error, in consequence of which he fell upon the sidewalk, suffering severe injuries. The defendant in error himself describes what occurred as follows: "I commenced sawing until, I think, the pole—as near as I can remember, I think the pole was about half off, and I felt it coming. It did not crack, or nothing more. It commenced coming towards me. I was up there on the pole, with my right hand over here (indicating), and my left hand about three inches above. I felt it coming, and I threw my hand down to catch on the lower piece of the pole. Just got a small hold there, when that other piece struck me. I grabbed the piece that had broken off, and fell backwards. It was over me until I turned over. I can remember turning over. I had hold of the pole something like that (indicating), and I shoved the left leg away from me. That is as far as I can remember." The defendant's left leg was so broken and crushed by the fall that amputation was rendered necessary, and other serious injuries were suffered. There was evidence in the case tending to show that work or experience as a lineman during a period of 6 to 12 months was necessary to reasonably qualify such lineman for the dangerous work of climbing and sawing down poles by sections, like the work in which defendant in error was engaged at the time of the injury. There was also evidence tending to show that the pole on which he was at work had been standing in position and in use for about 18 years, and that the life of a pole like it, or the time during which it would remain sound and safe, was from 12 to 20 years. It was what is called a white cedar pole. There was no system of inspection of the poles on the particular line of which this pole was a part, and the record fails to disclose any rule promulgated or custom adopted by which it was the duty of defendant in error, or any other particular person, to make inspection; nor is any contract provision, direction, or instruction in that regard shown.

¹ Risks assumed by servant, see note to *Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 314.

² Conformity to practice in state courts, see notes to *O'Connell v. Reed*, 5 C. C. A. 594; *Nederland Life Ins. Co. v. Hall*, 27 C. C. A. 392.

During the early part of the year 1896 the defendant in error had worked about 60 days, at irregular intervals, in the construction of a telegraph line on a railroad called the "Lima Northern," and during about 6 or 8 days of that time had done the work of climbing poles and stringing or tying wires, or assisted in such work; but the remainder of the time was engaged in what is called "ground work," such as carrying poles, setting them in the ground, and other work, which did not require climbing the poles for any purpose. He commenced work for the plaintiff in error on the 1st day of August, 1896, and his injury was sustained on the 12th day of the same month. Such work as he did while in the service of plaintiff in error, before the injury, consisted in ground work, until in the afternoon of the 11th day of August. What took place then and on the morning of the accident was stated by the defendant in error, and may be given just as found in the record, as follows: "Q. Let me call your attention to the evening of the 11th of August. Did you have an interview with the foreman of that company on that evening? A. While we were at work? Q. Yes. A. Yes, sir. Q. Under whom were you working at that time? A. W. A. Shadd. Q. What was his position? A. Foreman. Q. Was there any one else who had authority over you besides Shadd? A. Yes, sir. Q. Who was that? A. Mr. Miles. Q. What was his position? A. Assistant foreman. Q. What did these foremen usually do while you were working with them? What orders did they give? What did they do? A. They told us what we were to do, and we did that usually. Q. Who engaged you to work for the Western Union Telegraph Company? A. Mr. Miles. Q. Well, now, you can go on and state what Shadd told you that evening of the 11th of August. A. We were working in the city. I do not know what street we were on. He said to the gang, 'Boys, we will go over and take down the rest of these poles.' He named the street, and we started over. On the road over— We did not have any ax. I asked Mr. Shadd how we were going to take them down. He said, 'We will cut them from the top.' We went on over, and come to the first pole. He told Jim Lang,—I think his name was Jim,—'You and Burgess take this pole.' Q. That was the evening before? A. That was the afternoon of the 11th. I said, 'Mr. Shadd, I never did any of this kind of work, sawing down poles.' He said, 'You can take the poles off of the rope for Jim.' And Jim started up the pole. On the way up—it was a step pole—he caught his saw on the step, and broke it. Q. What do you mean by a step pole? A. That pole has iron steps driven in the side of it, to make steps—to make a ladder. Q. Climbers? A. Yes, sir. He broke his saw when he went on it, then he came down, and told me to saw until he went down to the— Q. Who told you to go up the pole? A. Jim Lang. Q. A man who was working with you? A. Yes, sir. Mr. Scribner: This is to show what experience he had. This was not the time he was hurt. This was the evening before he was hurt. I want to show what experience he had. The Court: I do not hear any objection. Mr. Newbegin: I object to this line of testimony. Mr. Scribner: I want to show simply that this was all the experience he had. Q. Did you ever saw a pole down before that? A. I sawed some on a pole. I did not take any pieces down. Q. You may state to the court what occurred the next day. A. Well, the next morning we got ready to go to work, and Shadd said to Mr. Henderson and me, 'You will go over on that terminal pole, and change the iron.' Shadd had put it on the day before, and put it on wrong. He said, 'You will go over and change that, and come over where we are working.' We did so. I should judge it was about half-past ten in the morning when I got there,—got over where they were at work. The gang was working on that street. I think it is St. Clair street. They were taking down wires and taking off cross-arms. We come up to where they were. Shadd says to Mr. Henderson, he says, 'Red, you and Burgess go to sawing poles.' I asked him if I was to take the poles off the ropes for Mr. Henderson. He said, 'No, you take this pole, and Red will take the other one.' Q. What did you do then? A. I picked up a handline and handsaw that was laying on the sidewalk and proceeded to climb the pole. Q. At the time you started up the pole, where was Mr. Shadd? A. When he had told me to take this pole, he had started uptown. Q. Where was Mr. Miles at that time? A. Mr. Miles was, I should judge, about 60 feet out in the street. Q. Did he see you go up the pole? A. Yes, sir. Q. Go

ahead, and state what you did. A. Went up the pole there, tied our handline on the pole above where I intended to saw it. There was a bracket there. I fastened the end of the rope on the bracket. I started my sawing on the pole right over the bracket. I put the rope over the bracket to keep it out of the way of the saw. * * * Q. You may state what knowledge you had, if any, in regard to the condition of that pole, as to its being rotten or sound. A. None at all. Q. You may state what you knew, or what knowledge you had, as to the danger of sawing off a pole. (Objected to.) A. None at all. I had never seen any of that kind of work done until the day before. Never heard of it. (Exception taken to both the question and form of answer for reasons heretofore given.) Q. You may state what directions were given to you by Mr. Shadd, or Mr. Miles, or any one, as to how this work should be done. A. None at all. Q. You may state whether Mr. Shadd or Mr. Miles ever informed you that the pole was rotten, or what the dangers were in doing the work. (Question objected to by defendant. Objection overruled. Defendant excepts on ground that he took the risk of the work upon himself.) A. Nothing. Q. You may state what instructions, if any, Mr. Shadd, or Mr. Miles, or any one gave you as to the manner in which you should do that work. A. They had never given me any. Q. You may state whether or not they directed you to make any tests of the pole to ascertain its condition. (Question objected to. Objection sustained.) The Court: Ask him what directions were given him. Q. You may state what, if any, directions were given to you in regard to testing the pole to ascertain its condition. (Objected to, and not answered.) Q. Now, you may state, if you know, what was the height of that pole from the ground; that is, from the point at which you fell. A. From where it broke, I would judge about forty feet. Q. About how much did you saw off? A. About four feet and a half. Q. From the top? A. Yes, sir. Q. Upon what did you fall? A. The sidewalk. Q. What kind of a sidewalk was it,—brick or stone? A. It was, I think, what they call a sandstone sidewalk. Q. Just describe the manner in which you sawed that off,—the direction in which you sawed. A. I was standing with my back to the building, standing on the pole with my back to the building, and was sawing with my right hand. Q. What were you holding on with? A. With my left hand. Q. With your feet braced on the pole? A. I was on the pole like this (indicating), sawing around here on this corner (indicating), had hold about like that where I was sawing here (indicating). Q. Opposite the middle of your body? A. Yes, sir. Q. You had to saw below your hand? A. My hand was above the cut. Q. You were holding on with your feet below the cut? A. Yes, sir. Q. Was there any steps on that pole? A. No, sir." The testimony thus given by the defendant in error is substantially uncontroverted. The foreman, Shadd, was examined as a witness. So far as he relates what occurred, he does not differ materially from the defendant in error, although he does not remember, or, if so, does not state, the conversation between him and the defendant in error so fully as the defendant in error does; but he does not contradict or deny what the defendant in error said. There was some evidence tending to show that the pole was internally decayed and unsound, although the weight of the evidence is to the effect that it was substantially sound.

In the petition negligence was charged in two respects, and recovery sought on both grounds. First, the plaintiff in error was charged with negligence in putting the defendant to the work in which he was at the time engaged, with knowledge that he was inexperienced in that particular kind of work; that it was attended with greater danger than the work in which he had theretofore been engaged, and that this was done without any warning of the increased dangers, and without any instructions reasonably calculated to enable him to do the new work in a safe and proper manner so as to guard himself against injury. Second, as a distinct ground of recovery it is alleged that the defendant in error was set at work upon a pole which was dangerous, decayed, and liable to break, the condition of which was known to plaintiff in error, or by proper inspection ought to have been known to the plaintiff in error in the exercise of that reasonable care for the safety of its servants, which, it is alleged, was one of the master's obligations. At the close of the whole of the evidence plaintiff in error moved the court to direct a verdict in

favor of the defendant, the motion being in the following language: "The defendant, by its attorneys, requests the court to instruct the jury to return a verdict for the defendant, for the reason stated that on the whole case the law required a verdict for the defendant." This request was declined, and exception taken. All questions in relation to the second ground of recovery were eliminated from the case by the court below in the instructions to the jury. The instruction in this respect was that the master was not liable on account of a latent defect like that of internal decay in the pole, and that the master was under no duty to the servant to make inspection of the pole at which he was put to work. The jury was told to disregard this aspect of the case. The court then submitted the case to the jury to determine, as a question of fact, whether the plaintiff in error was or was not reasonably qualified for the work at which he was put, and whether that work involved dangers and risks in excess of that which he had been previously accustomed to do, and, if so, whether or not the foreman, Shadd, knew that he was inexperienced in the work at which he placed him. In short, the case was allowed to go to the jury on the question of negligence alleged as the first ground of recovery, and the instructions to the jury in relation to that question were full and specific. The trial resulted in a verdict and judgment in favor of the defendant in error for \$5,000, and thereupon the plaintiff in error sued out the writ of error on which the case is before us for review. Exceptions were taken to the ruling of the court in the admission and exclusion of evidence; to different portions of the court's instructions to the jury; to the refusal of the court to give certain special requests in charge; the denial of a request by plaintiff in error that the jury be permitted to take with them to their consultation room the written charge of the court; to the refusal of the court to arrest judgment upon the ground, to use the very language of counsel: "That upon the statement of the pleadings herein the said defendant is entitled to judgment in its favor;" and errors (27 in number) are assigned on these different grounds.

Henry & Robert Newbegin, for plaintiff in error.

Harvey Scribner and W. H. Handy, for defendant in error.

Before DAY and SEVERENS, Circuit Judges, and CLARK, District Judge.

CLARK, District Judge, after stating the case, delivered the opinion of the court.

We do not deem it necessary to discuss in detail and separately each of the various errors assigned. We shall consider briefly only those chiefly relied on in the argument at bar, and which seem to us sufficiently serious to require separate and special treatment.

In regard to the seventeen errors assigned to the court's action in the admission and rejection of evidence, it is sufficient to say that in only two or three of these were the exceptions specific in stating the ground of the objection, and the assignments of error could not, for this reason, be sustained. *Toplitz v. Hedden*, 146 U. S. 252, 13 Sup. Ct. 70, 36 L. Ed. 961; *Railroad Co. v. Hellenenthal*, 31 C. C. A. 414, 88 Fed. 116, and cases there cited.

Such of the objections as were sufficiently specific are, in our opinion, not well taken. Indeed, we do not regard any of the exceptions taken to the rulings in relation to the evidence as tenable, apart from the difficulty that they are not sufficiently specific to put the court in error in overruling the objections. In support of the error assigned on the ruling of the court in refusing to direct a verdict in favor of the defendant it is urged, first, that the foreman and defendant in error sustained to each other the relation of fellow servants, and that

there is no liability on the part of the master for an injury to the defendant in error caused by negligence, in any respect, of his fellow servant. It is not to be doubted, and is conceded, that, as a general proposition, the relation between the foreman and the servants at work under his orders and directions are fellow servants, and the general rule of nonliability of the master is not controverted. Where, however, the negligence of the foreman is in the failure to discharge one of those positive duties which the master owes to the servant, and which cannot be delegated, the rule of nonliability is inapplicable, and the master is responsible for the foreman's failure to discharge this positive duty. The case in this respect is undistinguishable from *Felton v. Girardy*, 43 C. C. A. 439, 104 Fed. 127; *Railroad Co. v. Miller*, 43 C. C. A. 436, 104 Fed. 124, recently decided by this court. It is sufficient to refer to those cases, where the subject will be found discussed, and the distinction involved pointed out, and it is unnecessary to restate the doctrine for the purposes of this case.

Much of the argument at bar and in the brief was and is devoted to an effort to show that the defendant in error was guilty of such contributory negligence as defeated his right to recover, if otherwise made out. The contention is that it was negligent in the servant to climb the pole, without any inspection as to its soundness, a distance of 40 feet, and take hold of it with one hand above the saw, and then proceed to cut off the section in that position. In answer to this we remark that the record does not disclose that any question of contributory negligence of the defendant in error was urged or presented on the trial in the court below, unless the motion to direct a verdict for defendant must be regarded as distinctly raising that point. No specific instruction was requested in that regard, and no distinct ruling had, or exception taken or reserved. *Railroad Co. v. Ives*, 144 U. S. 409, 12 Sup. Ct. 679, 36 L. Ed. 485; *Columbus Const. Co. v. Crane Co.*, 40 C. C. A. 35, 98 Fed. 946. Under such circumstances it will admit of serious doubt whether such question is presented for consideration or review by this court. Conceding, however, but not deciding, that a general motion to direct a verdict upon the whole record, without stating the specific grounds of the motion, is sufficient to raise the question of contributory negligence, we conclude, on the evidence disclosed in this record, that this was an issue of fact, which, like the question of negligence, was proper for the consideration of the jury. It will appear from the statement of the case that there was some evidence tending to show that the defendant in error was an inexperienced servant, and was changed from the work to which he had become accustomed, and set at work which involved greater danger, without any warning or instruction as to the safest mode of doing the new work. Under such circumstances, and in this state of the case, we think the question of contributory negligence was a question of fact for the jury to determine. In view of such a state of the case, if the jury should find that the defendant in error was not sufficiently experienced to enable him to do the new work, and that he was neither warned nor instructed as to the proper mode of doing the work, we conclude that it could not be said as matter of law that the servant was guilty of contributory negligence in not making an inspec-

tion of the pole for himself, and in the particular method adopted of sawing off the section of the pole. It could not be said, upon the facts of this case, that defendant in error was guilty of negligence as matter of law if he supposed the pole was sound, and that he might safely do the work as it was done. If the pole was regarded, upon reasonable ground, as sound, it could not be said that the method of sawing, up to the time the section broke off and fell, was an obvious danger to an inexperienced servant without instruction or warning.

The exceptions to the court's instructions on which the nineteenth, twentieth, twenty-first, twenty-second, and twenty-third errors are assigned, only raised and sought to raise the same general objection as was presented by the motion to direct a verdict for the defendant. In support of these general assignments it is said:

"All of these propositions as charged by the court were erroneous, and misleading to the jury. We have shown both from the admissions in the pleadings and the evidence that the plaintiff knew of the special risk of the work. We have further shown, and the court charged the jury, that it was the duty of the plaintiff to inspect the pole for himself to see whether it was a safe one for him to work at; or, on the other hand, if its unsafe condition was latent, that he took the risk upon himself."

In relation to these assignments we need only say that we think they relate to questions of fact, which were properly submitted to the jury for determination, and the point at issue is substantially the same as the general question involved in the motion to direct the verdict, and is disposed of in what was said in relation to that question and the cases cited.

The twenty-fourth assignment of error presents objection to the court's refusal to give in charge the following request, made by the plaintiff in error:

"When the plaintiff accepted the employment of the defendant as a line-man, he held himself out as competent to discharge all of its duties in the line of his work as such lineman, and cannot now be heard to complain on account of having received an injury while in the line of his duty."

This request was clearly unsound, and properly refused, as will appear by referring again to *Railroad Co. v. Miller* and *Felton v. Girardy*.

It is finally assigned as error (twenty-fifth assignment) that the court refused to permit the jury to take with them on their retirement the written charge, in accordance with section 5190 of the Code of Ohio, which provides:

"And all written charges and instructions shall be taken by the jurors in their retirement, and returned with their verdict into court, and shall remain on file with the papers in the case."

The contention is that under section 914 of the Revised Statutes of the United States this rule of practice prescribed for the state courts of Ohio was applicable to this court. It is settled, however, that a provision like that found in the Ohio Code of Practice does not control proceedings in the circuit courts of the United States sitting in that state, and the objection is consequently not well taken. *St. Clair v. U. S.*, 154 U. S. 134, 14 Sup. Ct. 1002, 38 L. Ed. 936; *Nudd v. Burrows*, 91 U. S. 439, 23 L. Ed. 286. See, also, *Railroad Co. v. Horst*,

93 U. S. 291, 23 L. Ed. 898; *In re Chateaugay Ore & Iron Co.*, 128 U. S. 544, 9 Sup. Ct. 150, 32 L. Ed. 508; *City of Lincoln v. Power*, 151 U. S. 436, 14 Sup. Ct. 387, 38 L. Ed. 224; *Shepard v. Adams*, 168 U. S. 618, 18 Sup. Ct. 214, 42 L. Ed. 602,—where this general subject will be found considered and the cases reviewed.

The twenty-sixth error assigned is to the court's denial of motion in arrest of judgment, and is clearly not tenable; and the twenty-seventh assignment only seeks to raise in different form the main question presented and necessarily involved in the consideration and disposition made of that question, and does not seem to require separate discussion.

What is thus said concludes such discussion as we think the various errors assigned require, with the result that we do not regard any of them as well taken. Judgment affirmed.

BAGGS v. MARTIN et al.

(Circuit Court of Appeals, Eighth Circuit. April 4, 1901.)

No. 1,308.

1. APPEAL—INSTRUCTIONS—EXCEPTIONS—SUFFICIENCY.

Where instructions given at plaintiff's request embrace several distinct propositions, a general exception to the giving of the instructions, and to each and every part thereof, is not sufficient to support an assignment of error which only relates to one proposition included therein.

2. SAME—REFUSAL TO GIVE INSTRUCTIONS.

A general exception to the refusal to give instructions, including several distinct points, is not sufficient to support an assignment of error.

3. STREET RAILROADS—NEGLIGENCE—EVIDENCE—ADMISSIBILITY.

Where the receiver of a street railroad defends an action for the negligent killing of an alleged passenger on the ground that she was not a passenger on the car, and did not receive any injuries through defendant's negligence, the clothing worn by deceased at the time of the accident is admissible for the purpose of her identification, and as tending to show the nature and extent of her injuries.

4. APPEAL—MISCONDUCT OF COUNSEL.

Where an assignment of errors, on the ground of misconduct of counsel in his argument to the jury, does not contain a reference to the record showing an exception to the remark when made, and the ruling of the court thereon, as required by a rule of court, it will not be considered on appeal.

5. SAME.

Where objection to misconduct of counsel in his argument to the jury is first made on the motion for new trial, it will not be considered on exceptions to the action of the court in overruling the motion, since exceptions should have been taken thereto at the time of the making of the improper argument.

In Error to the Circuit Court of the United States for the District of Colorado.

A. M. Stevenson, for plaintiff in error.

E. Keeler, H. N. Sale, and E. H. Wilson, for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. This action was brought by Albert Martin and others, heirs at law of Mary E. Martin, against Edward C. Baggs, as receiver of the Denver City Railroad Company, to recover damages for the killing of Mary E. Martin through the alleged negligent management of the street cars operated by the defendant. There was a trial to a jury, and a verdict and judgment for the plaintiffs, and the defendant sued out this writ of error.

The first three errors assigned relate to instructions given and refused. But these alleged errors cannot be considered, because no sufficient exception was taken to the instructions given, or to the refusal to give those asked by the defendant. To a series of instructions, embracing several separate and distinct propositions, asked by the plaintiff and given by the court, only one of which is assigned for error or claimed to be erroneous, the only exception taken was: "To the giving of the instructions asked by the plaintiffs, and to each and every thereof, defendant then and there duly excepted." To a series of instructions, embracing nine separate and distinct propositions, asked by the defendant and refused by the court, the only exception taken was in these words: "To the refusing of which instructions defendant by his counsel duly excepted." These exceptions were not sufficient, for reasons so often stated by this and other courts as not to require repetition. *Railway Co. v. Jurey*, 111 U. S. 584, 596, 4 Sup. Ct. 566, 28 L. Ed. 527; *Price v. Pankhurst*, 10 U. S. App. 497, 499, 3 C. C. A. 55, 53 Fed. 312; *Association v. Lyman*, 18 U. S. App. 507, 9 C. C. A. 104, 60 Fed. 498. In the last case cited, an exception in this form, "To the giving of each and all of which instructions the defendant, by its counsel, then and there excepted," was held to be of no avail. *Anthony v. Railroad Co.*, 132 U. S. 173, 10 Sup. Ct. 53, 33 L. Ed. 301; *Railway Co. v. Johnson*, 4 C. C. A. 447, 54 Fed. 481, 10 U. S. App. 629; *Philip Schneider Brewing Co. v. American Ice-Mach. Co.*, 23 C. C. A. 89, 77 Fed. 147, 40 U. S. App. 382; *Shelp v. U. S.*, 26 C. C. A. 570, 81 Fed. 700, 48 U. S. App. 385; *Holder v. U. S.*, 150 U. S. 91, 14 Sup. Ct. 10, 37 L. Ed. 1010; *Lewis v. U. S.*, 146 U. S. 370, 13 Sup. Ct. 136, 36 L. Ed. 1011; *Iron Co. v. Blake*, 144 U. S. 476, 12 Sup. Ct. 731, 36 L. Ed. 510.

The clothing Mrs. Martin had on when she received the injury which resulted in her death was exhibited to the jury for the purpose of identifying her as the woman who received the injury, and as tending to prove the character and extent of her injuries. There was no error in this. The defendant denied that the deceased was a passenger on his car, or that she received any injury through the negligence of himself or his servants.

The remaining assignment of error relates to a remark of the plaintiff's counsel in his argument to the jury. This assignment of error is not supported by a reference to the record showing that an exception was taken to the remark when made, and what action the court took thereon. Under the rules of this court, such a reference is necessary. The only reference to the record in the brief of counsel for the plaintiff in error is to page 101, and upon turning to that page we find the alleged remark is set out as one of the grounds for a new trial, and we do not find it referred to elsewhere in the record.

Such exceptions cannot be saved by assigning them for the first time in a motion for a new trial, and then excepting to the action of the court in overruling such motion. The judgment of the circuit court is affirmed.

In re HASSENBUSCH.

(Circuit Court of Appeals, Sixth Circuit. April 2, 1901.)

No. 954.

BANKRUPTCY—POWERS OF COURT—WARRANT FOR ARREST OF BANKRUPT.

Bankr. Act 1898, § 9, subd. "b," providing that the judge may, before the expiration of one month after the qualification of the trustee, upon satisfactory proof that the bankrupt "is about to leave the district in which he resides or has his principal place of business to avoid examination, and that his departure will defeat the proceedings in bankruptcy, issue a warrant to the marshal directing him to bring such bankrupt forthwith before the court for examination," confers no authority upon a court of bankruptcy to issue a warrant for the arrest of a bankrupt who is not within the district, but who removed from it six months previously and before the proceedings in bankruptcy were instituted, such warrant being applied for to serve as the basis for extradition proceedings in another district; nor has the court such authority under the general powers conferred upon it by section 2, cl. 15, "to make such orders and issue such process * * * in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act."

Petition for Revision of Proceedings of the District Court of the United States for the Western Division of the Western District of Tennessee, in Bankruptcy.

The question now presented for decision arises upon an original petition filed in this court February 21, 1901, by the trustee in bankruptcy appointed in the court below, pursuant to section 24, subd. "b," in which it is provided: "The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved." The bankrupt left Memphis, Tenn., August 1, 1900. He had up to that time been engaged in business in the city of Memphis, trading as the Enterprise Furniture & Carpet Company. He removed from Memphis to the city of Cincinnati, Ohio. On the 11th of October following, the original petition was filed in the court below, and involuntary proceedings in bankruptcy thereby instituted. The case was proceeded with until a receiver and trustee had been appointed, and the property of the bankrupt seized in the usual way. Subpoena regularly issued for the defendant was returned not executed, the return showing that the defendant could not be found within the district. This was followed by publication for the defendant, and the defendant, failing to appear, was subsequently adjudged a bankrupt. In the progress of the case it became desirable to secure an examination of the bankrupt, and for this purpose application was made to the district judge, February 8, 1901, in open court, for a warrant for the arrest of the defendant. It appeared that he was at that time in the Western district of Missouri, and the purpose of the motion was to obtain a warrant for his arrest, and make this the basis for extradition proceedings in the Western district of Missouri. The application was made under section 9, subd. "b," of the bankruptcy act of 1898, which, given in full, is as follows: "The judge may, at any time after the filing of a petition by or against a person, and before the expiration of one month after the qualification of the trustee, upon satisfactory proof by the affidavits of at least two persons that such bankrupt is about to leave the

district in which he resides or has his principal place of business to avoid examination, and that his departure will defeat the proceedings in bankruptcy, issue a warrant to the marshal, directing him to bring such bankrupt forth-with before the court for examination. If upon hearing the evidence of the parties it shall appear to the court or a judge thereof that the allegations are true and that it is necessary, he shall order such marshal to keep such bankrupt in custody not exceeding ten days, but not imprison him, until he shall be examined and released or give bail conditioned for his appearance for examination, from time to time, not exceeding in all ten days, as required by the court, and for his obedience to all lawful orders made in reference thereto." The district judge denied the application for the warrant of arrest, and his action in this respect is assigned for error, and presents the only question in respect of which we are now asked to revise the proceedings in the court below. Section 10 of the bankruptcy act is cited as affecting the proper construction of subdivision "b," and as supporting the contention of the trustee as to the proper interpretation of that clause of section 9. Section 10 is as follows: "Whenever a warrant for the apprehension of a bankrupt shall have been issued, and he shall have been found within the jurisdiction of a court other than the one issuing the warrant, he may be extradited in the same manner in which persons under indictment are now extradited from the district, within which a district court has jurisdiction to another." In section 2 of the same act the jurisdiction and power of the district courts in matters of bankruptcy is declared, and among other powers defined are the powers to "(13) enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment, or fine and imprisonment; (14) extradite bankrupts from their respective districts to other districts; (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act."

C. L. Marsilliott, for petitioner.

Before LURTON and SEVERENS, Circuit Judges, and CLARK, District Judge.

CLARK, District Judge, after making the foregoing statement, delivered the opinion of the court.

It would seem that there ought to be no doubt or difficulty in regard to the meaning or interpretation of section 9, cl. "b," when the entire subdivision and the subject to which it relates are considered. Indeed, the language of the provision throughout seems quite plain and free from difficulty, in view of the settled rule of construction applicable to a statutory power like that here conferred. The provisions of subdivision "b," in which only the power to issue the warrant of arrest is found, are very plain and specific, and are not involved in any doubt by reference to the other provisions of the same enactment which are supposed to affect the meaning of subdivision "b," and enlarge by implication the power therein defined. Section 10 clearly does not deal with or concern the jurisdiction or power of the court in which the bankruptcy case is pending to issue a warrant for the apprehension of the bankrupt, but only confers power on a court other than the one issuing the warrant to extradite the bankrupt, just as a person under indictment in one district may be extradited from another district in which he is found, under the provisions of the existing statute upon the subject. In reference to section 10 the learned district judge said:

"But the trouble here is that, broad as this section is in its language, it cannot be made to cover any case except one in which a lawful warrant may be

issued for the apprehension of a bankrupt, and that only can be done under the limited provisions of the preceding section 9."

And, discussing the restrictions in clause "b," the district judge said:

"The next limitation is 'that such bankrupt is about to leave the district in which he resides or has his principal place of business to avoid examination.' Now, this bankrupt is not 'about to leave this district.' He has long since left it. If it was his residence at the time the original petition in bankruptcy was filed, it does not appear to be so now, at the time this application is made. If it was his principal place of business at the time of the original petition in bankruptcy was filed, it does not appear to be so now. Referring to the question of section 2 (1), if it was his domicile at the time the original petition was filed, it does not appear to be so now. If it were either of these at the time the original petition in bankruptcy was filed, or if it had been either of these for the greater portion of six months next before the filing of that petition, this court had the power to adjudicate him a bankrupt; nor did that power to do this at all depend upon his personal presence within the district. In either category, if personally found within the district, the bankruptcy court, after adjudication, or, it may be, before, had the power to summon him for inquisitorial examination; but, in order to exercise this power, he must be personally served with process for the purpose. He need not be personally served with process for the purpose of adjudication, since special provision is made for bringing him in by publication for that purpose. But no provision is made for bringing him in by publication for inquisitorial examination; nor is any provision made for sending for him for that purpose, if he be without the district. Indeed, no provision is made for sending for him to bring him into the court for the purpose of adjudication if he be without the district. That must be done by publication. It is stretching the provisions of this section of the statute beyond all bounds of narrow or reasonable construction of its character to say that it will cover the issuance of a warrant to apprehend a bankrupt when he was not within the district, and is not about to leave it, but where he has been absent from it, as shown by the facts, for quite six months before the application is made. * * * It was held under the act of 1867 that the power of issuing a provisional warrant for the seizing of person or property was one of great delicacy, not to be called into action unless the court was satisfied that it was necessary for the protection of the estate. Extradition from one district to another is of far greater delicacy, as I have already indicated. *Bump, Bankr. (9th Ed.) 444, 446.* It was also held under that act that arrest was in no sense a security for the creditors' debts, and had no other purpose than the attendance from time to time as the court should order. *In re Sheehan, 8 N. B. R. 345, Fed. Cas. No. 12,737; M. & M. Nat. Bank v. Brady's Bend Iron Co., 5 N. B. R. 491, Fed. Cas. No. 9,018.* In the case of *Usher v. Pease, 116 Mass. 440*, Mr. Chief Justice Gray (now Mr. Justice Gray, of the supreme court of the United States) held that the analogous provision of the act of 1867 should be strictly confined to the language of the act; that under that act the bankrupt, when arrested, could only be detained 'until the decision of the court upon the petition or the further order of the court'; and that the power of the court in that behalf could not be enlarged by turning 'and' into 'or' in the order for the warrant, whereby the court might detain him for other purposes after the adjudication."

In *Coll. Bankr. (3d Ed.) p. 116*, the author, commenting on section 9, cl. "b," says:

"The bankrupt's sole purpose in leaving the district must be to avoid examination. In presenting its report on the bankruptcy bill to the 55th congress, on December 16, 1897, the judiciary committee of the house said, with reference to this section (then section 8), which had been amended in committee so that this provision with reference to the motives of the bankrupt in leaving the district read exactly as it here appears: 'In the section where provisions are made for taking into custody the bankrupt when he is about to leave the district, and where his departure would tend to delay the proceed-

ings in bankruptcy, an amendment has been made, limiting the departure to cases in which the bankrupt was leaving for the sole purpose of avoiding the examination. If he left for other purposes,—such as to better his condition,—the provisions of the law will not apply to him.' Every particular fact required in order to give one a right to move for the arrest of the bankrupt must be clearly shown to exist. The language of the section implies that, before the court can issue a warrant, it must not only find it to be true that the bankrupt leaves to avoid examination, but that it is necessary that he be detained, that it is necessary that he be examined, and that in no other way than by detention by the marshal can his presence be secured."

It is quite evident that the jurisdiction "to extradite bankrupts from their respective districts to other districts," as declared in the fourteenth specification of jurisdiction in section 2, is exactly the same power, stated in more general terms, as that found in section 10 of the same act, wherein the power is more specifically defined and limited, and can in no just view be held to enlarge by implication the power in the court of another jurisdiction to issue the warrant of arrest provided for in clause "b," § 9. Nor is there any foundation in authority or reason for the suggestion that the power to "make such orders, issue such process and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act," gives to subdivision "b" of section 9 any larger meaning than its terms naturally and fairly import or convey. No discussion could make this plainer than a simple reference to the terms of the two provisions of the statute, from which it is obvious that there is no substantial ground for the proposition that the broader powers conferred on the district court in the fifteenth subdivision of jurisdiction do not extend or enlarge a jurisdiction separately dealt with and specifically and carefully defined and limited, like the power contained in clause "b" of section 9. In this case the bankrupt had departed from the district and from the state of Tennessee more than two months before the petition in bankruptcy was filed, and six months before the application for the warrant of arrest was made; and under these circumstances the issuance of a warrant of arrest would have been clearly the exercise of a power not warranted by the statute in terms or by any fair implication, giving to it even a liberal construction. Perhaps the closest analogy to the warrant for arrest authorized by clause "b" of section 9 is found in the long-used and familiar writ of *ne exeat* in the English system of equity practice. That writ was only authorized and used against one who, "designing to avoid the justice and equity of the court, is about to go beyond sea, so that the duty will be endangered if he goes." The writ was only issued against one at the time within the jurisdiction of the court and subject to the personal execution of its process, and for the distinct purpose of retaining him within the jurisdiction, and to prevent his going beyond sea. The writ was, of course, never used or attempted to be used for the purpose of procuring the return of one who had already gone beyond sea, or as the basis of extradition or rendition proceedings. And if, as was held by Judge Brown in *Re Lipke* (D. C.) 98 Fed. 970, the court, in the exercise of its equity jurisdiction in a bankruptcy proceeding, may issue this writ under the power with which the district court is invested by subdivision 15 of section 2, the decision is no authority for the proposition that the

court may issue a warrant of arrest under the circumstances and for the purposes disclosed in this record, and furnishes no support to the contention of the trustee. Judgment affirmed.

In re SMITH.

(District Court, E. D. North Carolina. January 26, 1901.)

1. **BANKRUPTCY—ALLOWANCE OF ATTORNEY'S FEES.**

Bankr. Act 1898 contains no provision authorizing the allowance from the estate of a bankrupt in voluntary proceedings of fees to attorneys who appear for creditors.

2. **SAME.**

Bankr. Act 1898 presupposes that attorneys employed to file a voluntary petition in bankruptcy will arrange with their client for the prepayment of their fees for the services required in the ordinary course of the proceedings, and the provision of section 64b, cl. 3, contemplates the allowance from the estate by the court, in its discretion, of additional fees for extraordinary services which may have been required from such attorneys, which should be fixed at such sum as is equitable in view of the fees already received and the rights of creditors.

3. **SAME—COMMISSION OF REFEREES AND TRUSTEES.**

Referees and trustees are entitled to commissions only "on sums to be paid as dividends and commissions," and not on the gross amount collected.

In Bankruptcy. On consideration of final dividend sheet and allowances to officers and attorneys.

Aycock & Daniels, for bankrupt.

H. L. Stevens, for creditors and Stevens, Beasley & Weeks.

PURNELL, District Judge. This case is before the court on the final dividend sheet prepared by the referee and petitions by attorneys asking a reconsideration of the order heretofore made reforming said dividend sheet, disallowing one attorney's fee, and reducing the other. On an examination of the records sent up by the referee and clerk, it is now ordered, adjudged, and decreed: That all orders heretofore made in the cause by this court, including the granting of a final discharge, April 28, 1900, be, and the same are hereby, affirmed.

The attorney's fee now asked for by Messrs. Stevens, Beasley & Weeks for legal services rendered the trustee were in the original dividend sheet merely entered as "legal services rendered." An examination of the records discloses the fact that these gentlemen at every hearing in the bankrupt and state courts represented creditors. There is no provision in the act of 1898 (bankrupt law) which authorizes the allowance of an attorney's fee such as asked out of the bankrupt's estate in a voluntary proceeding. Section 64b, cl. 3, only provides for the allowance of one fee in a voluntary proceeding,—to the bankrupt; and this is discretionary. But it is said these attorneys have increased the assets of the estate by their professional services. This appears to be true, but under section 62a, Bankr. Act, the actual and necessary expenses of the officers of the court can be paid out of the estate only, when reported in detail under oath, and examined and approved by the court. There is no such report in the records.

Nor is there anything in the record showing these services were actually and necessarily rendered the estate or trustee, but, if increased assets resulted, such an increase was only incident to a vigorous contention in behalf of creditors, apparently, at least, adverse to the trustee, at a considerable increase of cost to all concerned. This attorney's fee is, therefore, disallowed, as heretofore ordered, and cannot be paid out of the estate. In *Re Carolina Coopera-ge Co.*, 3 Am. Bankr. R. 154, 96 Fed. 604, this court has expressed views in regard to attorneys' fees which it is not necessary to repeat. It would be a strained construction to hold that congress intended by the adoption of section 64b, cl. 3, to provide for the full compensation to attorneys in bankruptcy proceedings at an inequitable expense and loss to creditors of the estate. Lawyers can, and do generally, take care of themselves, and protect their own interests. Many members of congress are and have been practicing attorneys. That all feel the courteous respect for members of the profession, universal among lawyers, goes without saying; but it is an unfair presumption to suppose they are oblivious to common practice, or legislate for those of the brethren who rely on the courts to make their contracts. It is common knowledge that one of the first things an attorney does when a client seeks to secure his professional services is to establish the relationship of attorney and client. All understand how this is accomplished. This relationship is frequently of great importance to both. The client unbosoms himself, and his attorney becomes the repository of secrets which would be disclosed to no one else. It must be presumed the legislative body had in mind this practice, understood by litigant and lawyers, and legislated accordingly. Courts are no less ignorant of the custom. The section should, therefore, be considered and construed as having been adopted with the expectation that attorneys, when employed to file a petition in bankruptcy, would, as a rule, require the payment of a fee as a condition precedent to having secrets touching the estate confided to them, and the labor incident to preparing schedules and conducting the case in the ordinary course of the court. When labors greater than contemplated in the ordinary course of such proceedings arise, the act vests in the court the discretion to allow out of the estate, under the reasonable supposition that the petitioner has made a surrender of all his property, an additional allowance for unforeseen additional professional services by the attorney, the discretion of the court to be governed by the circumstances of each case. That the court "may allow" does not vest a right in the attorney to any fee. It is a matter of discretion with the court. When asked to exercise this discretion, imposing an increased cost and loss on unfortunate creditors, it is not unreasonable to ask the attorney to disclose the amount his client has paid him, that the court may act equitably.

As to the petition of Messrs. Aycock & Daniels, therefore, as attorneys for the bankrupt, preparing the petition and schedules, attending meetings when the bankrupt was examined, and services which should have reasonably been contemplated when the proceedings were instituted, should be presumed to have been arranged as

one of the initiatory steps in the cause. There is nothing in the record on the subject, and, if a bad bargain was then made, the court should not attempt to remedy the mistake. That these attorneys' services from start to finish were worth much more than is asked is conceded. That is not the question under consideration. What services were reasonably contemplated under the original retainer should be regarded as having been paid for. What extraordinary, unexpected, additional professional services, not contemplated, but necessary by the subsequent action of creditors, were rendered, which should be paid for out of the assets of the estate? It is stated they went to Fayetteville to argue exceptions before the referee, and afterwards to Raleigh to argue the same exceptions, when a typewritten brief was filed; and prepared themselves to argue the same exceptions before the circuit court of appeals at Richmond, but the appeal was not pressed to a hearing, having been dismissed or withdrawn by consent. They represented the trustee in a suit in the superior court of Duplin county, instituted by creditors, and prepared the deed conveying the equity of redemption in the homestead. Taking into consideration the size of the estate, the allowance of \$50 is not only reasonable, but a liberal allowance, and almost a punitive tax on the creditors who have proved their claims. Creditors are entitled to consideration in these proceedings. They have rights which the court must and others ought to respect, and their dividends should not be reduced more than reason and equity demand. When they instigate litigation or increase expense, they do so with full knowledge, actual or presumed, of the law, and should expect to have the estate in which they are interested depleted to the extent of the extra cost thus incurred. The former order reducing the attorney's fee allowed to \$50 is affirmed.

The trustee is entitled to commissions on such sums to be paid as dividends and commissions, not to exceed, etc. Section 48, Bankr. Act 1898. The commissions of the trustee in the dividend sheet are calculated at the highest per cent. on the gross amount of the estate,—money collected. Under the law the trustee is not entitled to this. The trustee will be allowed 3 per centum on amounts to be paid as dividends and commissions, and no more.

The referee's compensation is fixed by section 40, Bankr. Act 1898, and general order 10 of the supreme court, at 1 per centum on such sums to be paid as dividends and commissions. In the dividend sheet the commissions are calculated on the gross amount collected. These two items in the dividend sheet must be reduced accordingly, and the commissions of these two officers calculated on amounts paid as dividends and commissions only, and not on costs or other payments. It is ordered that the dividend sheet be reformed in accordance with the foregoing, and submitted for approval, together with a copy of the dividend sheet referred to, but not in the record, as having been made March 20, 1900. And this cause is held for further order.

UNITED STATES v. LEONARD et al.

(Circuit Court of Appeals, First Circuit. April 12, 1901.)

No. 364.

CUSTOMS DUTIES—CLASSIFICATION—WOOL GREASE.

Substances obtained by washing the solid residuum left after the distillation of wool grease, known as "hard yellow grease" and "white grease," which are of a yellowish color, and have the consistency of a hard cake, being in truth and substance wool grease, though not included in what is commercially known as such, are dutiable as "wool grease," under paragraph 279 of the customs act of 1897, providing for a duty on "wool grease, including that known commercially as degreas or brown wool grease," and they are not entitled to free entry under paragraph 568.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

For opinion below, see 100 Fed. 288.

Albert H. Washburn, Asst. U. S. Atty. (Boyd B. Jones, U. S. Atty., on the brief).

Howard T. Walden, for appellees.

Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

PUTNAM, Circuit Judge. This appeal relates to the construction and application of paragraphs 279 and 568 of the customs act of 1897, as follows:

"(279) Tallow, three-fourths of one cent per pound; wool grease, including that known commercially as degreas or brown wool grease, one-half of one cent per pound."

"(568) Grease, and oils (excepting fish oils), such as are commonly used in soap making or in wire drawing, or for stuffing or dressing leather, and which are fit only for such uses, and not specially provided for in this act."

Unfortunately, the record does not contain the invoices; but we gather from it that the importation was invoiced partly as "hard yellow grease," and partly as "white grease." How much there was of each, we are not advised. It is enough, perhaps, to remark that neither party seems to claim any substantial distinction, and what we find in the record in reference thereto is that the "white grease" is the "hard yellow grease" bleached.

The controversy originated at the port of Boston, where the collector classified the entire importation as "wool grease." The record shows that "hard yellow grease" had been imported at Boston for some time, and always classified as "wool grease." It was also testified by Mr. Hopkins that it was classified under the customs act of 1894 as "wool grease, free."

Wool grease and its origin are perhaps best described by the following extract from a technical work published in London, cited by the United States:

"Wool fat is the natural grease contained in sheep's wool. In the course of preparing the raw wool for spinning, this grease is removed by means of dilute soap (or sodium carbonate) solutions, or by extraction with volatile solvents. In this country the suds from wool scouring are collected in large

tanks, and, by acidulating with mineral acids, 'brown grease' or 'recovered grease' is obtained, of varying composition, according as the suds from the wool are kept separate, or are mixed with the soap suds from the scoured woven goods, as is the case in those woollen mills where wool is washed, spun, and woven."

The word "degras," found in paragraph 279, has had, to some extent, a generic meaning, and is not always limited to wool grease or its products; but, in the trade of the United States, "degras" and "brown grease," found in that paragraph, have now like signification, and each is the equivalent of what is known commercially as "wool grease." Indeed, the proofs show that, in trade, "degras," "brown wool grease," and "wool grease" have an identical meaning, although "degras" or "wool grease" is not always brown. There is no suggestion to the contrary in the record; and this is an important fact to be considered, because it determines that in construing paragraph 279 we must understand the words "including that known commercially as degras, or brown wool grease," to cover all "wool grease" as known in the trade at the time of the passage of the act of 1897.

The United States claim that the imports under consideration are the residuum of the distillation of the suds to which we have referred, that what goes over in the distillation becomes what is ordinarily known in trade as "wool grease," and that the residuum is truly and substantially wool grease, and nothing else. It may well be said that this is not controverted by the importers, and that they rest their case on the proposition that, although the residuum is wool grease, yet it is not the wool grease known to trade. They are supported in this proposition by the testimony of Mr. Webster, an examiner in the United States appraiser's office at New York, who was called in behalf of the United States before the appraisers. He said that he was not acquainted with the articles in controversy here, that he should not consider them to be what is known commercially as "wool grease," and that they differ from what is so known, in color and in viscosity, and are hard substances, while what is known as "wool grease" is more of the consistency of molasses or soft lard. Mr. Leonard, one of the importers, also testified that the articles in controversy would not be a good delivery for what is known in trade as "wool grease." On the other hand, it is clear they have never received a commercial designation within the rules pertinent thereto which concern the construction of customs acts. It appears by the testimony of Mr. Leonard that the quantity produced is small, and that the importers in this case have the exclusive control of it in this country. It also appears that they invoice it as "hard yellow grease" and as "white grease"; but, on the other hand, it appears, as we have seen, that until this controversy arose it was always classified at the customs in Boston as "wool grease."

If the article had a commercial designation, differing from the expression "wool grease," this, by the well-settled rule, would have very great weight in determining the question before us, and might compel an application of paragraph 279 different from that which we must give it. But it is, of course, apparent that it is not to be

expected that any so-called commercial designation is within the contemplation of congress in enacting a customs act, unless it has in some way obtruded itself upon public attention. We have the subordinate rule, restated in *Sonn v. Magone*, 159 U. S. 417, 420, 421, 16 Sup. Ct. 67, 40 L. Ed. 203, that a commercial designation is not to prevail unless it appears that it is the result of established use in commerce, and that such use is definite, uniform, and general in the trade, and not partial, local, or personal. Therefore, on the most favorable view of the facts which can be taken for the importers on this appeal, it is apparent that there is nothing in these rules of interpretation which can assist them, in view of the peculiar phraseology of paragraph 279, which we will consider later.

Coming now more closely to the substantial character of the importations, we find the testimony of Mr. Hopkins, who is a special examiner of drugs and chemicals in charge of the United States laboratory at Boston, which is in no way contradicted. He testified that, on the distillation of which we have spoken, a yellow wool grease comes over, and a yellow residue is left in the kettles, and that this residue is still wool grease, as is proven by its analysis by chemical tests and distillation by superheated steam. Referring to this fact, Charles S. Bush, who is engaged in this trade and in kindred merchandise, testified that his concern had been making laboratory experiments with superheated steam, trying to break up "degras or wool grease," and that they have never succeeded in doing so. Mr. Leonard also described the entire operation and its commercial effect quite clearly, showing that the importation is a certain residuum, that it had been considered of no special value until finally brought up and washed, that "yellow grease" and "white grease" are a little higher than "ordinary degras or wool grease," and that it is higher in price on account of its hardness, and because it has uses as hard grease. But there seems to be no particular difference on this point, the importers resting their case on the contention that, whatever the articles are in truth and substance, they are not "wool grease" as known to the trade; and we have gone into this fully in order only that the true nature of the imports may be better explained. The result is that what comes over from the distillation is, both in the trade and in truth, wool grease; that the residuum has not been known in the trade as "wool grease," but that it is in fact wool grease, and is used for the same purpose as what comes over,—that is, for stuffing leather.

Indeed, the importers, in order to bring their case within paragraph 568; must and do rest it on the proposition that their imports are truly and substantially grease, and are used for stuffing or dressing leather. Being grease, it is, from the very nature of the thing, in truth, wool grease, and it can be nothing else. Therefore the importers necessarily agree with the proposition of the United States that the substance of the residuum is, in truth, the same as the substance of the distillate known in the market as "wool grease," and that it has not been changed by the distillation or the subsequent washing and pressing. It follows that it comes precisely within

the letter of paragraph 279, and it can be excepted from it only on one of two theories: One is that it has a definite trade designation, which is not "wool grease," which, under the rules given by the supreme court, we have shown, is not the fact; and the other is that the term "wool grease," in paragraph 279, is limited to "wool grease" known to the trade, so that it includes no imports which are not so known, like those in question here. This is met by the clear phraseology and intent of paragraph 279. We have already shown that the expression contained therein, "degras or brown wool grease," covers all the wool grease known to the trade. Therefore, inasmuch as, by the very terms of paragraph 279, the general expression "wool grease" is stated to include what is commercially known as "wool grease," the paragraph can have no construction except a generic one, so as to cover everything which is, in truth and in substance, wool grease, and which is not definitely known to the trade under some other name. As these imports are not so known, it follows that they are within the meaning which must be given to the expression "wool grease" as found in this paragraph.

The importers rely on *Smith v. Rheinstrom*, 13 C. C. A. 261, 65 Fed. 984, decided by the circuit court of appeals for the Sixth circuit; *Movius v. U. S.* (C. C.) 66 Fed. 734, affirmed, under the title of *Morris v. U. S.*, 24 C. C. A. 685, 79 Fed. 999, by the circuit court of appeals for the Second circuit; and *Apgar v. U. S.*, 24 C. C. A. 113, 78 Fed. 332, decided by the circuit court of appeals for the Seventh circuit. All of these cases, however, belong to the class of custom decisions having reference to an article which has been advanced by a process of manufacture or compounding, or the equivalent thereof; and they fall within the discussions relating to such advanced articles in *Tide-Water Oil Co. v. U. S.*, 171 U. S. 210, 18 Sup. Ct. 837, 43 L. Ed. 139; *Allen v. Smith*, 173 U. S. 389, 19 Sup. Ct. 446, 43 L. Ed. 741; and *U. S. v. Dudley*, 174 U. S. 670, 19 Sup. Ct. 801, 43 L. Ed. 1129. What we have to deal with on this appeal, so far from being preparations or compounds, would, if the statute left the question an open one, be more properly solved by the decisions relating to residuum or other waste. However, this particular topic is disposed of by what we have already said, to the effect that the articles imported are, in truth and substance, wool grease, and have no trade designation, within the rule which we have given, while paragraph 279 is expressly framed to cover wool grease in its broadest sense.

In conclusion, while the articles imported cannot be held to be "wool grease," as the expression is commonly understood in the trade, yet they are, in truth and substance, wool grease. They have no specific trade designation within the rules which we have stated, and paragraph 279 is specifically expressed to cover all wool grease which is, in truth and substance, such, and which has not some peculiar commercial designation.

The judgment of the circuit court is reversed, and the case is remanded to that court for further proceedings in accordance with law.

BETTMAN, Collector of Internal Revenue, v. WARWICK.

(Circuit Court of Appeals, Sixth Circuit. March 5, 1901.)

No. 878.

1. INTERNAL REVENUE—TAX ON FUNCTIONS OF STATE GOVERNMENT—LIMIT OF FEDERAL AUTHORITY.

The United States and the states act separately and independently of each other in the field within which each is sovereign, and neither have power to impose a tax which will interfere with the exercise of the sovereignty of the other within their own sphere, either by taxing their functions or the means by which they are exercised. A power in the federal government to exact a tax upon the right to qualify, under a state law, for the performance of the duties of a state office, is inconsistent with the existence of any supreme governmental authority in the state, and the converse is true as regards the power of the state to tax the means employed by the federal government to carry into execution the powers vested in it by the constitution.

2. SAME—STAMP TAX—BOND OF STATE OFFICER.

A stamp tax imposed by the United States upon a bond required by a state from an officer as a prerequisite to the exercise of the duties of his office is, in necessary legal effect, a tax upon the officer's right to qualify, and upon the exercise by the state of its governmental functions, and the fact that the tax is required to be paid before the officer has qualified is unimportant.

3. SAME—BOND OF NOTARY PUBLIC—WAR REVENUE ACT OF 1898.

A notary public, appointed under the laws of a state by the governor, is a state officer, employed in the exercise of functions belonging to it in its governmental capacity, and a bond which he is required to execute for the faithful discharge of the duties of his office, as a condition to his qualification, is an instrument exempt from the stamp tax imposed by the war revenue act of 1898, within the plain meaning of the proviso to Schedule A, exempting states in the exercise of functions belonging to them in their ordinary governmental capacity.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

Edward Moulinier, for plaintiff in error.

Walter W. Warwick, in pro. per.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

LURTON, Circuit Judge. This is an action to recover an alleged illegal tax collected by and paid under protest to the defendant. The suit was brought before a justice of the peace for the state of Ohio, and removed into the court below, under section 643 of the Revised Statutes of the United States. The petition, which constituted the pleading under Ohio practice, stated that the plaintiff was a citizen of Ohio, and that the defendant was the collector of internal revenue for the First collection district of the state of Ohio; that on November 28, 1898, petitioner was duly appointed and commissioned, by the governor of Ohio, a notary public, and entered into bond, as required by the law of Ohio, in the sum of \$1,500, conditioned for the faithful performance of the duties of his said office, and has since that date held the office and performed the duties of a notary public. The petition then proceeds as follows:

"Plaintiff says that on or about the 23d day of January, 1899, the said bond was returned to him by the said governor, with the request that he at once affix thereto a United States internal revenue stamp of the denomination of fifty cents, in accordance with the demands of the officers of the United States charged with the collection of the internal revenue; that plaintiff was informed by the defendant, acting as collector of internal revenue, that a tax of fifty cents must be paid by this plaintiff upon this bond; that, unless the same was then paid, he, the defendant, would institute proceedings against this plaintiff for the collection of the tax, as well as a penalty for nonpayment; that thereupon, in order to avoid such threatened action upon the part of the defendant, plaintiff, on the 23d day of January, 1899, paid, under protest, to the defendant, acting as collector of internal revenue, the sum of fifty cents, receiving therefor an internal revenue stamp of the value of fifty cents, which plaintiff affixed to said bond. Plaintiff says that on or about the 24th of January, 1899, he made application to the commissioner of internal revenue to have said sum of fifty cents refunded, but that said commissioner, on the 4th day of February, 1899, refused to direct the payment of said amount, and disallowed and rejected plaintiff's claim. Plaintiff says that said bond was not subject to the tax of fifty cents demanded by the defendant and collected from this plaintiff, nor was the plaintiff liable to any tax on account of the execution of said bond; that the said sum of fifty cents was illegally and unjustly collected from the plaintiff by the defendant, to the damage of the plaintiff in the sum of fifty cents. Wherefore plaintiff prays judgment against the defendant for fifty cents and for his costs."

The defendant demurred to the petition as not stating any ground of action. This demurrer was overruled, and judgment rendered against the defendant, he refusing to plead further. The opinion of Judge Thompson upon the question of law raised by the demurrer is reported in 102 Fed. 127. The defendant, Bernhard Bettman, has sued out this writ of error.

The provision of law under which the collector required the defendant in error to affix a stamp to his official bond is found in Schedule A of the act of June 13, 1898, being an act entitled "An act to provide ways and means to meet war expenditures, and for other purposes," and is in these words:

"Bond: For indemnifying any person or persons, firm or corporation, who shall have become bound or engaged as surety for the payment of any sum of money, or for the due execution or performance of the duties of any office or position, and to account for money received by virtue thereof, and all other bonds of any description, except such as may be required in legal proceedings, not otherwise provided for in this schedule, fifty cents."

This provision is probably broad enough to include within its terms every class of official bonds, whether executed by persons holding office under the federal or state governments. For the defendant in error, it is insisted that bonds made by state or municipal officials, as a condition to the exercise of their duties, are exempted from the broad terms of the provision set out by the provision of section 17 of the same act, which is as follows:

"Provided, That it is the intent hereby to exempt from the stamp taxes imposed by this act such state, county, town or other municipal corporations in the exercise only of functions strictly belonging to them in their ordinary governmental, taxing or municipal capacity."

A notary public is a well-known public official, whose duties are both administrative and judicial. In Ohio he is appointed by the governor for a term of three years, and receives a commission upon

which he is required to indorse an oath of office. Before entering upon the duties of his office, he is required to give bond to the state, with sureties to be approved by the governor, conditioned for the faithful discharge of the duties of his office. He is required to use an official seal; has authority to protest and give notice of nonpayment or acceptance of commercial paper; administer all the oaths required by law; to take and certify acknowledgment of conveyances, powers of attorney, etc. That he is an officer of the state, engaged in the administration of the law of the state, and that he exercises most important public functions by authority of the state, cannot be denied. If a tax may be lawfully collected from a notary public, it may be exacted from every other official of the state who is required to give a bond as a condition precedent. That his services are compensated by fees and not by a salary, is of no importance. Many more important officials of the state are paid by fees. It is for the government which appoints him to determine how he shall be paid, and he is no less a governmental official because paid by fees for services rendered than if paid a stipulated salary out of the treasury of the state.

The test as to whether a notary is engaged in the exercise of the governmental powers of the state does not depend upon how his compensation is provided. That is a matter for legislative regulation, and in no wise affects the nature or powers of the official who is so compensated. In *Freedman v. Sigel*, 10 Blatchf. 327, and Fed. Cas. No. 5,080, a tax upon the salary of a state judge was sought to be sustained upon the ground that his salary was fixed by the supervisors of the county, and paid out of the county treasury, and not by the state. Judge Shipman held that he was, nevertheless, a state official, and his salary exempt from federal taxation, although fixed and paid by a county of the state.

For the government it has been urged that "a tax on bonds required before a person can enter on the duties of a state office is not a tax on the functions of a state government." This is said to be the ground upon which the commissioner of internal revenue has required the exaction of the stamp tax from state officials required to give bonds as a prerequisite to qualification, and we have been cited to various rulings, made by the commissioner, which tend to confirm this as the ground upon which the plaintiff in error exacted the tax in question. To this distinction we cannot assent. A tax exacted upon a bond required by the state from an official as a prerequisite to the exercise of the duties of the office is, in necessary legal effect, a tax upon the appointee's right to qualify as an official of the state. If congress has the power to exact such a tax from a notary public, it has the power to exact it from every official appointed by a state, a county, or other subdivision of the state. If it may lawfully exact a tax of 50 cents as a tax upon the right of qualifying, it may exact \$50, \$500, or any sum it may see fit. The power to tax involves the power to destroy. What is there to restrain the imposition of such a tax as will prohibit qualification for any state office? The case of *Bank v. Fenno*, 8 Wall. 533, 19 L. Ed. 482, furnishes an illustration of the destructive power of a law-

ful tax. The right to impose a tax upon the right to qualify under a state law to fill a state office thus involves the power to destroy the supremacy of the states in respect of the exercise of those powers and of that authority which by both implication and express constitutional recognition remains with the states. Can it be that that which the one government has the power to create the other has the power to destroy? Under our complex form of government, we have two sovereignties existing with the same territorial limits. The United States and the states united under the constitution act separately and independently of each other in the field within which each is sovereign. The federal government, within the sphere of its delegated authority, is supreme, but the states are equally so when acting within the limits of their reserved and ungranted powers. Among the powers not delegated, but reserved, to the states are most of those governmental powers which most closely touch and affect the lives, conduct, and business of the people.

Is the existence of a power in the federal government to exact a tax upon the right to qualify, under a state law, for the performance of the duties of a state office, at all consistent with the existence of any supreme governmental authority in the state? If the qualification of a state official can be thus prevented or controlled, is there any real supremacy of the states within the sphere of their reserved and ungranted powers? The question is the counterpart of that which arose when the state sought to tax the operations and instrumentalities of the federal government.

In the great case of *McCulloch v. Maryland*, 4 Wheat. 316, 429, 4 L. Ed. 579, 607, Chief Justice Marshall, in vindicating the conclusion that "the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operation of the constitutional laws enacted by congress to carry into execution the powers vested in the general government," laid down a rule, in respect to the power of taxation, which has application here. After saying that "the sovereignty of a state extends to everything which exists by its authority or is introduced by its permission, but does not extend to the means which are employed by congress to carry into execution powers conferred on that body by the people of the United States," he said:

"If we measure the power of taxation residing in a state by the extent of sovereignty which the people of a single state possess and can confer on its government, we have an intelligible standard, applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a state unimpaired, which leaves to a state the command of all its resources, and which places beyond its reach all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the states and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve."

In *People v. Tax Com'rs*, 2 Black, 620, 635, 17 L. Ed. 451, 456, this rule was quoted and reaffirmed, the court, by Justice Nelson, saying:

"All will agree that this is the enunciation of a true principle, and it is only by a wise and forbearing application of it that the operation of the powers and functions of the two governments can be harmonized. Their powers are so intimately blended and connected that it is impossible to define or fix the limit of the one without at the same time that of the other, in respect to any one of the great departments of government. When the limit is ascertained and fixed, all perplexity and confusion disappear. Each is sovereign and independent in its sphere of action, and exempt from the interference or control of the other, either in the means employed or functions exercised, and, influenced by a public and patriotic spirit on both sides, a conflict of authority need not occur or be feared."

Upon the principles settled by *McCulloch v. Maryland*, it was held in *Dobbins v. Commissioners*, 16 Pet. 435, 10 L. Ed. 1022, that it was not competent for a state to levy a tax upon the salary or emoluments of an officer of the United States; and in *Weston v. City Council*, 2 Pet. 449, 7 L. Ed. 481, it was held that a state could not lay a tax upon stocks or bonds of the United States in the hands of a citizen of the state. None of these cases rest the exemption of the means and agencies employed by the federal government from state taxation upon any express provision of the constitution. The exemption depends upon the implication that those agencies and instrumentalities adopted by the government in the execution of its granted powers must, in the very nature of things, be beyond the control of any other sovereignty whatever. If this were not so, the federal government would not be supreme, even in the sphere of the powers assigned to it. The principle is, that the power to tax is the power to control, the power to destroy, and that any government is at the mercy of another which has the power to tax the instrumentalities by which it governs. These principles were applied in *Buffington v. Day*, 11 Wall. 113, 20 L. Ed. 122, where the question was whether the salary of a state judge was subject to the exactions of the income tax law of the United States. After considering the duality of the governments under the federal system, the court said:

"The supremacy of the general government, therefore, so much relied on in the argument of the counsel for the plaintiff in error, in respect to the question before us, cannot be maintained. The two governments are upon an equality, and the question is whether the power 'to lay and collect taxes' enables the general government to tax the salary of a judicial officer of the state, which officer is a means or instrumentality employed to carry into execution one of its most important functions, the administration of the laws, and which concerns the exercise of a right reserved to the states. We do not say the mere circumstance of the establishment of the judicial department, and the appointment of officers to administer the laws, being among the reserved powers of the state, disables the general government from levying the tax, as that depends upon the express power 'to lay and collect taxes'; but it shows that it is an original inherent power, never parted with, and in respect to which the supremacy of that government does not exist, and is of no importance in determining the question; and, further, that being an original and reserved power, and the judicial officers appointed under it being a means or instrumentality employed to carry it into effect, the right and necessity of its unimpaired exercise, and the exemption of the officer from taxation by the general government, stand upon as solid a ground, and are maintained by principles and reasons as cogent, as those which led to the exemption of the federal officer in *Dobbins v. Commissioners* from taxation by the state; for, in this respect,—that is, in respect to the reserved powers,—the state is as sovereign and independent as the general government. And if the means and instrumentalities employed by that gov-

ernment to carry into operation the powers granted to it are, necessarily, and for the sake of self-preservation, exempt from taxation by the states, why are not those of the states, depending upon their reserved powers, for like reasons equally exempt from federal taxation? Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is no express provision in the constitution that prohibits the general government from taxing the means and instrumentalities of the states, nor is there any prohibiting the states from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means, if another power may tax them at discretion?"

Upon the same general principle it was decided in *U. S. v. Railroad Co.*, 17 Wall. 322, 21 L. Ed. 597, that a tax could not be lawfully assessed upon the interest of the bonds of the Baltimore & Ohio Railroad Company held by the city of Baltimore. Such interest constituting, in part, the revenue of the city,—a corporation exercising a portion of the sovereign power of the state.

That it is often a difficult question whether a tax imposed by the general government or by a state government is one which, in fact, invades the domain of the other, may be conceded. But, in respect to the tax here involved, there can be no doubt but that a tax imposed upon the official bond required by the state law to be executed by an appointee to a state office, conditioned for the faithful discharge of the duties imposed upon him by the state, is a tax which necessarily embarrasses and impedes the state's freedom in the due exercise of its governmental authority as a state. Whether the tax be imposed before or after qualification is not important. It is a burden placed upon the right of qualification, and is, by necessary implication, forbidden. That congress recognized the principle upon which any exemption from the taxing power of congress must rest is very obvious, from the language of the exemption clause inserted in the very forefront of the war revenue act of 1898. The bond which the defendant in error was required to execute as a condition to qualification was a bond which the state of Ohio imposed in the exercise of a governmental function, and was an instrument exempt from the taxes imposed by the stamp act, within the plain meaning of the exemption clause of the seventeenth section, set out heretofore. We quite agree with Judge Thompson, who heard the case below, in holding that the tax was illegally demanded from defendant in error, and that the plaintiff in error cannot justify its collection under the law. The judgment of the court below is accordingly affirmed.

LEDBETTER v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. April 16, 1901.)

No. 994.

1. CIRCUIT COURT OF APPEALS—JUDICIAL NOTICE—SESSIONS OF DISTRICT AND CIRCUIT COURTS.

The circuit court of appeals will take judicial notice as to whether, at the time a grand jury was impaneled and returned bills of indictment, as specified in the transcript on a writ of error, both the district and circuit courts were in session, and as to who were the presiding judge and clerk thereof.

2. INDICTMENT—FORMAL IMPERFECTION—ORDER TO REMIT FROM CIRCUIT TO DISTRICT COURT—NECESSITY.

The grand jury which found an indictment being impaneled in the district court, and having returned the indictment in that court, and all the proceedings thereafter being had therein, an order remitting the indictment from the circuit to the district court was neither necessary nor proper, notwithstanding it was entitled "In the Circuit Court," as that is merely a formal imperfection, not necessarily prejudicial to accused, nor having the effect to return it to that court, or vitiating the same.

3. RECORD ON WRIT OF ERROR—RETURN OF INDICTMENT—SUFFICIENCY.

The record on writ of error as to the return of an indictment showed a minute entry reciting the return by the grand jury on November 21, 1899, of 52 bills, each of which was indorsed "A true bill," and signed by J. W. P. as foreman, and the file mark, signed by the clerk, indicating that the indictment was filed on the same day on which the minute entry was made. In addition the bill of exceptions recited that it was shown by the government that the indictment in question was received by the judge of the district court, and that the entry on the minutes was as follows: "The grand jury came into court, and returned 52 bills of indictment, each of which was indorsed 'A true bill,' and signed by J. W. P. as foreman, and that the bill in this case was one of the bills of indictment thus returned by said grand jury; that the day of such return of said grand jury is November 21, 1899; that the clerk of the said United States district court thereupon placed said case for trial upon the docket of the district court." *Held*, that while the record of either the minute entry or file mark, or of both together, was insufficient to identify the indictment as properly returned into the district court by the grand jury, the defect was cured by the recitals in the bill of exceptions.

In Error to the District Court of the United States for the Middle District of Alabama.

The original transcript in this case shows as follows:

"At a district court of the United States for the Middle district of Alabama, begun and held at Montgomery, Alabama, on the first Monday in May, it being the 7th day of said month, in the year of our Lord 1900, present and presiding the Honorable John Bruce, United States district judge for the Northern and Middle districts of Alabama, Wednesday, June 13, 1900, it being a day of said court, the following proceedings were had:

"The United States versus Joe Ledbetter. No. 3,489.

"Indictment.

"The United States of America.

"In the Circuit Court of the United States for the Middle District of Alabama.

"The grand jurors of the United States, duly elected, impaneled, sworn, and charged to inquire in and for the body of the Middle district of Alabama, on their oaths do find and present: That on the 14th day of August, in the year of our Lord 1897, in the nighttime, before the finding of this indictment, in the county of Elmore, in the state of Alabama, within the Middle district of Alabama, and within the jurisdiction of this court, Joe Ledbetter and John

Henry Threatt, well knowing that the storehouse of Sistrunk, Jordan & Patterson, at Tallahassee, in the county of Elmore, in the state of Alabama, was then and there used in part as a post office of the United States, established by and under the authority of the postmaster general of the United States, did forcibly break into the part of said storehouse of said Sistrunk, Jordan & Patterson, then and there used as a post office of the United States, established by and under the authority of the postmaster general of the United States, with the intent to commit therein a larceny; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States. And the grand jurors aforesaid, under their oaths aforesaid, do further find and present: That on the 14th day of August, in the year of our Lord 1897, in the nighttime, before the finding of this indictment, at Tallahassee, in the county of Elmore, in the state of Alabama, within the Middle district of Alabama, within the jurisdiction of this court, Joe Ledbetter and John Henry Threatt, then and there well knowing that the storehouse of Sistrunk, Jordan & Patterson, at Tallahassee, in the county of Elmore, in the state of Alabama, was then and there used in part as a post office of the United States, established by and under the authority of the postmaster general of the United States at Tallahassee, in the county of Elmore, in the state of Alabama, did forcibly break into that part of the said storehouse of said Sistrunk, Jordan & Patterson, which said part so broken into was then and there used as the post office of the United States at Tallahassee, in the county of Elmore, in the state of Alabama, established by and under the authority of the postmaster general of the United States, with intent to commit therein a larceny, and did feloniously take and carry therefrom lawful money of the United States of the value of one hundred dollars, a more particular and proper description of which is to the grand jury unknown, the same being the property of the United States, with intent to steal; they, the said Joe Ledbetter and the said John Henry Threatt, then and there well knowing that said storehouse was then and there the building then and there used in part as said post office of the United States, established by and under the authority of the postmaster general of the United States at Tallahassee, in the county of Elmore, in the state of Alabama; and that said lawful money of the United States taken and carried therefrom was the property of the United States; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

"W. S. Reese, Jr.,

"United States Attorney.

James W. Powell,

"Foreman of the Grand Jury.

"A true bill.

"Filed in open court this 21st day of Nov., 1899.

"J. W. Dimmick, Clerk."

And the bill of exceptions contained in the transcript is to the following effect:

"Be it remembered that this cause coming on to be heard on a regular day of the May term, 1900, of the district court of the United States for the Middle district of Alabama, the following proceedings were had in said court: The defendant was arraigned in said court, and on the reading of the indictment, and before pleading to the same, the defendant moved the court orally to quash said indictment on the ground that said indictment showed on its face that it was pending in the circuit court of the United States, and not in the district court for the middle district of Alabama, and because the district court was without jurisdiction to try defendant on the indictment read to him. It was admitted by the United States that the grand jury which found the indictment was drawn in and organized in the district court, and there was no grand jury drawn or organized in the circuit court at the term at which the indictment in this cause was returned. It was also admitted that the name of the foreman of the grand jury indorsed on the indictment was the name of the foreman that was drawn and served as foreman of grand jury in the district court of the United States for the Middle district of Alabama. It was shown by the United States that the indictment in this cause was received by the judge of the district court of the United States; that entry on

the United States district court minutes is as follows: "The grand jury came into court, and returned 52 bills of indictment, each of which was indorsed "A true bill," and signed by James W. Powell as foreman;" and that the bill in this cause was one of the bills of indictment thus returned by said grand jury; that the date of said return of said grand jury is November 21, 1899; that the clerk of the said United States district court thereupon placed said case for trial upon the docket of the district court. The court overruled the motion to quash said indictment, and the defendant then and there duly and legally excepted. Thereupon the court ordered the defendant to plead to said indictment in the district court, and to be tried before a jury organized in the district court of the United States for said district, and the defendant thereupon duly and legally excepted. A plea of not guilty was then entered, and there was evidence which tended to show that the defendant broke into the post office at Tallahassee, Ala., and took therefrom money belonging to the United States. There was also testimony tending to show that shortly after the robbery the defendant spent about forty-five dollars in the city of Montgomery, which is about 30 miles from Tallahassee, and connected with it by railway. There was also evidence tending to show an alibi for the defendant, and also evidence tending to show the falsity of said alibi. On this testimony the jury found the defendant guilty, and there was verdict accordingly. Thereupon, and before any sentence passed on him, the defendant moved the court in arrest of judgment on the verdict on the following grounds: (1) Because the indictment on which the defendant was tried is pending in the circuit court, and no order of transfer was made in said cause, as required by section 1037 of the Revised Statutes of the United States; (2) because no motion was made to transfer said cause to the district court of the United States for trial; (3) because the district attorney made no motion to transfer the cause to the district court. But the court overruled the motion, and refused to arrest the judgment on said verdict, and the defendant duly and legally excepted. Thereupon the court sentenced the defendant to two years' imprisonment in the penitentiary at Nashville, and the defendant then and there duly and legally excepted. And the defendant presents this, his bill of exceptions, which is signed, sealed, and allowed on this 20th day of July, 1900, a day of the May term, 1900, of the district court of the United States.

"John Bruce, Judge.

"Filed July 25, 1900.

J. W. Dimmick, Clerk."

Writ of error was regularly sued out, and errors assigned as follows: "First, the court erred in overruling and refusing the motion to quash the indictment; second, the court erred in compelling the defendant to go to trial in the district court on the indictment in this cause; third, the court erred in not remitting the trial under said indictment to the circuit court of the United States; third, the court erred in compelling the defendant to go to trial in the district court of the United States when no order had been made transferring the cause from the circuit court to the district court; fourth, the court erred in overruling and refusing the motion in arrest of judgment; fifth, the court erred in passing sentence on the defendant on the verdict rendered in the district court, as the indictment was pending in the circuit court."

A supplemental transcript, filed in this court, shows that on November 6, 1899, a grand jury was duly impaneled in the district court, Middle district of Alabama, and on Tuesday, November 21, 1899, at a day of said court, the grand jury came into court, and returned 52 bills of indictment, each of which was indorsed, "A true bill," and signed by James W. Powell as foreman. The court takes judicial notice of the fact that at the time mentioned when the grand jury was impaneled and returned bills of indictment both the circuit and district courts of the Middle district of Alabama were in session, and were presided over by the Honorable John Bruce, Judge, and that J. W. Dimmick was the clerk of both courts.

Gordon MacDonald, for plaintiff in error.

W. S. Reese, Jr., U. S. Atty., and J. Sternfeld, Asst. U. S. Atty.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts as above). It appears by the original transcript, bill of exceptions therein, and supplemental transcript, as given above, that the grand jury which found the indictment against the plaintiff in error was impaneled in the district court for the Middle district of Alabama, that the indictment was returned in that court, and that all of the proceedings thereafter were had in said court. This being the case, it was neither necessary nor proper that there should be any order remitting the indictment from the circuit court to the district court for trial. The fact that the indictment begins or was entitled or headed "In the Circuit Court of the United States for the Middle District of Alabama," while apparently misleading, did not have the force and effect to return the indictment to that court, nor of itself did it constitute such error as to vitiate the indictment. At most, it amounted to an imperfection in matter of form, not necessarily prejudicial to the accused. See Rev. St. § 1025. It seems to be well settled that the record must show that the indictment was returned into court by the grand jury either by a minute entry to that effect or by indorsement of the fact upon the indictment itself, and that an omission will be fatal. See authorities cited in volume 10, Am. & Eng. Enc. Law, pp. 410, 411. It may be noticed that a defective record may be cured by proper entry ordered by the court during the term, or, if not called to the attention of the court during the term, then by proper order entered *nunc pro tunc* at a subsequent term. The minute entry with regard to the return of the indictment (claimed to apply) in this case is as follows: "November 21, 1899. The grand jury came into court, and returned 52 bills of indictment, each of which was indorsed 'A true bill,' and signed by Jas. W. Powell as foreman." The file mark of the clerk on the indictment was as follows: "Filed in open court this 21st day of November, 1899. J. W. Dimmick, Clerk." Neither this minute entry, nor the file mark, nor the two together, was sufficient to identify the indictment as properly returned into the district court by the grand jury, and this seems to be a plain error on the face of the record, unless it is cured by the recitals in the bill of exceptions as follows:

"It was shown by the United States that the indictment in this case was received by the judge of the district court of the United States; that the entry on the United States district court minutes is as follows: 'The grand jury came into court, and returned 52 bills of indictment, each of which was indorsed "A true bill," and signed by Jas. W. Powell as foreman,' and that the bill in this cause was one of the bills of indictment thus returned by said grand jury; that the date of said return of said grand jury is November 21, 1899; that the clerk of the said United States district court thereupon placed said case for trial upon the docket of the district court."

My Brethren are of opinion that these recitals sufficiently identify the indictment as one properly found by the grand jury, and by that body returned into the district court of the United States for the Middle district of Alabama. As at the time the proof of the facts was made it was competent for the trial court by proper order to have corrected the oversights and omissions in question, it does not appear that the plaintiff in error was really prejudiced. The judgment of the district court is affirmed.

DOUGHERTY v. UNITED STATES. FARRAHER v. SAME. LAVIN v. SAME.

(Circuit Court of Appeals, Third Circuit. April 19, 1901.)

Nos. 15, 17, and 23.

1. CONSTITUTIONAL LAW—POLICE REGULATION IN REVENUE LAW—TAX ON OLEOMARGARINE.

Act Aug. 2, 1886, § 6, regulating the manufacture and sale of oleomargarine, and imposing a tax thereon, in so far as it provides for marking, stamping, and branding packages used by retail dealers in oleomargarine, is not merely a police regulation, and as such unconstitutional, as such requirement must be regarded as a means to effect the objects of the act in raising revenue, and, so regarded, it is clearly within the constitutional power of congress.

2. OLEOMARGARINE—PENALTY FOR UNLAWFUL SALE—APPLICATION TO RETAILERS.

Act Aug. 2, 1886, § 6, first requires manufacturers to pack oleomargarine in new wooden packages, marked, stamped, and branded as prescribed. Sales by manufacturers and wholesale dealers are also required to be "in original stamped packages." Thereafter it provides that retailers must sell only from original stamped packages, and that they shall pack it "in suitable wooden or paper packages, marked and branded as prescribed." The penal clause thereof provides that every person who knowingly sells oleomargarine otherwise than in new wooden or paper packages, as above described, shall be fined, etc. *Held*, that such clause applied to retailers as well as others.

3. SAME—INDICTMENT OF RETAILER—SUFFICIENCY.

A count in an indictment under Act Aug. 2, 1886, § 6, requiring retailers of oleomargarine to sell the same in original packages, and that they shall pack it "in suitable wooden or paper packages, marked and branded as prescribed," charged a retail dealer with knowingly, willfully, and unlawfully selling oleomargarine "packed in a plain wrapper, and not in a new and suitable wooden or paper package or packages," as required by the act, and not "marked and branded" as prescribed. *Held* to sufficiently describe the offence, and the fact that it charged more than required to constitute a single offence was no objection thereto.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

F. B. Bracken, for plaintiffs in error.

J. Whitaker Thompson, for the United States.

Before DALLAS and GRAY, Circuit Judges, and BRADFORD, District Judge.

BRADFORD, District Judge. Daniel E. Dougherty, James P. Farraher and Michael F. Lavin, the plaintiffs in error, were severally indicted, tried, convicted and sentenced in the district court of the United States for the eastern district of Pennsylvania (101 Fed. 439), for the violation of section 6 of the act of congress of August 2, 1886, entitled "An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine." 24 Stat. 209. That section is as follows:

"Sec. 6. That all oleomargarine shall be packed by the manufacturer thereof in firkins, tubs, or other wooden packages not before used for that purpose, each containing not less than ten pounds, and marked, stamped, and

branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe; and all sales made by manufacturers of oleomargarine and wholesale dealers in oleomargarine shall be in original stamped packages. Retail dealers in oleomargarine must sell only from original stamped packages, in quantities not exceeding ten pounds, and shall pack the oleomargarine sold by them in suitable wooden or paper packages, which shall be marked and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe. Every person who knowingly sells or offers for sale, or delivers or offers to deliver, any oleomargarine in any other form than in new wooden or paper packages as above described, or who packs in any package any oleomargarine in any manner contrary to law, or who falsely brands any package or affixes a stamp on any package denoting a less amount of tax than that required by law, shall be fined for each offense not more than one thousand dollars, and be imprisoned not more than two years."

Pursuant to this section the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, promulgated certain regulations which, so far as material in this connection, provided that each retailer's wooden or paper package should have the name and address of the dealer printed or branded thereon, and also the words "Pound" and "Oleomargarine" in letters not less than one-quarter of an inch square, and the quantity written, printed or branded thereon in figures of the same size, substantially according to the form set forth in such regulations. Dougherty and Farraher severally demurred to the indictments against them. The demurrers having been overruled, the demurrants and Lavin, who did not demur, went to trial on the plea of not guilty, and thereafter each of them moved in arrest of judgment. The motions in arrest were denied and sentence pronounced. Writs of error having been taken, the three cases have for convenience been argued and considered together. There are substantially only two questions raised by the assignments of error relied on. They are, first, whether section 6 above quoted, in so far as it provides for marking and branding packages used by retail dealers in oleomargarine is not merely a police regulation and, as such, unconstitutional, and, secondly, whether the indictments sufficiently charge any offence punishable under that section. Whatever might be our opinion on the former question were it *res integra*, we feel concluded by the language employed by the supreme court in the case of *In re Kollock*, 165 U. S. 526, 17 Sup. Ct. 444, 41 L. Ed. 813. Kollock had been convicted and imprisoned for the violation of the section in question under an indictment charging that he, being a retail dealer in oleomargarine, knowingly sold and delivered half a pound of it, which was not at the time of such sale and delivery packed in a new wooden or paper package printed or branded as required by the regulations prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury. The defendant filed his petition for a writ of habeas corpus on the ground that it was not within the constitutional power of Congress "to delegate to the Commissioner of Internal Revenue or the Secretary of the Treasury of the United States, or any other person, authority or power to determine what acts shall be criminal, and the said act of Congress aforesaid does not sufficiently define, or define at

all, what acts done or omitted to be done within the supposed purview of the said act shall constitute an offence or offences against the United States." The writ was denied, the court holding that the authority conferred on the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to prescribe how packages of oleomargarine should be marked, stamped and branded, did not involve an unconstitutional delegation of power. It is true that the point there decided is not in dispute before us. The court, however, said:

"The act before us is on its face an act for levying taxes, and although it may operate in so doing to prevent deception in the sale of oleomargarine as and for butter, its primary object must be assumed to be the raising of revenue. And, considered as a revenue act, the designation of the stamps, marks and brands is merely in the discharge of an administrative function and falls within the numerous instances of regulations needful to the operation of the machinery of particular laws, authority to make which has always been recognized as within the competency of the legislative power to confer. * * * We concur with the Court of Appeals that this provision does not differ in principle from those of the Internal Revenue laws, which direct the Commissioner of Internal Revenue to prepare suitable stamps to be used on packages of cigars, tobacco and spirits; to change such stamps when deemed expedient; and to devise and regulate the means for affixing them. Rev. St. §§ 3312, 3395, 3445, 3446, etc. By section 3446 the Secretary and the Commissioner were empowered to alter or renew or change the form, style and device of any stamp, mark or label used under any provision of the laws relating to distilled spirits, tobacco, snuff and cigars, when in their judgment necessary for the collection of revenue taxes and the prevention or detection of frauds thereon; and may make and publish such regulations for the use of such mark, stamp or label as they find requisite; and by the act of March 1, 1879, 20 Stat. 327, 351, c. 125, § 18, the section was amended so as to provide that the Commissioner, with the approval of the Secretary, might 'establish and, from time to time, alter or change the form, style, character, material and device of any stamp, mark or label used under any provision of the laws relating to internal revenue.' The oleomargarine legislation does not differ in character from this, and the object is the same in both, namely, to secure revenue by internal taxation and to prevent fraud in the collection of such revenue. Protection of purchasers in respect of getting the real and not a spurious article cannot be held to be the primary object in either instance, and the identification of dealer, substance, quantity, etc., by marking and branding must be regarded as means to effect the objects of the act in respect of revenue."

We feel bound by the views thus expressed. The marking, stamping and branding, required by the regulations, must, therefore, be regarded as "means to effect the objects of the act in respect of revenue," and, so regarded, the provisions of section 6 clearly were within the constitutional power of Congress. We are now brought to the inquiry whether any offence punishable under that section is charged, or sufficiently charged in the indictments. Each of the indictments charges in different counts that the defendant therein named unlawfully packed, unlawfully sold and unlawfully delivered oleomargarine. A general verdict of guilty having been returned in each case, if any of the counts in any case be sufficient to support such a judgment as was rendered in that case, the judgment so rendered must be affirmed. The second count in the indictment against Dougherty charges that he "then and there a retail dealer in oleomargarine * * * did knowingly, wilfully and unlawfully sell and offer for sale a certain

amount of oleomargarine, to wit, one pound of oleomargarine, packed in a plain wrapper, and not in a new and suitable wooden or paper package, or packages, as then and there required by the act of Congress approved August 2nd, A. D. 1886, defining butter and imposing a tax upon and regulating the manufacture and sale of oleomargarine, and which said plain wrapper in which said oleomargarine so sold and offered for sale as aforesaid, was packed, was not then and there marked and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, had theretofore, to wit, on June 18th, 1895, in certain regulations prescribed." The second count in the indictment against Farraher and the corresponding count in the indictment against Lavin contained mutatis mutandis the above phraseology, save that the quantity of oleomargarine alleged to have been sold is half a pound instead of a pound. The plaintiffs in error contend on two grounds that the counts just referred to and other counts in the several indictments similar to them cannot support the judgments complained of. They urge, first, that section 6 does not provide any penalty against retail dealers, under any circumstances, for selling or offering for sale oleomargarine in packages other than those prescribed for their use, and, secondly, that even on the assumption that it does, such counts do not contain a sufficient description of any offence punishable under the section. The section relates to three classes of persons dealing in oleomargarine, namely, manufacturers, wholesale dealers and retail dealers. Manufacturers are required to pack oleomargarine "in firkins, tubs, or other wooden packages not before used for that purpose, each containing not less than ten pounds, and marked, stamped and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury shall prescribe." Sales of oleomargarine by manufacturers and wholesale dealers are required to be "in original stamped packages." Retail dealers are permitted to sell only from original stamped packages in quantities not exceeding ten pounds, and are required to pack the oleomargarine sold by them "in suitable wooden or paper packages, which shall be marked and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe." The penal clause of the section provides, among other things, that "every person who knowingly sells or offers for sale * * * any oleomargarine in any other form than in new wooden or paper packages as above described * * * shall be fined," &c. It is argued that, while the earlier portion of the section restricts manufacturers and wholesale dealers in selling oleomargarine, to the use of original stamped packages, or "packages not before used" for that commodity, it requires the retail dealer to pack, not in "new," but in "suitable" packages, which may or may not be new, and that, therefore, the penal clause of the section, in denouncing the sale of oleomargarine, is inapplicable to retail dealers. It is further urged in support of this contention that there is no reason why retail dealers should not be permitted to use old packages provided they are "suitable" and marked and branded as prescribed. This position we think is untenable. We are not prepared to say that it is unimportant for the purposes of the act that retail

dealers should be restricted to the use of new packages. But if the intent of the section as gathered from the language employed is clear, the question whether there is any or sufficient reason for requiring retail dealers to use only new packages, is not one for judicial determination, however it may address itself to legislative discretion. Careful examination of the section as a whole has satisfied us that the penal clause applies as well to retail dealers as to wholesale dealers and manufacturers. The words "every person who knowingly sells or offers for sale * * * any oleomargarine" are broad enough to include all of the three classes of persons with whom the section deals. Further than this, by the earlier portion of the section manufacturers and wholesale dealers are restricted to the use of wooden packages, while retail dealers are permitted to use either "wooden or paper packages." The penal clause in denouncing the sale of oleomargarine otherwise than in "new wooden or paper packages" clearly has reference to sales by retail dealers as well as by others, unless the words "or paper" are to be wholly disregarded. But there is no sufficient reason why these words should be ignored. On the contrary the general intent of the section imperatively requires that they should have their full and natural force. The remaining inquiry is whether the counts in question respectively contain a sufficient description of the offence sought to be charged. Each of them alleges that the defendant therein named, being a retail dealer, knowingly, wilfully and unlawfully sold oleomargarine "packed in a plain wrapper, and not in a new and suitable wooden or paper package, or packages," as required by the act of Congress, and that the wrapper was not "marked and branded" as prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury. The section requires that packages used by retail dealers shall be "new wooden or paper packages as above described," and the packages "above described" are "suitable wooden or paper packages," marked and branded as prescribed. A retail dealer violates the section who sells oleomargarine in a "plain wrapper" which is not a "new" wooden or paper package, or which is not a "suitable" package, or which is not "marked and branded" as required. Each of these three counts contains enough, and indeed more than enough, fully to describe an offence punishable under the section, and to sustain the judgment. It is alleged that the defendant sold oleomargarine in a wrapper which was not a new and suitable package, and was not marked and branded. It was unnecessary to charge in each count more than was required to constitute a single offence, but the joinder therein of several offences was not calculated to confuse or prejudice the defendant nor was it under the rules of criminal pleading a fatal defect.

The judgment below in each case is affirmed.

GANTT et al. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. April 2, 1901.)

No. 918.

INDICTMENT—CONSPIRACY TO DEFRAUD UNITED STATES—DESCRIPTION OF OFFENSE.

An indictment under Rev. St. § 5440, charging a conspiracy to defraud the United States by depriving it of the title to certain lands by means of a fraudulent entry under the homestead laws, which avers that the entry was made, and that by means of it the accused obtained possession of the land, and cut the timber thereon, is sufficient, and need not allege that the land was subject to homestead entry. The conspiracy constitutes the offense, and it need not be shown how the overt act tended to effect its purpose, or that it was successful.

In Error to the Circuit Court of the United States for the Southern District of Alabama.

The plaintiffs in error, Isaac F. Gantt and Stephen Shine, together with George Nolen, were indicted in the court below under section 5440 of the Revised Statutes. The indictment is as follows:

"The grand jurors of the United States chosen, selected, and sworn in and for the Southern district of Alabama, in the name and by the authority of the United States of America, upon their oaths do find and present that Isaac F. Gantt, Stephen Shine, and George Nolen, whose names, other than as herein stated, are unknown to the grand jury, late of the district aforesaid, heretofore, to wit, on the 27th day of November, in the year of our Lord 1899, and before the finding of this indictment, and within the said Southern district of Alabama, and within the jurisdiction of this court, did then and there conspire, combine, confederate, and agree together to defraud the United States out of its title to the following lands of the said United States, to wit, the south half of the northwest quarter and the northeast quarter of the southwest quarter of section three, and the southeast quarter of the northeast quarter of section four, township three north, range four east, of Saint Stephen's meridian, Alabama, and out of the timber standing and being on the said lands. The scheme and artifice to defraud as aforesaid was to be carried out by one or more of the defendants entering the said described lands under the homestead laws of the United States by making a false affidavit in applying to enter said described lands, and another of said defendants locating thereon a sawmill to manufacture timber and lumber from trees cut upon the said homestead entry, and by all three of said defendants making the affidavits required by law before an officer duly qualified to take and receive final proof for the said entry, and which said affidavits were to be false and untrue, and by means of which the said defendants were to acquire the possession of and title to the said lands in fraud of the United States. For the purpose of executing the said conspiracy to defraud the said United States as aforesaid, the said Stephen Shine, on or about October 22, 1897, appeared before T. J. Emmons, clerk of the circuit court of Monroe county, Alabama, an officer duly qualified to administer the oath in that behalf, and made the oath required by law for the homestead entry of the said described lands, which said oath was false and untrue. And still further to effect the object of the said conspiracy to defraud the United States, as aforesaid, the said Isaac F. Gantt, on or about the 20th day of October, 1897, located upon the said described lands a sawmill, and erected thereon a dwelling house and a storehouse, which he has continuously occupied, controlled, and operated since the said location of the said mill and the erection of said dwelling and storehouse. And still further to effect the object of said conspiracy, the said Isaac F. Gantt, on January 3, 1899, caused to be published in the Monroe Journal, a newspaper published at Monroeville, Monroe county, Alabama, a notice of the intention of the said Stephen Shine to make final proof for his said homestead entry, and named among the witnesses to be examined in said final

proof proceedings himself, the said Isaac F. Gantt, and his co-defendant, George Nolen. And still further to effect the object of the said conspiracy to defraud the said United States as aforesaid, the said Isaac F. Gantt, Stephen Shine, and George Nolen, on or about the 2d day of March, 1899, before T. J. Emmons, clerk of the circuit court of Monroe county, Alabama, an officer then and there duly qualified to take and receive affidavits in final proof proceedings for homestead entries, made, respectively, the affidavits required by law in said homestead proceedings, which said affidavits were in material and essential particulars false and untrue. And still further to effect the object of the said conspiracy to defraud the said United States as aforesaid, the said Isaac F. Gantt has, since the 1st day of November, 1897, cut and removed to his said mill all of the merchantable timber upon the said described lands, and manufactured the same at the said mill for his own benefit. The said scheme to defraud the said United States, as aforesaid, was effected by the entry of the said lands under the homestead laws of the United States by the said Stephen Shine, not for the purpose of actual settlement and cultivation, or to obtain a home for himself, but the said entry, as aforesaid, was made for the actual benefit of the said Isaac F. Gantt and others unknown to the grand jury, and in order that the title and possession acquired from the government of the United States by the said Stephen Shine might inure, in whole or in part, to the benefit of the said Isaac F. Gantt and other persons unknown to this grand jury. Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States."

The defendants pleaded not guilty. On the trial Stephen Shine and Isaac F. Gantt were found guilty as indicted, and George Nolen was acquitted. The convicted defendants then moved in arrest of judgment, and to set aside the verdict of the jury, and quash the indictment for alleged defects in the indictment. The defects claimed in the indictment are summarized in the argument of counsel filed in this court as follows: (1) It fails to aver that the lands specified were subject to homestead entry; (2) it fails to set forth sufficiently the overt act relied on.

R. H. Clarke, for plaintiffs in error.

M. D. Wickersham, U. S. Atty.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Section 5440 of the Revised Statutes is as follows:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than one thousand dollars and not more than ten thousand dollars, and to imprisonment not more than two years."

It is a criminal offense under this statute for two or more persons to conspire to defraud the United States in any manner or for any purpose, where any one or more of such parties does any act to effect the object of the conspiracy. The offense is the conspiracy. It is not the act which is done to effect the object of the conspiracy. The provision of the statute that an act must be done to effect the object of the conspiracy affords a *locus penitentiae*, so that, before said act is done, either one or all of the parties may abandon their design, and avoid the penalty of the statute. *U. S. v. Britton*, 108 U. S. 193, 2 Sup. Ct. 526, 27 L. Ed. 701. The charge in the indictment is that the defendants conspired to defraud the United States out of its title to certain lands. Such conspiracy, it has been held, is covered by the

statute. *Dealy v. U. S.*, 152 U. S. 539, 14 Sup. Ct. 680, 38 L. Ed. 545. It is true that it is not stated in the indictment that the lands were subject to homestead entry, but it is averred that the scheme to defraud the United States was effected by the entry of the lands under the homestead laws of the United States. It appears from the indictment that the alleged conspirators obtained possession of the lands, and cut and removed from them timber growing thereon. If it be conceded that it is not sufficiently averred that the lands were subject to homestead entry, it is not material, for a conspiracy to defraud the United States out of the title to the lands, which, by acts of the defendants, resulted in the conspirators obtaining possession of them and of the timber growing on them, is an offense against the laws of the United States. It is not essential, however, that the indictment should show the success of the conspiracy. Nor need it show in what manner the overt act will tend to accomplish the object of the conspirators. If an unlawful combination to defraud the United States is alleged, together with an act by one of the parties to show the agreement in operation, this is sufficient without showing how the act would tend to effect the object, or that it was effected. *U. S. v. Benson*, 17 C. C. A. 293, 70 Fed. 591; *U. S. v. Dennee*, 3 Woods, 47, Fed. Cas. No. 14,948; *U. S. v. Donau*, 11 Blatchf. 168, Fed. Cas. No. 14,983. The indictment shows the conspiracy and several overt acts. The motion in arrest of judgment, we think, was properly overruled. The judgment of the circuit court is affirmed.

WEYMAN v. SODERBERG et al.

(Circuit Court, W. D. Wisconsin. April 23, 1901.)

No. 171.

TRADE-NAME—COPENHAGEN SNUFF—INFRINGEMENT—UNFAIR COMPETITION—INJUNCTION.

Complainant, a Pittsburg manufacturer of snuff, used the name "Copenhagen," adopted by his predecessor as a trade-mark, in labeling the jars in which it was sold, and advertised it in the usual forms of the name as used in various languages. It was not intended thereby to denote that it was imported, but was adopted to secure Scandinavian customers. Defendants, retail dealers in snuff, bought for the purpose of sale, from a Chicago manufacturer, several jars labeled "Kjobenhavn Snus," to indicate that it was imported, so as to likewise secure Scandinavian trade. Otherwise the jars and labels, and the smell, taste, appearance, and quality of the article, did not resemble those of complainant. They sold it without intending to deceive, and there was no evidence that any one was misled. *Held*, that no right to a geographical name as a trade-mark proper could be acquired, but that, conceding that complainant had acquired such a right to use the word "Copenhagen," there was no infringement thereof, and no intent to unfairly compete with him, and his bill for injunction should be dismissed.¹

In Equity.

P. H. Gunckel, for complainant.

Higbee & Bunge and G. M. Woodward, for defendants.

¹Unfair competition in trade, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.

BUNN, District Judge. This is a suit in equity to establish a trade-mark and for a perpetual injunction enjoining the defendants against its use. The complainant is a citizen of Pittsburg, Pa., and a manufacturer of tobacco and snuff in that city. He and his predecessors have been in that business, as is alleged, since 1827. The defendants are citizens of La Crosse, in the state of Wisconsin, and engaged, in a small way, in the business of grocers. From 1827 to 1865 the complainant's business was carried on by George Weyman, the father of the complainant; afterwards by the complainant and his brother, William P. Weyman, as Weyman & Bro., until about 1877; and since then by the complainant. About the year 1835 the complainant's predecessor adopted the name "Copenhagen" in connection with the sale of the snuff, calling and advertising it as Copenhagen snuff in the English, Norwegian, German, and Swedish languages, claiming the name "Copenhagen" as a trade-mark. The complainant claims that this word was chosen, not as the place of the manufacture, or to denote that the snuff was imported, but as a merely arbitrary and fanciful designation. At the same time they did not confine themselves to the English form of the word, but on their labels they advertised it in all the usual forms of the name as used in the English, Danish, Swedish, Norwegian, and German languages. In English it was "Weyman's Copenhagen Snuff," in Swedish it was "Weyman's Köpenhamn Snus," in German it was "Weyman's Copenhagen Schnupftabak," in Norwegian and Danish it was "Weyman's Kjöbenhavn Snuss." All these different forms were used upon their labels and advertising sheets. As appears from the testimony, these words are not only spelled differently, but are differently pronounced in these different languages, but in none has it any meaning, so far as appears, except as being the name of a city in Denmark. The defendants, about 1897, purchased from the Swedish Snuff Agency in Chicago in all three five-pound jars of a snuff manufactured in Chicago with a label upon the jars containing the words "Akta Kjöbenhavn Snus," and also containing the words, "The Swedish Snuff Agency, Sole Agents of U. S. Main Office, 768 to 772 Sedgwick St., Chicago, Ill." Without any intention of deceiving anybody, and without in fact deceiving anybody, they sold these 15 pounds of snuff. When notified by complainant that he had the exclusive right to use the name "Copenhagen" on his snuff, defendants ceased selling, and have not bought or sold any since. This is the head and front of their offending. They were selling the complainant's snuff and two or three other kinds at the same time, side by side, but did not try to sell one kind for another, but sold to every customer just what he called for, and sold several times more of the complainant's snuff than that of any other and all other kinds together. The question is whether the complainant could have or has acquired the exclusive right to the word "Copenhagen" as applied to the sale of snuff, and, if so, whether that right applies to all forms of the word in the different languages of Northern Europe. Another question is, aside from the one of an exclusive proprietary right to the use of a geographical name as a trade-mark, whether the defendants have been guilty of unfair competition in trade in dressing out their goods in such a manner as to put them

off upon the public as the goods of the complainant. There is no evidence that they have done this in fact, or had any intention of doing it. But, from the manner in which the defendants' snuff was labeled and dressed out, would there be any likelihood or probability that a person of ordinary sense and prudence purchasing could be deceived? In *McLean v. Fleming*, 96 U. S. 251, 24 L. Ed. 831, the supreme court lays down the rule as follows:

"What degree of resemblance is necessary to constitute an infringement is incapable of exact definition as applicable to all cases. All that courts of justice can do in that regard is to say that no trader can adopt a trade-mark so resembling that of another trader as that ordinary purchasers, buying with ordinary caution, are likely to be misled."

See, also, *Brown v. Seidel*, 153 Pa. 72, 25 Atl. 1064.

Within this rule, the labels are the best evidence, and no one looking at these could mistake the one snuff for the other. The language of Mr. Justice Field in *Tobacco Co. v. Finzer*, 128 U. S. 182, 9 Sup. Ct. 60, 32 L. Ed. 395, is quite applicable to the case at bar:

"The judgment of the eye upon the two is more satisfactory than evidence from any other source as to the possibility of parties being misled so as to take one tobacco for the other; and this judgment is against any such possibility. Seeing, in such case, is believing; existing differences being at once perceived, and remaining on the mind of the observer. There is no evidence that any one was ever misled by the alleged resemblance between the two designs."

Upon a careful study of the testimony, and especially of the different jars, with their labels, produced as exhibits on the final hearing, in which the complainant's and defendants' snuffs were kept and sold from, I am satisfied that there has been no infringement, and no unfair competition. There is not a single thing about the jars or labels used by the defendants that is at all suggestive of those of the complainant, except the words "Kjobenhavn Snus," unless it be the fact that these jars are both of earthenware manufacture. The complainant has used this form of the name "Copenhagen" in advertising to his Danish and Norwegian customers. But the labels in every other way are totally unlike; so much so that it would seem that no person of common sense and intelligence could be deceived into buying one kind of snuff for the other. Both jars are round earthen jars holding about a gallon, but of different shapes; the plaintiff's jars being nine inches high, and the defendants' an inch lower, but about one inch broader. The color of complainant's jar is a pale green; that of defendants a dark brown. The cover of the plaintiff's jar is tin; that of defendants is earthen. And when we come to the labels the difference is still more marked. The plaintiff's label is about six inches high and seven inches wide, and circular, or somewhat elliptical, in form. The defendants' approximates the same height and breadth, but is in diamond shape, with four sharp corners. The coloring of the complainant's letters is white upon a background of red. The color of the defendants' lettering is black upon a plain background of white paper. The complainant's label is considerably embellished and ornamented with three borders of different stripes and colors, with a diamond-shaped center piece in black and gold, with a "W" in different colors of blue and gold and white, fantastically in-

terwoven with a horseshoe of black and red and white color. The defendants' is all plain black and white, with little attempt at ornamentation, except that the words "Kjöbenhavn Rappe" are printed over a long leaf or spray of something in black. The defendants, as already seen, represent the snuff as being imported and sold by "The Swedish Snuff Agency, Sole Agents of the U. S.," while the complainant's label represents the snuff as manufactured by "Weyman & Bro., Tobacco and Snuff Manufacturers, Pittsburg, Pa." Upon inspection it is quite difficult to see how the defendants' snuff could be mistaken for that of the complainant. The complainant's own witnesses testify, in substance, that the one snuff could not be mistaken for the other unless the jars were placed so the labels could not be seen. If the jars were turned around, so as to present the back side, and hide the label, then one might be sold or taken for the other. But it is evident that in that case, with the labels hidden from view, there is no such resemblance in color or shape as to mislead. This does not savor much of deceit; and when we come to the snuffs themselves the evidence shows they are quite unlike in smell, taste, appearance, and quality, the defendants' being of a much cheaper and coarser grade; and that the difference in those respects is quite as great as the difference in the design and finish of the labels which dress them out. In fact, there does not seem to have been any design on the part of the manufacturers or dealers in Chicago of the snuff sold by defendants, of which complaint is made, to imitate the complainant's label, or to put off their snuff upon the public as and for that manufactured by the complainant. On the contrary, judging from the labels used upon the jars, it would seem to have been their design to catch the Swedish, Norwegian, and Danish trade by representing their snuff to be imported from Sweden. The evidence shows that a great part of the trade in snuff is with these peoples, and it is quite natural to suppose that a snuff made in their own country would be desirable. The complainants have built up a large trade with the people of these nationalities in this country, and no doubt the prominent words "Copenhagen Snuff," which is the marked and prominent part of their label, and the one which catches the eye, were intended and have had the effect to attract and stimulate the trade in snuff with the people of these countries coming from these Northern nations of Europe; although on the same label, in smaller letters, in circular form, reading up on one side and down on the other, and so not easily seen or read, are the words, "Weyman & Bro., Tobacco and Snuff Manufacturers, Pittsburg, Pa." Both complainant and the dealers in Chicago were no doubt advertising to attract this trade, but I cannot see that there has been any unfairness in dealing as between the complainant and defendants, who bought and sold the snuff without any idea of invading the plaintiff's rights. The complainant does not ask for any accounting, or for damages, except those that are nominal. He wants a decree establishing his trade-mark, with one cent damages and costs of suit. On the preliminary hearing the defendants stated that they had no intention of buying or selling any more of the snuff, and offered to the complainant that he might take a decree for a perpetual injunction if he would take it without costs, which complainant de-

clined to do. I think the complainant should have accepted this offer, and not proceeded to take testimony, and make a bill of costs. It was, indeed, more than the court is now inclined to give to the complainant upon consideration of the testimony. Since the decision of the supreme court in *Mill Co. v. Alcorn*, 150 U. S. 460, 14 Sup. Ct. 151, 37 L. Ed. 1144, it has been considered as settled doctrine that a person cannot acquire a right to the exclusive use of a geographical or proper name as a trade-mark proper. But, even if we assume that the complainant acquired such a right to the use of the word "Copenhagen," it seems quite clear from the testimony, as we have seen, that there has been no infringement, and no intent to put off the defendants' snuff as and for that of the complainant. A person of some learning in modern languages would know that "Kjöbenhavn" and "Copenhagen" were each intended to designate a city known to the world as the capital of Denmark, but, taking the jars and labels together, no one of the least degree of intelligence would be deceived into buying one snuff for the other. The plaintiff's bill will be dismissed, with costs.

DOWAGIAC MFG. CO. v. SMITH et al.

(Circuit Court, D. Minnesota, Fourth Division. April 12, 1901.)

PATENTS—INFRINGEMENT—GRAIN DRILLS.

The Hoyt patent, No. 446,230, for a grain drill, while only for a combination of old devices, is valid, in view of the superior merit and efficiency of the machine as a whole, and the inventor is entitled to the benefit of equivalents. Claims 1, 2, and 3 *held* infringed by a machine containing all the elements of the combination, or others, which, while variant in form, are clearly their mechanical equivalents.

In Equity. Suit for infringement of a patent. On final hearing.

Fred L. Chappell, for complainant.

Julius S. Starr and William V. Tefft, for defendants.

LOCHREN, District Judge. This is a bill in equity, wherein the complainant, the Dowagiac Manufacturing Company, owners by assignment from the patentee of letters patent No. 446,230, issued to Will F. Hoyt, February 10, 1891, for grain drill, charges the defendants, Ernest F. Smith and Lippo W. Zimmer, with infringement of said letters patent by the making, using, and vending to others of large numbers of grain drills having in their structure the combination of parts and devices which are covered and secured to said complainant by the said letters patent, and said assignment to it of the same; and charging that said defendants still continue such infringement, and praying for an injunction and accounting. Defendants, by their answer, contest the validity of said letters patent; deny that Hoyt was the original or first inventor of the grain drill described in said letters patent; and plead several prior patents and grain drills in use before Hoyt's alleged invention, as embodying and anticipating such alleged invention. On the hearing the complainant confined its charge of infringement to claims numbered 1, 2, and 3 of the Hoyt patent, which are as follows:

"(1) In combination with the transporting wheels and frame, the hopper, shoe, and draft rods, the latter having a pivotal connection with the frame; the clamping plates, having a pivotal connection with the draft rods; the spring-metal pressure rods attached to said plates, said rods extending rearwardly of the hopper; the forked arm coupled to said rods, and means for raising and lowering said arm,—substantially as specified. (2) In combination with the frame of a grain drill, the hopper, having a flange at the upper end; the shoe attached to the hopper; the curved draft rods leading from the shoe, and having a pivotal connection with the frame of the machine; a swinging head located between the upper ends of the draft rods; spring-metal rods attached to the swinging head, said rods extending back of the hopper, and below the flange thereof, said spring-metal rods being coupled to an arm, said arm having means for raising and lowering it, and means for locking the parts,—for the purposes set forth. (3) In combination with the frame, hopper, shoe, and draft rods, the plates pivotally attached between the upper portions of said draft rods, said plates having the horizontal shoulders, said shoulders bearing upon the draft rods; the spring-metal rods attached to said plates, and passing rearward of and on opposite faces of the hopper, and means for applying pressure to the rear ends of said spring-metal rods,—for the purpose specified."

Drawings showing this patented combination appear in 41 C. C. A. 627, 101 Fed. 718, in the report of the case of McSherry Mfg. Co. v. Dowagiac Mfg. Co. The question of the validity of the Hoyt patent is not a difficult one. Although it is only for a combination of old devices,—for the clamping plates or swinging head, even if new, is not patented, and therefore is, as a separate device, free to the public,—and although the patented combination produces only old results in the old way, yet, when compared with the older styles of shoe drills, it possesses the advantages of lightness, greater convenience in moving from field to field, superior attractiveness in appearance, with little liability to get out of repair, and its long, light, flexible springs adapt it better to uneven surfaces. It has met with very favorable reception and large sales, and, for the reasons suggested, the main features of the combination have been extensively copied and appropriated by other manufacturers of seed drills. I think that patentable novelty cannot be denied to this combination, and I therefore hold that the patent is valid. In the McSherry Case, above referred to, its validity was sustained, and seems to have been in fact conceded.

The question of the alleged infringement by the defendants is the serious and difficult question in the case. The shoe drills which have been sold and are being sold by defendants, and which the complainant claims infringe the Hoyt patent, are manufactured by Selby, Starr & Co., of Peoria, Ill., and spoken of in the testimony as the "Peoria Seeder," which bears a close resemblance in its general appearance and in the details of its devices and combination to the machine of the Hoyt patent, as shown in the drawings and described in the first three claims of that patent; and it performs the same functions in the same way. All the combined elements and devices are the same, with immaterial variations in mere matters of form, except that the defendants assert that there are absent from the Peoria seeder, dealt in by them, two of the elements of the Hoyt patent set forth in each of its first three claims. They assert that in the Peoria seeder the connection between the springs and the draw-

bars is not a pivotal, but a rigid, connection,—as rigid as if they were solidly welded, bolted, or brazed together at their junction; and, secondly, that the Peoria seeder has no clamping plates or swinging head, nor any mechanical equivalent for the same. In the Peoria seeder, dealt in by the defendants, the springs, which are flattened, and not round, as shown in the Hoyt patent, are separate springs, each extending from the bifurcated arm in the rear of the hopper forward, close by the sides of the hopper, and under its flange, which they engage when raised, to a direct connection with the forward part of the curved drawbars, where they are so connected by being bent downward between the drawbars, and over and partially around an iron pin or bolt which passes through the drawbars; and the ends of the springs are thence carried downward and backward about five inches between the drawbars, the ends passing over, and being bent or hooked partly around, another similar bolt, which also passes through the drawbars. Between these two bolts and between the drawbars is a cast-iron plate or spacer, fitted to its surroundings, to keep the drawbars and springs in proper place with reference to each other; and thus the forward ends of the springs are held in place, and in connection with the forward ends of the drawbars in proper position to transmit to the drawbars any pressure applied to the rear end of the springs, while the raising of the springs at the rear causes them to engage the flange or lugs on the hopper, and lift the shoe from the ground when desired. Although the pivotal movement of the springs upon the forward bolt where they thus engage the drawbars may be very slight, I think there is, and from the construction must be, some pivotal movement there in the application and withdrawal of pressure upon the rear end of the springs, as the same flexible springs extend over and beyond that bolt downward to the other bolt at the end of the springs. Were the distance between these two bolts considerably greater than it is, I think such pivotal motion would be easily observable; and that, slight as it is, it has value in distributing strain which might bear more on a single point if the connection were rigid.

It remains to be considered whether the Peoria seeder has the clamping plates which are described in each of the three first claims of the Hoyt patent, or any mechanical equivalent for the same. No question is made but that the "clamping plates" described in the first claim, and the "swinging head" described in the second claim, and the "plates pivotally attached between the upper portions of said draft rods" described in the third claim, all refer to the same identical device. Its connections, as stated in each of these claims, show it to be the same; and its construction, functions, and uses appear in the drawings and specifications. The clamping plates form an essential element of Hoyt's invention as described in his patent. The second paragraph of the specifications refers to the claims as pointing out the essential features of the invention, and such is the office of claims, without such reference. Each of the three first claims, and, indeed, every claim in the patent except the fourth, describes the clamping plates as devices entering into the combination. This device cannot be overlooked, nor can the court declare it to be imma-

terial. *Fay v. Gordesman*, 109 U. S. 408, 420, 421, 3 Sup. Ct. 236, 27 L. Ed. 979. Besides, if that element or device were omitted, and no equivalent supplied in its place, it is obvious that the combination would be inoperative. "It is a well-known doctrine of patent law that the claim of a combination is not infringed if any of the material parts of that combination are omitted. It is equally well known that, if any one of the parts is only formally omitted, and is supplied by a mechanical equivalent, performing the same office, and producing the same result, the patent is infringed." *Water-Meter Co. v. Desper*, 101 U. S. 332, 335, 25 L. Ed. 1024, 1025. "Such inventors [of combinations] may claim equivalents as well as any other class of inventors, and they have the same right to suppress every other subsequent improvement not substantially different from what they have invented and secured by letters patent." *Gould v. Rees*, 15 Wall. 187, 192, 21 L. Ed. 39, 41. As the defendants' machine, the Peoria seeder, has no device in form like the clamping plates of the Hoyt patent, it is necessary to consider whether it has the mechanical equivalents of that device, performing the same office and function, and producing the same result in substantially the same way. The function and office of the clamping plates appears to be three-fold. This device serves to hold in proper space relation to each other the two drawbars and the forward ends of the long springs. It connects the springs pivotally upon the bolt which passes through the drawbars, and it includes the device bearing upon the drawbars, by means of which pressure upon the springs is applied to the drawbars to depress the shoe. The iron casting used in the Peoria seeder at the same place in the machine holds in proper space relation to each other the two drawbars and the forward ends of the springs, substantially the same as do the clamping plates of the Hoyt patent. The springs in the Peoria seeder pass over this casting to a direct pivotal connection with the bolt through the drawbars, which is substantially and mechanically the same thing as the connection of the springs in the Hoyt patent with the clamping plates, the eyes in the forward part of which are passed through by the same bolt, thus giving the same pivotal connection of the springs with the drawbars. The result is the same in both cases. Neat as the clamping plates are in appearance, and doubtless efficient in service, their adoption to extend the springs to the pivotal connection with the bolt through the drawbars seems as unnecessary, and apparently as objectionable, as it would be to splice a wooden lever at the point where the strain is perhaps greatest. But, even in that case, the substitution of an unspliced lever made of a single entire stick, instead of such spliced lever, would be a plain change to a mechanical equivalent, though the substitute might be stronger, simpler, and better. So the looping of the ends of the springs over the second bolt in the Peoria seeder, to check their pivotal movement over the forward bolt, and obtain the pressure of the springs upon the drawbars, is the mechanical equivalent of the lugs on the sides of the clamping plates which in the Hoyt patent impart the spring pressure to the drawbars in the same way. The variation in respect to these matters is in the form of the devices merely, and is of no more importance, mechanically considered, than

the variation between the round springs of the Hoyt patent and the flat springs of the Peoria seeder. As I understand the opinion of the court of appeals in the McSherry Case, above referred to, it is in harmony with my holding in this case. What was there intended and meant by the statement that "the clamping plates of Hoyt's patent are not of the essence or substance of his invention" is shown by the restatement of the matter on the next page:

"The form he describes and claims is not of the essence of his invention, and the law allows a patentee any form which is the equivalent of that claimed, unless he has expressly limited himself to the one specific form in order to save his patent from anticipation."

I therefore hold the defendants guilty of infringement, and there must be a decree in favor of the complainant and against the defendants for an accounting and injunction as prayed, and for costs. The form of the decree, unless agreed to by counsel, may be settled upon five days' notice.

BLACKLEDGE v. WEIR & CRAIG MFG. CO.

(Circuit Court of Appeals, Seventh Circuit. April 9, 1901.)

No. 746.

PATENTS—RIGHTS AND LIABILITIES OF JOINT OWNERS—RIGHT TO ACCOUNTING FOR PROFITS.

A patent confers on the patentee only the right to exclude others from using the invention for which it is granted, and where it is owned by two or more persons the effect is merely to except each part owner from such exclusion, leaving him free to use the invention in any way he may choose for his own interest, independently of his co-owners, but subject to their equal rights. He cannot be held accountable to a co-owner for any part of the profits he may make from the manufacture and sale or use of the patented article, nor from licenses granted by him to others, since such licenses cannot convey any exclusive right, or any interest which belongs to the co-owner, but amount only to a sale by him of the whole or a part of his own interest.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

The plaintiff in error, who is the guardian of Moses Crawford, insane, brought this action in right of his ward as the equal co-owner with the defendant, the Weir & Craig Manufacturing Company, of letters patent of the United States No. 373,353, granted on January 31, 1888, to James A. Cuning and Frank P. Woolen, for a device used for scraping hogs. Cuning, on March 30, 1888, assigned his title and interest to the plaintiff for the use of his ward, and by mesne assignments the title and interest of Woolen passed to William H. Silberhorn, who, on the 17th day of August, 1889, joined the plaintiff in executing to the defendant a written grant of the right to manufacture and sell the patented device in the United States for the period of five years from that date, in consideration whereof the defendant agreed to pay a royalty of \$600 on each machine manufactured by it, \$300 to the plaintiff and \$300 to Silberhorn. On August 11, 1890, Silberhorn assigned his interest in the letters patent to the defendant, and since that time the plaintiff and the defendant have been equal co-owners of the patent. Upon the expiration of the contract on August 17, 1894, the defendant, though it has since manufactured, sold, and used the patented machine as before, ceased to pay the plaintiff the stipulated royalty or any share of the profits realized.

The declaration is in assumpsit, and, after reciting the facts stated, charges that the defendant, from the 11th day of August, 1890, has by itself, at Chicago and elsewhere throughout the United States, exercised the exclusive rights of both owners "by granting licenses, shop rights, and other rights under said letters patent," and from August 17, 1894, to the commencement of the action had by itself exercised and enjoyed the monopoly of the patent by manufacturing, selling, leasing, and using the patented device, and has received therefor, and by reason of the monopoly, large sums, amounting to \$10,000, one-half of which belongs to the plaintiff, etc. To this declaration the defendant interposed a general demurrer, which the court sustained (105 Fed. 1006), and, the plaintiff declining to amend, judgment was given for the defendant. Error is assigned upon the ruling on the demurrer.

Reference has been made in the briefs of both parties to the following cases: In re Russell's Patent, 2 De Gex & J. 130; Hancock v. Bewley, Johns. 601; Mathers v. Green, 34 Beav. 170; s. c. on appeal, 35 Law J. Ch. 1; In re Horsley & Knighton's Patent, 39 Law J. Ch. 157; Steers v. Rogers, 62 Law J. Ch. 671; Sheehan v. Railway Co., 16 Ch. Div. 59; Dent v. Turpin, 2 Johns. & H. 139; Powell v. Head, 12 Ch. Div. 686 (copyright); Parkhurst v. Kinsman, 6 N. J. Eq. 601; Vose v. Singer, 4 Allen, 226; Freeman v. Freeman, 142 Mass. 98, 7 N. E. 710; De Witt v. Manufacturing Co., 66 N. Y. 460; Fraser v. Gates, 118 Ill. 99, 1 N. E. 817; Washburn & Moen Mfg. Co. v. Chicago Galvanized Wire Fence Co., 109 Ill. 71; Gates v. Fraser, 9 Ill. App. 624; Marsh v. Machine Co. (N. J. Sup.) 29 Atl. 481; Carter v. Bailey, 64 Me. 458 (copyright); Gould v. Banks, 8 Wend. 568 (copyright); Dunham v. Railroad Co., Fed. Cas. No. 4,151; Curran v. Burdsall (D. C.) 20 Fed. 835; Manufacturing Co. v. Gill (C. C.) 32 Fed. 697, 702; Pusey & Jones Co. v. Miller (C. C.) 61 Fed. 401; Pitts v. Hall, Fed. Cas. No. 11,193; Clum v. Brewer, 2 Curt. 506, Fed. Cas. No. 2,909; Herring v. Association (C. C.) 9 Fed. 536; Lalance & Grosjean Mfg. Co. v. Haberman Mfg. Co. (C. C.) 93 Fed. 197; Jewett v. Suspender Co. (C. C.) 100 Fed. 647; Bloomer v. McQuewan, 14 How. 539, 14 L. Ed. 532; Curt. Pat. §§ 188-192; Walk. Pat. (3d Ed.) § 294; Rob. Pat. § 795 et seq.

V. H. Lockwood, for plaintiff in error.

Charles E. Pickard, for defendant in error.

Before WOODS and JENKINS, Circuit Judges.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

Most of the cases cited contain nothing but dicta on the subject, and in many instances dicta of more than the usual irrelevancy to the cases in which they were uttered.

In Clum v. Brewer, 2 Curt. 506, Fed. Cas. No. 2,909, Justice Curtis ruled that:

"One tenant in common has as good a right to use, and to license third persons to use, the thing patented, as the other tenant in common has. Neither can * * * assert a superior equity, unless it has been created by some contract modifying the rights which belong to them as tenants in common."

Whatever be the bearing of the principle stated, this expression does not in terms cover the question of the liability of one part owner to another to account for profits derived from the use of the invention.

In Manufacturing Co. v. Gill Justice Bradley said:

"If one joint owner derives a profit from the patent, either by using the invention, or getting royalties for its use, or purchase money for sale of rights, it would seem that he should be accountable to the other part owners for their portion of such profit; and probably a bill for an account should be sustained therefor."

He immediately added:

"But this is a matter of mere speculation, so far as this case is concerned. It is clear, I think, that one part owner cannot maintain suit against another for infringement."

In the cases decided by them, Judges Drummond, Blodgett, Treat, Wales, and Lacombe have each in more or less direct terms expressed the opinion or supposition that there might be a right to an accounting for profits between co-owners of an invention, and in two or three cases it has been said that one part owner might have an action against the other owner for infringement,—a proposition which seems to us wholly untenable. "The franchise which the patent grants," said the supreme court in *Bloomer v. McQuewan*, 14 How. 539, 14 L. Ed. 532, "consists altogether in the right to exclude every one from making, using, or vending the thing patented, without the permission of the patentee"; and while the statute regulating the subject authorizes the issue of a patent to two or more, and the transfer by assignment of partial interests to different persons, it contains no expression or intimation that one owner may not use the invention without the consent of the co-owner. To ingraft such a meaning upon the statute by construction would be promotive of injustice, because it would put the enterprising owner at the mercy of the drone, visionary, or knave with whom he should find himself associated.

The English cases are explicit. In *Mathers v. Green* the master of the rolls held a part owner of a patent accountable to another part owner for a share of the profits made by the use of the invention, but on appeal the judgment was reversed; the lord chancellor (Cranworth) in the course of his opinion saying:

"The right conferred is a right to exclude all the world other than the grantees from using the invention. But there is no exclusion in the letters patent of any one of the patentees. The inability of any one of the patentees to use the invention, if such inability exists, must be sought elsewhere than in the letters patent. But there is no principle, in the absence of contract, which can prevent any persons not prohibited by statute from using any invention whatever. Is there, then, any implied contract, where two or more persons jointly obtain letters patent, that no one of them shall use the invention without the consent of the others, or, if he does, that he shall use it for their joint benefit? I can discover no principle for such a doctrine. It would enable one of two patentees either to prevent the use of the invention altogether, or else compel the other patentee to risk his skill and capital in the use of the invention on the terms of his being accountable for half the profit, if profit should be made, without being able to call on his co-patentees for contribution if there should be a loss. This would be to place the parties in a relation to each other which, I think, no court can assume to have been intended, in the absence of express contract to that effect."

And to the same effect in *Steers v. Rogers* the lord chancellor (Herschel) said:

"What is the right which a patentee has, or patentees have? It has been spoken of as though a patent right were a chattel or analogous to a chattel. The truth is that letters patent do not give the patentee any right to use the invention. They do not confer upon him a right to manufacture according to his invention. That is a right which he would have equally effectually if there were no letters patent at all, only in that case the world would equally have the right. What the letters patent confer is the right to exclude others

from manufacturing in a particular way and using a particular invention. When that is borne in mind it appears to me very clear that it would be impossible to hold under these circumstances that, where there are several patentees, either of them, if he uses the patent, can be called upon by the others to pay them a portion of the profits which he makes by that manufacture, because they are all of them, or perhaps any of them is, entitled to prevent the rest of the world from using it."

An instructive discussion of the subject may be found in *Vose v. Singer*, 4 Allen, 226. The parties to that suit were the half owners, respectively, of "the sole and exclusive right to use and to vend to others to be used (but not to build or make)" the patented machine within specified territory; and, in considering whether the defendants should account to the plaintiffs for a moiety of profits made from the sales of the patented article, the court rejected as unsatisfactory the analogies supposed to be found in the joint ownership of real estate and the various species of personal property, and, in expression of the principles involved, said:

"A patent right is a chattel interest. Therefore a tenancy in common or part ownership in it is much like a tenancy in common or part ownership of other personal property. But the use of a patent right is different from the use of any other property, and therefore it is not safe to follow the rules adopted in regard to the mutual liabilities of part owners of ships, horses, grain, liquor, etc. It would not be safe to conclude that, because the owner in common of a horse is not liable, though he retains the exclusive use of him, therefore the part owner of the patent who uses it exclusively is not liable; nor because the tenant in common of the grain or liquor, who uses it exclusively and consumes it in using, is liable, therefore the part owner of a patent is liable. There is a possibility that the part owner of the patent may so supply the market as to appropriate to himself the whole value of the patent; and, on the other hand, his use of it may have the effect to create a market so extensive as greatly to enhance the value of the whole patent. On the whole, then, we are compelled to reject all arguments from analogy, and look at the question upon its own apparent merits. * * * There is nothing to restrict the party owning each moiety of the right from selling and assigning that moiety, or any fractional part of it, or as many fractional parts as he pleases. Each may purchase as many machines as he pleases; and, having purchased them, he may sell them to others, with the right to use and sell them; or may refuse to sell them, and may rent them, or establish manufacturing, either alone or in company with others, in which the machines shall be used; or either party may neglect or refuse to purchase, use, or sell any machines or any rights, or to make his moiety profitable in any way. The right is thus subject to transfers and subdivisions, and may be used in a great variety of ways. None of the parties interested has any right to control the action of the other parties, or to exercise any supervision over them. It is difficult to see how an equitable right of contribution can exist among any of them, unless it includes all the parties interested and extends through the whole term of the patent right; and if there be a claim for contribution of profits, there should also be a correlative claim for losses, and an obligation upon each party to use due diligence in making his interest profitable. It is not and cannot be contended that these parties are co-partners; but the idea of mutual contribution for profits and losses would require even more than co-partnership. Nothing short of the relation of stockholders in a joint-stock company would meet the exigencies of parties whose interests may be thus transferred and subdivided. But even as between the original parties, as there was no mutual obligation to contribute for losses, or to use any diligence to make the property profitable, and as each party was at liberty to buy, use, and sell machines at his pleasure, and to sell his moiety of the right, or fractional parts of it, we think no obligation arose out of the part ownership, as being legally or equitably incident to it, to make contribution of profits. But, in the absence of any contract, we think each party was at liberty to

use his moiety as he might think fit, within the territory described. If the defendants have realized any profit in the manner alleged, it has been by investing capital in the purchase of machines, and the use of skill and labor in selling them; and they have taken the risk of losses. Apparently there is no more reason why the plaintiffs should claim a part of the advanced price for which they may have sold their machines than there would have been for claiming a part of the price if they had sold their right itself for an advance. * * * These parties must be regarded as having interests which are distinct and separate in their nature, though they are derived from the same contract; and having such interests, with the right to use them separately, they cannot for any legal use of them incur any obligation to each other."

In the Dunham Case the question was whether one who had contracted with a part owner of a patent for a license to use the invention could rightfully refuse to accept of the contracting owner a license not signed by the other owners. "The material point," it was declared, "is, who is to answer, if any one, to the other patentees for the use of the part which does not belong to them, when a joint owner uses the improvement or makes a contract with another person for its use?" and reasoning from that point of view, in accord with the quotation from Justice Curtis in *Clum v. Brewer*, Judge Drummond said:

"One of them has no superiority of right over the other. One of them can use and manufacture the article patented without the consent of the others; that is, each has the same right, although one may own a greater share of the thing patented than the other. The grant was, in this case, to the three to make, use, and vend the improved car-brake shoes; and while it is clear that one of the patentees cannot grant what does not belong to him, and, if he gives a license or makes a contract for the use of the thing patented, he can only grant that which he has himself, and not the rights of the other patentees, still he can clothe his grantee or licensee with the same right that he has himself, namely, the right to sell or use the thing patented. And it seems to me the better rule is to hold, if there is a liability at all, that, where a party owning less than the whole of a thing patented makes a grant or license, he shall be answerable to the others, rather than that the other patentees shall look to the grantee or licensee."

—and, after quoting the passage cited above from Chancellor Cranworth, added:

"Now, while this is the principle announced by the chancellor, it perhaps should be with this qualification: that, if one of the patentees obtains more than his share of the profits, he might be held liable under certain circumstances to the others. Certainly I do not wish to be understood as affirming that there is never such liability. Of course, we must take into consideration any risk which he may run, and any outlay of money which he may make in the manufacture or sale of the article; but if, looking at it upon equitable principles, he has obtained more than his share of the profits arising from the thing patented, either in the use or sale of it or of licenses, it seems to me he might in certain cases be held accountable to the other joint patentees. But it is not necessary in this case to decide that point. My conclusion therefore is that the fact that one of the patentees has given a license to the defendant to use the thing patented clothes him with the right to use it, and, having that right, he is liable under his contract for the payment of the one thousand dollars which he agreed to pay for the license."

The contract in that case as it is briefly stated—"a contract with the defendant," one of the three joint patentees, "for a license to use the invention"—called for a license from the defendant only, and the refusal to accept the license tendered was a breach of the contract

for which the plaintiff had a cause of action, regardless of the question who, if anybody, should answer to the other patentees for the use of the invention by the licensee. Knowing the law, the parties to the contract knew that the stipulated grant could confer upon the licensee only the right of the licensor,—that is to say, the right to make, use, and vend the patented article,—but not an exclusive right, because the other patentees might confer upon rival manufacturers or dealers equal privileges under the patent. This being so, it is to be presumed that the price agreed to be paid for the individual license, which left the other patentees free to use and to license others to use the invention, was less than would have been paid for a license from all of the patentees.

The use of an invention by one of co-owners or by his licensees is not the exercise of the entire monopoly conferred by the patent. That can be effected only by the joint or concurrent action of all owners. The separate action of any one owner or of his licensees can be an exercise or use only of his individual right, which, though exclusive of all besides, is not exclusive of the other patentees, their assignees or licensees. On principle, therefore, there can be no accountability on the part of a part owner of an invention to other owners for profits made by the exercise of his individual right, whether it be by engaging in the manufacture and sale, or by granting to others licenses, or by assigning interests in the patent. His use of the invention in any lawful way is not an appropriation of anything which belongs to another. The separate rights of the other owners remain unaffected. They are equally free to use the invention in all legitimate ways for their individual profit. Each is entitled to the fruits of his endeavors, taking no risk and expecting no reward from enterprises in which he does not choose to join. There is, therefore, no ground for the distinction insisted upon between profits derived directly from the manufacture, use, and sale of the patented article by the owner and profits derived by him from the sale of licenses. It is conceded that the part owner of an invention may sell his title or interest as a whole or in parts without being accountable to another owner for any portion of the consideration received. But it is clear that he might part with his entire title or interest by granting a license or licenses in terms which should forbid further licenses and further use by himself of the invention. In such a case the license fee or fees would be the price obtained for his interest in the invention, and so the price of any license by which he parts with a fraction of his interests in terms excluding him and his assigns from a rival use of the invention is the consideration received for the transfer of so much of his right or interest, and not of any right of the other owners of the patent. Besides, if it be conceded that one of co-owners may engage in the manufacture and sale of a patented article without accounting to the other owners for the profits, on what principle shall it be said that he may not grant a license to a corporation or a partnership in which he is interested,—it may be, solely interested? And if to a corporation or a partnership in which he is directly interested, then why not to a corporation or company or person in whom he

is indirectly concerned, say as mortgagee, general creditor, surety, or otherwise? Where shall the line be drawn?

It follows that the charge in the declaration that the defendant "has by itself exercised the exclusive rights granted to both the plaintiff and defendant" is not true. In the nature of things that could not be technically so; and it is not alleged that the defendant has intentionally and wrongfully so exercised its individual right under the patent as to destroy the value of the equal right possessed by the plaintiff.

The judgment of the circuit court is affirmed.

LALANCE & GROSJEAN MFG. CO. v. NATIONAL ENAMELING & STAMPING CO.

(Circuit Court, S. D. New York. April 11, 1901.)

1. PATENTS—RIGHTS OF JOINT OWNERS—CONVEYANCE OF RIGHTS BY PART OWNER.

A part owner of a patent has the legal right to convey to others the right to make, use, and vend the patented article, without the consent of his co-owner, and the latter cannot maintain a suit for infringement against the grantees.

2. SAME.

Evidence considered, and *held* insufficient to establish a contract between the owners in common of a patent that neither should sell its interest or grant licenses thereunder without the consent of the other.

In Equity. Suit for infringement of patent. On final hearing.

Walter D. Edmunds, for complainant.

Louis Marshall, for defendant.

COXE, District Judge. This is a suit for the infringement of letters patent No. 527,361, granted to Hubert Claus for improvements in enameling metal ware, granted October 9, 1894. On the 16th of November, 1894, Claus duly assigned the patent to the complainant and the St. Louis Stamping Company. On the 31st of January, 1899, the St. Louis Company duly assigned its half interest in the patent to the Haberman Manufacturing Company, Kieckheffer Bros., and Matthai, Ingram & Co., who in turn assigned it to the defendant. The legal title to the patent is, therefore, in the complainant and defendant, each owning a half interest.

The validity of the patent and its infringement are, of course, admitted, the defendant insisting that it has the same right as the complainant to practice the invention.

The complainant contends—First, that the St. Louis Company could not convey to the defendant the right to make, use and vend without the consent of the complainant; and, second, that even if this proposition cannot be maintained broadly, the evidence establishes a trust relation by which the patent was held for the joint benefit of both the original owners and was not to be disposed of except by mutual consent.

The first of these propositions has never been directly passed upon by the supreme court, but the overwhelming weight of authority

in this country and in England is against the view asserted by the complainant. Indeed, but one authority is cited in its support—*Pitts v. Hall*, 3 Blatchf. 201, Fed. Cas. No. 11,193, decided in 1854—which has never, so far as the court has been able to ascertain, been followed in a carefully considered case. It is not thought that the learned judge who denied the motion to dismiss the bill in the infringement suits against the Haberman Company and others (C. C., 93 Fed. 197) intended to express a definitive opinion upon the question now under discussion. He considered the question an open one, but disposed of the motion upon other reasoning, which, at that stage of the litigation, appears to be unanswerable. The authorities supporting the defendant's contention are too numerous to cite, but the argument in its support will be found sufficiently stated in the following: *Clum v. Brewer*, 2 Curt. 506, Fed. Cas. No. 2,909; *Vose v. Singer*, 4 Allen, 226; *Dunham v. Railroad Co.*, 7 Biss. 223, Fed. Cas. No. 4,151; *De Witt v. Manufacturing Co.*, 66 N. Y. 459; *Manufacturing Co. v. Gill* (C. C.) 32 Fed. 697; *Whiting v. Graves*, 3 Ban. & A. 222, Fed. Cas. No. 17,577; *Pusey & Jones Co. v. Miller* (C. C.) 61 Fed. 401; *Walk. Pat. §§ 294, 295*. See, also, the recent and well-considered case of *Blackledge v. Manufacturing Co.*, 95 O. G. 1853, 108 Fed. 71. It is thought that a rule so generally recognized will not be disturbed, but in any view it is too firmly established and has been enforced for too long a period to be disregarded by this court.

The second proposition urged by the complainant is that the evidence tends to establish an oral agreement between the parties at the time the Claus patent was purchased that neither corporation should grant licenses under the patent or sell its half interest therein without the consent of the other. The court entered upon an examination of the proof with the inclination to find such an agreement if possible, but, after a careful reading of the record, is constrained to reach the conclusion that the proof is wholly insufficient to sustain such a finding. The reasons for this conclusion are as follows:

First. The bill fails to allege such an agreement. The averment is "that it was fully understood, if not expressly agreed, by and between your orators and the St. Louis Stamping Company, that each of them should enjoy, respectively, the privilege of using said invention, and of making and vending the articles containing the same in their aforesaid respective remotely separated businesses, and without further accountability to each other." This is far from stating an agreement of any kind, much less an agreement that neither party should exercise the legal rights growing out of the half ownership without the other's consent.

Second. The only witness who swears to facts tending to establish an agreement is the complainant's vice president, Mr. Cordier. His testimony will be found on analysis to be vague, indefinite, uncertain and insufficient, even if uncontradicted, to establish a clear and unambiguous contract—such a contract as the court would be justified in enforcing. When asked to state what he and the other officers of the complainant understood to be the agreement he an-

swers without hesitation, but when asked what was said and who said it, he leaves the court entangled in a maze of uncertainty and doubt. The court cannot resist the conclusion that the mind of the witness has become so imbued with the idea that the defendant's conduct was unfair that he has, unwittingly perhaps, permitted imagination to take the place of facts and has substituted what he thinks the agreement should have been for what the agreement actually was. If the question were what the parties should have done there would probably be little disagreement between the complainant and the court, but this is not the question. The code of morals which commands the defendant, who has had his coat taken in replevin, to give his cloak also to the successful plaintiff, is from an ethical point of view without a flaw, but it has never been followed in a single reported case. The golden rule is not as yet a rule in equity. A few quotations from Mr. Cordier's testimony will illustrate the difficulty the court has found in accepting it as proof of an enforceable agreement:

"Q. 10. What was the prime motive which led your company and yourself to make this purchase? Was it in order that you might manufacture these goods under the patent, or in order to prevent your rivals in business, the Haberman Manufacturing Company, Matthai-Ingram and others from getting the patents themselves and introducing these cheap goods? A. Principally to keep it out of other hands. Q. 11. Mr. Niedringhaus satisfied you by his statements made to you and Mr. Grosjean in your presence that, unless you purchased this patent together with his company, it would get into the hands of Haberman or others of your rivals and prove injurious, did he not? A. He did positively." "Cross-Q. 207. My question then referred to what conversation it was took place between you and the St. Louis Stamping Company and its representatives at the time when you acquired this patent from Claus? A. I can't remember the exact language, sir. Cross-Q. 208. But the substance of it was that you were each to acquire a half interest in the patent and each to pay one-half of the consideration money? A. We agreed at first to be licensed under that patent, and then we had an arrangement with Mr. Claus by which we could become absolute owners of the patent by paying \$30,000 more, and we agreed after that to buy the patent of him. Cross-Q. 209. And you did buy it? A. And we did buy it. Cross-Q. 210. And you each owned a one-half interest in the patent? A. That is right. Cross-Q. 211. And that was all that was said on the subject? A. A great deal was said that I can't remember now. Cross-Q. 212. I know, but that was the substance of all that was said? A. That was the substance. * * * Cross-Q. 215. There wasn't anything said to the effect that the Lalance and Grosjean Manufacturing Company should not be permitted to sell out its business? A. It never came up that I know of. * * * Cross-Q. 262. You never entered into any contract on that subject with the St. Louis Stamping Company? A. Entered into any written contract? Cross-Q. 263. Yes. A. No, sir. Cross-Q. 264. You never made any contract at all on that subject? A. It was always agreed that we wouldn't license. Cross-Q. 265. Give me the language of any conversation in which that matter came up. A. I can't give you the exact language. It was absolutely agreed between us that we would not. Cross-Q. 266. When was it agreed? A. Why, in our general conversations. Cross-Q. 267. Tell me one conversation? A. I can't give you the date. Cross-Q. 268. Who was present? A. I can't recall; I haven't got the exact facts in my mind. Cross-Q. 269. Who was the person with whom you had the conversation? A. Why, Mr. Niedringhaus was the man we had all of our conversations with. Cross-Q. 270. Now tell me one single conversation upon that subject, where it occurred and when it occurred? A. I couldn't do that. Cross-Q. 271. You can't tell me the time or place when any conversation occurred? A. No, I cannot. Cross-Q. 272. Will you tell me what was said in that conversation? A. I can't remember."

Third. But the testimony of Mr. Cordier is not uncontradicted. Mr. Niedringhaus, who represented the St. Louis Stamping Company, contradicts him upon every material point and, even if the issue stood between these two men, there certainly is no preponderance in favor of the complainant.

Fourth. The controlling influence and master-mind of the complainant company is Mr. Florian Grosjean, its president. It is perfectly plain from the record that no important step was taken without his knowledge and consent, in fact he dominated and controlled the entire situation. He knew the precise scope of the agreement between the companies, for he made it. Mr. Cordier says, "Mr. Niedringhaus had a great many conferences with Mr. Grosjean, at most of which I was present." Mr. Niedringhaus, Mr. Brown and Mr. Untermeyer testify to repeated instances in which Mr. Grosjean made statements to them utterly inconsistent with the present contention of his company and yet Mr. Grosjean was not called as a witness. The excuse offered in the complainant's brief, that the most active agent representing the complainant in the negotiations was Mr. Cordier, and, therefore, Mr. Grosjean was not needed, seems wholly insufficient. There is no way to escape the inevitable presumption that Mr. Grosjean did not contradict Mr. Niedringhaus, Mr. Brown and Mr. Untermeyer because he could not do so truthfully.

Fifth. Four years after the assignment of the patent an effort was made to secure a written agreement between the parties limiting the right to grant licenses. On the 18th of September, Mr. von Briesen, who was the counsel for both parties, at the suggestion of Mr. Cordier, addressed a letter to the complainant in which he says:

"In reply to so much of your inquiry as relates to the question of granting a license to other enamel works, I would say that you ought not to do this without the written consent of the St. Louis Stamping Co. Although at present I suppose there is no agreement between you and the St. Louis Stamping Co. preventing you or them from granting licenses without the written consent of the other party, yet you should act as though there was such an agreement. As a matter of fact, I think for the protection of both parties a short agreement providing that neither you nor the St. Louis Stamping Co. should grant licenses or other rights under the patent without the written consent of the other ought to be entered into without delay."

It will be noted that in this letter the counsel who advised the purchase of the Claus patent, who drew up the original transfers and who would be more likely than any other person in existence, except the parties themselves, to know all the circumstances attending the purchase of the patent, says:

"I suppose there is no agreement between you and the St. Louis Stamping Co. preventing you or them from granting licenses without the written consent of the other."

It will be noted also that this letter was written after a consultation with a representative of the complainant, and that the suggestion as to the proposed agreement was that it should relate to "licenses or other rights under the patent," and not to a transfer of the patent or the consolidation or sale of the business of either of its owners. A copy of the letter was sent to the St. Louis Company and

there is no pretense that it did not express fully and completely the wishes of the complainant regarding the proposed agreement. After a number of conferences between the parties and their counsel an agreement was drawn up by the latter on or about December 8, 1897, which provided *inter alia* "that neither of the parties hereto will grant any licenses or privileges of any kind whatsoever under said letters patent without the written consent of the other party first having been obtained, and that neither of the parties hereto farm out or subdivide its interest in said letters patent without the like consent in writing." The St. Louis Company agreed to sign this contract and a time was fixed when the parties should meet and attach their signatures. On the appointed day the parties met and the complainant refused to sign. This incident seems to the court to establish two propositions—First, that there was no previous agreement such as is now asserted; and, second, that the complainant after suggesting that there should be a written agreement and dictating its terms and then repudiating it, is not in a position to assert the existence of any agreement, much less an agreement which prevented all independent action by either party. The reason given for thus withdrawing from the agreement which the complainant had proposed seems wholly inadequate upon the theory that the complainant was sincere in its desire to have its rights limited by a contract. There was no suggestion that the contract should be altered or extended so as to prevent in explicit terms an assignment of the patent. There was nothing but a flat refusal to sign and a positive breaking off of the negotiations. Upon the theory that the complainant after reflection had concluded that its interests were best subserved by leaving the future action of its officers wholly untrammelled, its conduct was perfectly natural.

Sixth. In the summer of 1897 negotiations were commenced looking to a consolidation of all the principal manufacturers of enameled goods, and, although the complainant, for personal and somewhat sentimental reasons, refused to enter the combination the project had the hearty and enthusiastic support of all the complainant's officers, including its president, Mr. Grosjean. The complainant promised to aid the project and abide by the agreement reached and every energy of both parties was bent to the consummation of the consolidation. The arrangements were finally consummated in the latter part of January, 1899. It was not until January 10, 1899, after all the negotiations and arrangements had been acted upon and the St. Louis Company bound to their fulfillment that the complainant abruptly and irrevocably withdrew from the consolidation. If thereafter the course pursued by the St. Louis Company was unfriendly and not in consonance with the former relations existing it must be conceded that there was some ground for its action. It had induced the constituent companies to enter into the consolidation upon the assurance that the complainant approved and desired it. To have abandoned the consolidation upon the withdrawal of the complainant would have subjected the St. Louis Company to just criticism and thrown the trade into confusion to the lasting injury of all concerned. Upon the ethical side of the question much might

be said, but so far as the issue in this suit is concerned it must be held that the St. Louis Company, confronted as it was with a distressing and perplexing dilemma, acted within its strict legal rights.

Seventh. Enough has been said to indicate the reasons which compel the court to refuse the relief asked by the complainant. Generally it may be said that the court is convinced that when the Claus patent was purchased no thought of subsequent complications entered the mind of either party. The parties had been on the most intimate and friendly terms for years, and they purchased the patent in the usual way, each taking a half interest. In neither of the written transfers is there a hint or suggestion limiting the rights of a licensee or joint owner of a patent. Had they dealt with each other upon the harsh supposition that they might one day become enemies it might have prevented subsequent misunderstanding, but they did not do so. Each had confidence in the other and for years peace and good will existed between them. When agreement was no longer possible and war was actually declared it is not surprising that the spear was substituted for the pruning hook. If the complainant has been injured by the consolidation the injury is one for which the defendant is not responsible. In administering equity the court should keep in mind the conduct of all and the rights of all as the law defines those rights. An attempt to do justice upon any other theory inevitably leads to injustice. The bill is dismissed.

CIMIOTTI UNHAIRING CO. et al. v. AMERICAN UNHAIRING MACH. CO.

(Circuit Court, S. D. New York. August 27, 1900.)

PATENTS—ANTICIPATION—MACHINE FOR REMOVING HAIRS FROM FUR SKINS.

The Sutton patent, No. 383,258, for a machine for removing hairs from fur skins, claim 8, considered on rehearing with reference to alleged anticipations, and *held* not anticipated and valid; also *held* infringed.

In Equity. Suits for infringement of patent. On rehearing. For former opinions, see 95 Fed. 474, 98 Fed. 297, and 99 Fed. 1003.

Goepel & Raegenar, for complainants.

Schreiter & Mathews, for defendant.

TOWNSEND, District Judge. This opinion relates to three cases, namely, this complainant against Max Bowsky, Karl Mischke, and the American Unhairing Machine Company. The defendant Mischke constructed the machines used by the defendant the American Unhairing Machine Company. The suit against Max Bowsky after final hearing was decided in favor of this complainant as to the eighth claim of the Sutton patent. Afterwards the case of this complainant against Karl Mischke, upon practically the same testimony, was opened, and evidence was introduced as to a machine known as the "Covert Machine," and this machine was claimed by defendant to show prior public use. This case also was argued at final hearing, and Judge Wheeler, following the opinion in the case against Bowsky, sustained the patent, and, upon independent con-

sideration, held the Covert machine not to be an anticipation. Subsequently the defendant again moved to reopen the cases, alleging an English patent to Lake as a complete anticipation of the patent in suit. All three cases have been opened, therefore, and further testimony has been taken as to this Lake English patent. In this discussion it is understood that the findings in the former cases will be followed, except in so far as they may be affected by the evidence as to the English patent. The defendant has abandoned practically all the contentions made on the final hearings in each of the other cases, and upon the oral argument herein seemed further to have abandoned the claim that the Lake patent is an anticipation. The claim as stated by him on the oral argument is that while the Lake machine, in view of the prior art, does not fully anticipate the eighth claim of the patent in suit, yet that features which distinguish said claim from the prior art are not infringed by the defendant Bowsky, because he does not use the mechanism to bring the brush forward, but uses a sliding motion of the brush on the offside of the stretcher bar, and not in front thereof, and that the defendant Mischke merely uses the Lake device minus the roll, D, and does not have the sliding motion of the patent. The Lake English patent was published in October, 1881. It has the elements common to all unhairing machines of this class, namely, a stretcher bar, means for intermittently feeding the pelt over said bar, a pressure plate or guard device on the feed side thereof, and knives for cutting the hairs. Its mode of operation is not very clear. The utmost that defendant's expert, who also appears as counsel, claims for it in his testimony and argument is that the instructions therein are "sufficient to enable a mechanic skilled in the art to produce the rearrangement or modification of the construction of the machine necessary to produce this result," namely, the result achieved by the complainant's and defendants' machines. The construction described in said patent is such that when the pelt is stretched over the stretcher bar the bar is moved toward two rolls, known, respectively, as D' and D. It is stated in the patent that these rolls are "brushes or brushing rolls * * * covered with card clothing or bristles or teazles to draw the fur on the skin over the edge of the bar, B," etc. It is not clear whether this machine is intended to operate in such a way as to first bring the stretcher bar in contact with D' or with D. If the former or more natural mode of operation is the one intended, the device does not disclose the inventive conception of the eighth claim of the Sutton patent. If operated in the opposite direction, counsel for defendants strenuously claims that it discloses the exact function and would produce the same result as that in the patent in suit. Much stress is laid by defendants' counsel on the suggestion that the rolls are to be covered with bristles or teazles. He therefore assumes that they are to be like the stiff brush of the Sutton invention, and would produce the same effect. The essence of the Sutton invention, so far as this Lake device is pertinent to the inquiry, is the motion of the brush in Sutton which brushes the fur downward from the working edge of the stretcher bar on to the offside thereof in order that the soft fur, having been already sep-

arated by the bristles from the stiff water hairs, may lie flat and be continuously held in that position away from the knives after the water hairs have sprung up. This construction peculiar to Sutton is contained in the machines of all the defendants.

The first inquiry is how far the Lake patent compares with the device in suit. The following considerations are relevant in this connection: (1) The Lake patent has been published for nearly 20 years, and during all this time, while various independent inventors have been working on the same lines and have made many valuable inventions in this art, no one, until Sutton, had found the way to so adapt the Lake or other devices of the prior art as to produce the desired successful result. (2) Within the past seven years the complainants have unhaired some six or seven million coney pelts, and the validity of the patent has been generally acquiesced in everywhere until very recently, except by this defendant Bowsky and by the owners of the Hedbavny patent, which patent was considered in the other case, and is not material here. (3) It seems clear from an examination of the Covert machine and patent and the Castle and Blank devices of the prior art that Lake's is nothing more than another form of the same device, embodying the same idea. Covert used a brush and a wiper. Blank used a card or comb. Lake used two brushes, and with his second brush attempted to do what Covert's brush, D', did. (4) Herein lies one of the important differences between Sutton and the prior art, namely, that in all the other machines two distinct devices were used to keep the fur down, and there was an interval of space between the two which permitted the fur to spring up, while Sutton accomplished the result previously sought to be accomplished by the use of two devices, by the use of a single device, by giving it a new motion, namely, a brushing motion on top of a stretcher bar, and by then continuously extending it downward on the offside, so that there was no opportunity for the fur to spring up during the operation.

The Lake patent does not seriously affect the meritorious position of the Sutton patent, as stated in the former opinion.

Counsel for the defendants says that Mischke does not infringe, because the patent obtained a few months ago, and under which he claims to construct his machine, does not show the mechanism "substantially as described, whereby the rotary brush moved upward and forward into a position in front of the stretcher bar." But it is proved that the Mischke construction, whereby the bar moved, while the brush wobbled, was the well-known equivalent of the patented construction. It is not claimed that there is anything novel or patentably different between Lake, Mischke, and the patent in suit, so far as the ordinary mechanical construction for giving the required motion is concerned.

Counsel for defendants says that Bowsky does not infringe, because he does not have mechanism to bring the brush forward, and does have a sliding motion of the brush on the offside of the stretcher bar, but not in front thereof. This, also, is an equivalent motion for the purpose of producing the same effect. Further, the uncontradicted testimony of the expert for complainant indicates that

the machines of both defendants do have substantially the motion covered by the patent in suit.

A thorough examination of the patents and machines considered in the former opinion, and a comparison of the Lake patent therewith, forces the conclusion that, while these constructions all came very close to that of the patent in suit, no one ever conceived the idea of such a brush as would separate the fur and hair, so arranged with such mechanism that it would by a single motion brush the fur downward and separate it from the water hairs and hold it continuously away therefrom until after the completion of the cutting operation. Even the counsel and expert for defendants admits that the Lake brush acts in the edge of the stretcher bar or in a line at right angles thereto. Finally, there is no evidence anywhere in the case that Lake's "brushes or brushing rolls" were the brush of the patent in suit. His use of these words only in connection with the words "card clothing, bristles, or teazles," without any description, would seem to indicate that he had in mind such a brush as was well known in the prior art. A decree may be entered for an injunction and an accounting.

On Motion for Settlement of Decree.

(December 19, 1900.)

Counsel for defendant has, upon various grounds, secured six hearings on various questions involved herein. These hearings have been characterized by charges and counter charges against counsel and clients, by attempted discussions of matters outside the record, and by other evidences of professional asperities which have tended to obscure the issues. In these circumstances, it has seemed necessary to state the following facts:

1. I have denied the motion of counsel for complainant to incorporate in the decree certain language construing the eighth claim, because it is contrary to practice to insert such language in a decree. I have not passed upon the contention of either party as to the construction of the eighth claim, except as appears from my opinion.

2. I have refused the request of counsel for defendant to incorporate into the decree the statement that nothing therein shall be understood as enjoining against the use of the prior Lake machine, for the foregoing reasons, and because such a statement would merely state the law.

3. I have declined to erase the word "continuously" from my opinion, without prejudice, however, to the contentions of the parties herein. The statements in which said word appears are correct, if understood with the following explanation: When the brush is on top of the working edge of the stretcher bar it revolves and assists in making the part, and then, in leaving the working edge and traveling over to the position 2 of the Sutton patent, the bristles carry down the fur onto the offside of the stretcher bar. In this sense the operation is continuous.

PROPFE v. CODDINGTON.

(Circuit Court of Appeals, Third Circuit. April 26, 1901.)

No. 20.

PATENTS—VALIDITY—INFRINGEMENT.

The Coddington patent, No. 307,746, claim 1, as to sealing-wax composed of certain designated substances and finely-ground fibrous material, *held* infringed by the Propfe patent, No. 363,922, claiming a sealing-wax composed of certain named substances and "fibers of asbestos wool."

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

Hector T. Fenton, for appellant.

E. H. Fairbanks, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. This is an appeal by August Propfe, the defendant below, from so much of the decree of the circuit court (105 Fed. 951) as sustained the validity of the first claim of letters patent No. 307,746, dated November 11, 1884, granted to George W. Coddington for a composition for sealing-wax, and adjudged that the defendant had infringed that claim of the patent. Referring to the specification of the Coddington patent, we find that the declared object of the invention is to produce a sealing-wax which shall possess to a great extent the qualities of wax composed largely of beeswax, but which shall be more tenacious and much cheaper. The product of the patented invention consists of a composition of resin, oil, or tallow or other oily substance or substances, and a fibrous material, such as cotton or hemp fiber, asbestos, or agatite finely ground, and mixed for ordinary purposes in the proportion of 16 parts resin, 1 to 2 parts tallow or oil, and 2 parts of the fibrous material. It is, however, stated that the proportion of resin or oil may be somewhat varied in case it is desired to make the wax harder or softer, increasing the proportion of resin in the former case, and the proportion of oil in the latter. It is also set forth that the fibrous material employed imparts to the wax a very tough and tenacious property. The first claim of the patent is as follows: "(1) A sealing-wax consisting of resin, oil, or oily substance or substances, and finely-ground fibrous material, substantially as and for the purposes specified." Upon an attentive examination of the proofs, we are convinced that the Coddington patent was not anticipated by the patent to Waterous, or invalidated by anything in the prior art disclosed in this record; and upon the question of the patentable novelty of the Coddington invention our judgment accords with that of the circuit court.

Was infringement shown? The composition of Propfe, the defendant below, is made up of resin, tallow (for which crude turpentine is sometimes substituted), fibrous asbestos wool, and stearic acid in the solid or cake form in which it is commercially sold. Now, the fibrous asbestos wool which the defendant employed in making his sealing composition may not be produced by grinding mechanism; but it is a finely divided fibrous material, not differing in appearance or other-

wise from the fibrous material of the Coddington invention. To all intents and purposes, it is the "finely-ground fibrous material" of the first claim of the Coddington patent. The call of that claim relates to the state of the fibrous material, not the method of reducing it to the named condition. In the course of his opinion the learned judge below said: "Stearic acid is a fatty or oily substance, and there is no evidence that would justify me in finding that it behaves otherwise in his [defendant's] composition than tallow or lard would behave." We are not persuaded that the judge here fell into any error. The positive testimony to that effect quite justified the finding that stearic acid is an "oily substance." Even the extract from the Century Dictionary and Cyclopedia (volume 7, p. 5922) which the appellant presses upon our attention states respecting stearic acid: "It burns like wax, and is used for making candles." Opening Webster's International Dictionary, we find this definition: "Stearic Acid (Chem.): A monobasic fatty acid, obtained in the form of white crystalline scales, soluble in alcohol and ether. It melts to an oily liquid at 69° C."

Upon the whole case, we agree with the conclusion of the circuit court that the first claim of the patent in suit is good and valid, and that infringement thereof by the defendant is shown; and accordingly the decree is affirmed.

THE PALMAS.

DALGARNO v. AMERICAN SUGAR REFINING CO.

(Circuit Court of Appeals, First Circuit. April 9, 1901.)

No. 351.

1. SHIPPING—CARGO DAMAGE—SEAWORTHINESS.

The chain locker of a steamship, which extended from the bottom to the main deck, was not water-tight, and during a voyage across the North Atlantic in winter sea water entered through the chain pipes, and damaged sugar which was stowed next the locker, without dunnage properly laid to protect it against leakage. The ends of the pipes on the fore-castle deck had been stopped or covered at the beginning of the voyage, but not sufficiently to withstand the action of the seas which broke over such deck, although the weather was no worse than should reasonably have been anticipated at that season of the year. *Held*, that the ship was liable for the injury to the cargo.

2. SAME—IMPROPER STOWAGE—HARTER ACT.

The provision of the Harter act exempting a vessel from liability for damage or loss to cargo arising from faults or errors of navigation or the management of the ship does not concern the proper stowage of cargo at the port of lading.

Appeal from the District Court of the United States for the District of Massachusetts.

Lewis S. Dabney and Eugene P. Carver (Edward E. Blodgett, on the brief), for appellant.

Frederick Dodge (Edward S. Dodge, on the brief), for appellee.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. This appeal grows out of a libel by the owner of sugar in bags, shipped by the *Palmas*. The decree of the district court was for the merchandise owner, and the vessel appealed. The vessel is a steel screw propeller of 1,598 net registered tons, and of about 4,300 tons "dead weight." She was seaworthy in all respects, unless as shown herein. She loaded at Hamburg with a general cargo, a large part of which was sugar; sailing from there on December 25, 1896, on a voyage to Boston via Newcastle. After taking coal at Newcastle, she sailed from there on December 30th, and arrived at Boston on January 18, 1897. She has a fore-castle deck, on the top of which are located her windlass and her chain pipes, leading into her chain locker. The locker extends from the floor of the ship to her main deck, and it was built of tongued and grooved $2\frac{1}{2}$ inch plank. On sailing from Hamburg, the tops of the chain pipes were filled with bagging and oakum, pounded in tightly, and then covered with cement. This filling was broken out in anchoring at Newcastle; but, after leaving Newcastle, the chain pipes were again covered. On January 2, 1897, the vessel experienced heavy weather, and so continued for several days, with head seas, but, until the night of January 5th, no injury was done the covering. On that night, or the morning of January 6th, during a very heavy storm, the covering was, by force of the sea, crushed in, and sea water entered the chain locker, a part leaking through, and injuring the sugar in litigation.

Whether or not the chain locker, as originally constructed of tongued and grooved plank, was water-tight, or should have been, we are not required to determine. One of the witnesses for the libellant testifies that on examining the vessel at Boston it appeared that the seams of the locker were not caulked, and that they had opened so that he could look through between the planks at half a dozen different places. There is no suggestion in the record by which this evidence is contradicted. Neither is there any suggestion that the vessel was so strained during the voyage as to open the seams. Therefore we must assume that the locker was, in these respects, in the condition in which it was when the ship sailed from Hamburg.

The learned judge of the district court found that the bags of sugar were stowed against the locker, and that they were not properly protected in view of the fact that it was leaky. The vessel called the port warden of Boston, who testified that there was considerable dunnage between the locker and the sugar. His testimony, however, is, in this particular, of an indefinite character. It is apparent that, while he found considerable dunnage, he did not take careful notice how it was laid, or whether it was properly laid to protect the sugar against the leakage. We fully agree with the learned judge of the district court that, inasmuch as the locker was leaky, the sugar was not properly protected from the liability of injury from the leaks. We also agree with him that the weather which the steamer experienced was only such as she might reasonably have been required to provide against at that season of the year on the North Atlantic Ocean. With a vessel of her size, crossing the North Atlantic in the winter months, it is a matter of com-

mon knowledge that the forecastle deck is liable to be washed by very heavy seas. It is, therefore, plain that it was the duty of the vessel to provide against this contingency, and, if her chain locker was not water-tight, to find some covering which would certainly stand the heavy weather at that season, or dunnage properly laid to protect a perishable article like sugar from the consequences of an inundation of the character which experience shows may well be expected.

We may add that, if there could be any doubt that the proper stowage of a cargo at the port of lading does not concern "damage or loss arising from faults or errors of navigation or the management" of the vessel, within the provisions of the Harter act, the point was determined against the vessel in *Knott v. Worsted Mills*, 179 U. S. 69, 21 Sup. Ct. 30, 45 L. Ed. 90. We also will add that, with reference to making due provision for heavy weather on the North Atlantic in the winter months, the learned judge of the district court required of the *Palmas* no more than was required in *The Edwin I. Morrison*, 153 U. S. 199, 209, 211, 14 Sup. Ct. 823, 38 L. Ed. 688, and in *The Majestic*, 166 U. S. 375, 386-388, 17 Sup. Ct. 597, 41 L. Ed. 1039. We agree fully with his conclusions.

The decree of the district court is affirmed, with interest, and the costs of appeal are awarded to the appellee.

MENCKE v. A CARGO OF JAVA SUGAR ex SHIP BENLARIG et al.

(Circuit Court of Appeals, Second Circuit. April 3, 1901.)

No. 96.

SHIPPING—CONSTRUCTION OF CHARTER—EXPENSE OF LIGHTERAGE.

A charter of a vessel to carry a cargo of sugar from Java provided that she should discharge as near the port of discharge as she could safely get, and deliver the cargo, always afloat, in a customary place and manner, at the dock directed by charterers. It also contained a not unusual provision that lighterage, if any, to deliver the cargo at the port of destination, should be paid by the receivers, any custom of the port notwithstanding. As authorized by the charter, New York was designated by the charterers as the port of delivery, and the dock of the consignees, which was above the Brooklyn Bridge, as the place of discharge. Such dock was a safe one, at which the vessel could discharge afloat, and was a customary place, from 75 to 85 per cent. of all sugar received at New York being discharged at docks above the bridge, but the ship was equipped with immovable iron masts of exceptional height and unusual construction, which prevented her from passing under the bridge unless they were cut off, and she was consequently discharged by lighters. There was no custom of the port in respect to such cases, and the evidence showed but three previous cases in which vessels had been unable to pass the bridge by reason of the height of their masts, and in such cases the masts had been cut. *Held*, that the provision of the charter requiring the consignee to pay the cost of lighterage was not intended, and could not fairly be construed, to apply to conditions so unusual; and that since the inability of the vessel to reach the dock, which 99 per cent. of all vessels could reach safely, was due solely to her exceptional construction, the cost of lighterage must be borne by the owners, in the absence of express provision in the charter to the contrary.

Appeal from the District Court of the United States for the Eastern District of New York.

This is an appeal from the decree of the district court for the Eastern district of New York in favor of the libellant. The facts of the case are stated by the district judge (99 Fed. 298) as follows: "The Benlarig was chartered in London, July 1, 1898, by her owners, to Erdmann & Sielcken, of Batavia, to carry a cargo of sugar from Java. The charter party, among other things, states that the vessel, 'being so loaded (and dispatched), shall (unless ordered to a direct port of discharge, on signing last bills of lading) therewith proceed to Barbadoes, thence Queenstown or Falmouth (as directed by charterers or their agents) for orders, to discharge always afloat, either at a safe port in the United Kingdom or on the continent of Europe between Havre and Hamburg (both included), Rouen excluded, or at option of charterers to order vessel from Barbadoes to proceed to Delaware Breakwater for orders, to discharge at New York, or Boston, or Philadelphia, or Baltimore, or so near the port of discharge as she may safely get, and deliver the same, always afloat, in a customary place and manner, in such dock as directed by charterers, agreeably to bills of lading, on being paid freight in full of all port charges, pilotage, and primage as customary at port of discharge,' etc. Section 4 of the charter party provides: 'All goods to be brought to and taken from alongside of the ship, always afloat, at the said charterer's risk and expense, who may direct the same to the most convenient anchorage; lighterage, if any, to reach the port of destination, or deliver the cargo at port of destination, remains for account of receivers, any custom of the port to the contrary notwithstanding.' From Batavia the ship went to Barbadoes for orders, pursuant to which she came to New York. Bills of lading had been issued for the cargo, making it deliverable at the port of discharge, as per charter party, to Messrs. Winter & Smillie as agents, or to their assigns, he or they paying freight for the said sugar as per charter party. The ship's documents were delivered to Czarnikow, MacDougall & Co., of New York, who transferred the same to the claimants. After due notice of the ship's arrival, the claimants gave orders in writing for the discharge, above the Brooklyn Bridge, at their refinery at the foot of Pearl street, Brooklyn. As the master considered that two of the ship's masts would not go under the bridge, arrangements were made between the parties for delivering the cargo by lighters, and payment of the expense thereof was deferred for subsequent determination. The question here is whether such expense should fall upon the libellant or claimants. The Benlarig was a square-rigged, iron ship. Her three masts were built up solid from the bottom to the top, and were composed of cylindrical plating riveted together, and internal transverse angle iron braces. * * * The clear height of the Brooklyn Bridge above the mean high water is 135 feet, and the mean rise and fall of the tide is $4\frac{5}{10}$ feet. At dead low water the ship could not pass under the bridge without cutting off about 5 feet from the mainmast and foremast, while safety required greater removal from such masts to avoid the effect of any disturbance of the water. After the ship should have been discharged it would be necessary to cut off an additional portion of such masts, and also some part of the mizzenmast, to allow her to repass under the bridge, unless a return cargo could have been taken above the bridge, or the ship could have gone out by the East river and Long Island Sound. There were but two means of escaping this mutilation of the masts, for the purpose of discharging the cargo: First, by approaching New York from the east, through Hell Gate. All shipping experts called by the claimants testified that they had never heard of a ship from Java pursuing that course. It may, therefore, be concluded that such alternative was contrary to the expectations and understanding of all parties to this contract, or of any other contract for the carriage of sugar from Java. The remaining alternative was to lighter the sugar; and the question is upon which party the expense of such lighterage should fall."

There is no custom in the port of New York respecting the course to be pursued by vessels directed to discharge above the bridge, which have immovable masts too high to permit a passage beneath the bridge. Three of such cases were known by the witnesses to have existed, and in these the masts were cut,

One of the vessels had a steel mast. Vessels with immovable steel masts of that height have not been built until within the last 10 years, and are very few in number,—perhaps not over a dozen. From 75 to 85 per cent. of the sugar arriving at New York in vessels is discharged at the docks of refineries above the bridge. Charters sometimes provide that the vessels shall not go above the bridge, and sometimes that charterers have the right to order the ship above the bridge, they paying the expense thereof. The expense of housing the masts or of cutting a wooden mast is not very large. The form of articles 1 and 4 of the charter in question is a very familiar one to sugar refiners.

Wilhelmus Mynderse, for appellants.

J. Parker Kirlin, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge (after stating the facts as above). On the construction of the two provisions of the charter party which apparently are applicable to this case, the question, not easy of solution, arises. By article 1, the vessel was to discharge as near the port of discharge as she could safely get, and deliver the cargo, always afloat, in a customary place and manner, at the dock directed by charterers. New York was one of the designated ports, and no question arises as to her safety. In this respect, the facts of the case differ from those in *Re Arbitration between Goodbody & Co. and Balfour, Williams & Co.*, 8 Asp. 503, in which Manchester was held not to be a safe port for the vessel in question, because, by reason of the height of her masts, she could not get under Runcorn Bridge, about 24 miles from Manchester, and about 12 miles from the entrance of the canal, and the ship would have to be dismantled 24 miles from the port. The Benlarig was in the port of discharge, and the Arbuckle dock was a safe one, where she could be always afloat, and a customary place for the discharge of sugar. The exceptional height of her masts and the unusual character of their construction alone interfered with the vessel's performance of her part of the contract, and, unquestionably, but for article 4, she would have been obliged either to deliver or to pay for the damages occasioned by nondelivery at the Arbuckle dock. Article 4 provides that lighterage, if any, to deliver the cargo at the port of destination, is to be paid by the receivers, any custom of the port notwithstanding. The argument of the libellant by which the two claims are sought to be made harmonious, and in which the district judge concurred, is that the cargo is to be delivered at the usual and customary place designated by the charterers or by the single consignee of the entire cargo; but if such delivery is prevented by a permanent cause, such as lack of depth of water or permanent obstructions at the port, and the cargo must be lightered, the expenses of such lightering are to be borne by the charterers. In the application of the construction, the libellant urges that as the Brooklyn Bridge prevented a delivery beyond it, and as a mutilation or destruction of the ship's masts would be a serious injury, and recourse must be had to lighters, the state of facts provided for by article 4 existed.

Article 4 is a well-known provision, and was introduced into charter parties originally to provide for the payment of lighterage

when the vessel was unable to deliver the cargo at the dock to which she had been assigned from a cause to which vessels generally might be expected to be subject, such as shoal water or a bar; and if the Brooklyn Bridge was an obstruction to vessels generally, or to such a proportion of vessels as to have become a well-recognized impediment to navigation, the construction of the libelants would be correct. This form of charter is the one commonly used in the sugar trade for the purpose of meeting a customary condition of affairs in different ports, and in regard to which a custom of the port would naturally exist. The facts in this case were exceptional and eccentric. When vessels having too high masts which can be lowered are ordered to go above the bridge, the masts are housed and the vessels proceed. In the rare instances which appear in the record of immovable masts of excessive height they were cut. In this case the vessel had steel masts of excessive height, and a recent, exceptional, and immovable method of construction, which makes the repair of the masts a serious affair. The owners knew, or had reason to know, of this peculiarity, but did not insert a provision in the charter that she should not be required to go above the bridge, but preferred to rely upon article 4. The case is that of the claimed application to novel circumstances of a clause intended for a different set of circumstances, and is as if a vessel, unable by reason of its novel construction to reach a dock which 99 per cent. of vessels do reach, should desire to place the expenses of lighterage upon the charterers under article 4. Such an attempt would be, and the facts of this case are, within the letter of the article, but not within its spirit. The decree of the district court is reversed, with costs of this court, and the case is remanded, with directions to dismiss the libel, with costs.

NEW YORK, N. H. & H. R. CO. v. PISCATAQUA NAV. CO. et al.

(Circuit Court of Appeals, First Circuit. March 27, 1901.)

No. 363.

1. NAVIGABLE WATERS—OBSTRUCTION OF CHANNEL BY FALLEN DRAWBRIDGE—RIGHT OF ACTION FOR PRIVATE INJURY.

Where the owner of a bridge over a navigable channel negligently permitted the draw of the bridge to improperly obstruct the channel, the owner of sea-going vessels which, before the creation of the obstruction, had sailed with cargoes for points of discharge in the channel above the bridge, and of vessels which were above the bridge when the obstruction was created, may, if the vessels were prevented by the obstruction from passing up and down the channel when necessary to do so, maintain suits in admiralty to recover damages in the way of demurrage, regardless of the local law.

2. SAME—INJURY TO SUSTAIN ACTION—REMOTENESS OF DAMAGES.

A tug engaged in towing vessels to and from a channel to which they resort, which channel is negligently and improperly obstructed temporarily by the draw of a bridge, but which tug was accustomed to deliver and receive its tows below the bridge and had no occasion to pass it, suffers no actionable injury by reason of the obstruction merely because it loses the towage of vessels which, except for the obstruction, would have used the channel obstructed.

Appeal from the District Court of the United States for the District of Massachusetts.

See 89 Fed. 362.

Josiah H. Benton, Jr., and Charles F. Choate, Jr., for appellant.

William M. Richardson, for appellees.

Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

PUTNAM, Circuit Judge. This is a proceeding in admiralty, arising out of claims in behalf of sundry vessels on account of an obstruction of a navigable channel by the falling of a draw in a bridge of the New York, New Haven & Hartford Railroad Company. The channel is the only communication between South Bay, so called, in Boston, and the harbor; and its obstruction prevents ingress and egress to and from South Bay, and, if unlawful, would undoubtedly constitute a public nuisance. The bridge and its draw were lawfully erected and maintained across the channel, and therefore they could not become a public nuisance, except through want of reasonable care in reference thereto. No question, however, is made by the parties on this particular point.

The damages claimed are in the way of demurrage for the detention of the various seagoing vessels to which the libel relates. These fall into three classes: First, vessels which had passed the draw-bridge loaded, discharged their cargoes, and were ready to proceed to sea when the draw was permitted to obstruct the channel, and were prevented from so doing by the obstruction; second, loaded vessels, obstructed in proceeding up the channel to discharge at the proper places in South Bay to which they were consigned, and which had sailed on their voyages before information was received that the obstruction existed; third, a tug owned by the Piscataqua Navigation Company, one of the libelants.

The decree of the court below included damages in behalf of the three several classes named. No specific assignment of error was made relating to this classification, or on account of the tug; but, before the commissioner of the court below, objections were taken to an allowance in behalf of the tug, and this was followed by proper exceptions, and the question as to her has been discussed at bar. In any event, we cannot ratify by our silence an allowance of damages in her behalf. The libelants state that she was used solely for towing cargo-carrying vessels to the bridge, and that, by reason of the fall of the draw, they were unable to use her, and so lost the value of her services for several days. The proofs show that she was engaged entirely below the bridge, and that there was no occasion for her to pass it, so that she was not, in truth, obstructed by it; and she merely lost her services in towing vessels which did not go up the channel, but which would have gone up except for the obstruction.

If we were bound by the decisions of the local courts (that is, of the supreme judicial court of Massachusetts), probably we would be compelled to reverse the decree of the district court; but Workman

v. *City of New York*, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. Ed. 314, directly holds that in a proceeding of this character we are governed by a uniform admiralty rule.

The general principle is sufficiently stated in *Pol. Torts* (5th Eng. Ed.) 376, as follows:

"A private action can be maintained in respect of a public nuisance by a person who suffers thereby some particular loss or damage beyond what is suffered by him in common with all other persons affected by the nuisance."

The difficulty arises in determining what constitutes a "particular loss or damage," within the meaning of the rule. In view of the conflicting authorities, it is useless for us to consider anything except what comes from the federal courts. Having regard to our disposition, which we have several times expressed, to follow the decisions of the circuit courts of appeals in other circuits, except in cases where they have clearly overlooked well-settled principles of law, we might well feel bound by that of the circuit court of appeals for the Eighth circuit in *Railway Co. v. Parsons*, 20 C. C. A. 481, 74 Fed. 408, and therefore holden to affirm the decree of the court below, except so far as it relates to the tug. In that case it appears that a suit at common law was brought to recover damages for an alleged unlawful detention, by means of a bridge across a public navigable river of the United States, of a steamboat and two barges with which the plaintiff below was navigating the stream. The circumstances were such that the bridge was held to be an illegal structure and a public nuisance. The action, like the libel at bar, was brought only for damages by way of demurrage. The judgment below was for the plaintiff below, and it was affirmed on appeal. It is true that the particular question whether the owner of the vessels was entitled to maintain such an action was not discussed; but the court seems to have assumed that there is no doubt on this point, and (page 485, 20 C. C. A., and page 412, 74 Fed.) it said unhesitatingly that the defendant was liable to the plaintiff for damages. We, however, think ourselves concluded by the decisions of the supreme court. The leading case is that of *Pennsylvania v. Wheeling & Belmont Bridge Co.*, which appears in the Reports at four different places. Our reference is especially to 13 How. 518, 557, 559-562, 564, 578, 14 L. Ed. 249. The case is so well known that we need not describe it at any length. It is sufficient to say that it was a proceeding in equity, and related to a bridge which was a public nuisance, and that the bill was sustained. It was held that the state was not suing in its sovereign capacity, but by virtue of its proprietorship of certain canals, which gave it a revenue interest in the navigation of the public river which the bridge obstructed. The precise point of the case in this particular was stated in *Louisiana v. Texas*, 176 U. S. 1, 19, 20 Sup. Ct. 251, 257, 44 L. Ed. 347, 354, as follows: "In *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 13 How. 519, 14 L. Ed. 249, the court treated the suit as brought to protect the property of the state of Pennsylvania."

The case was next reported in 18 How. 421, 15 L. Ed. 435. The court, at page 431, 18 How., and page 437, 15 L. Ed., refers to the right of private parties to a remedy against public nuisances; and

it puts the remedy at common law for demurrage, and that in equity for an abatement of the nuisance, on parallel lines. In *Irwin v. Dixon*, 9 How. 10, 13 L. Ed. 25, the real issue related to jurisdiction in equity with reference to nuisances, and no conclusion was reached which aids the case at bar. *Railroad Co. v. Ward*, 2 Black, 485, 17 L. Ed. 311, is in some respects an authority. There a bill brought by the owners of some steamboats, charging that a bridge over a navigable stream was a common nuisance, and asking relief against it, was dismissed on general grounds touching proceedings in equity as to nuisances. The court divided, three judges being in favor of sustaining the bill. The case is stated at pages 491, 492, 2 Black, and page 314, 17 L. Ed.; and, apparently, so far as the parties were concerned, the whole court thought the bill might be sustained. Otherwise, the question on which the bill was dismissed might never have been discussed. The question whether or not proper parties were made came directly in issue, so that the case might be said to be throughout in favor of individual relief in equity against public nuisances on navigable rivers, even where they merely cause detention. Its effect, however, may not be entirely clear, in view of the expression on page 492, 2 Black, and page 314, 17 L. Ed., that an individual seeking to enjoin a public nuisance sues rather as a public prosecutor than on his own account. While this observation was directly in issue in the case, because *Ward* sued without joining his co-owners in the same steamboats, yet its effect must be regarded as met by what is stated in *Gilman v. Philadelphia*, next referred to.

Gilman v. Philadelphia, 3 Wall. 713, 18 L. Ed. 96, was a suit brought by individuals on account of a bridge over the Schuylkill river, claimed to be a public nuisance. The bill was dismissed on the ground that the bridge was not a nuisance, but no question was made as to parties. It was brought by the owners of wharf and dock property from which access was cut off by the bridge; but the case becomes of use in view of what the opinion says, at page 722, 3 Wall., and page 98, 18 L. Ed., about *Pennsylvania v. Wheeling & Belmont Bridge Co.* In observing on the claim that the complainant was not specially interested in navigation, and could not interfere for its protection, it puts the owner of a wharf and the owner of vessels affected by a bridge which is a public nuisance on the same footing. Also, it lays down a general rule that, where a public nuisance is productive of a specific injury to an individual, he may make it the foundation of an action at common law, as well as, under proper circumstances, of a proceeding in equity. Of course, in making this observation, Mr. Justice Swayne, who delivered the opinion, had regard to the peculiar circumstances existing in each of the cases considered, so he must be regarded as having held that, under their respective circumstances, the owner of steamboats in the one, and the owner of the wharf in the other, could maintain an action at common law. *Hamilton v. Railroad Co.*, 119 U. S. 280, 7 Sup. Ct. 206, 30 L. Ed. 393, is not in point, because there it was held merely that the plaintiff could not recover for a temporary inconvenience arising from the exercise of an authority given by statute. Any further expressions, therefore, found therein are dicta.

We find no other decisions of the supreme court pertinent to the precise question before us. The result of those we have cited is that the libelants in this case would have had an undoubted remedy in equity, so far as concerns seagoing vessels which had occasion to pass the draw in question with cargoes consigned to South Bay, or with reference to the same vessels returning to sea after discharging. So far, the cases cited are directly in point. The only question which the supreme court has not directly ruled on is whether or not, in addition to relief in equity, vessels situated like these in question have a remedy at common law for damages in the way of demurrage on account of mere detention. We have seen that in at least two instances the opinions read in behalf of that court approve such a remedy equally with that in equity. Moreover, it having been thus established that an individual has, under these circumstances, a cause of action even in equity, it would seem to follow that the supreme court has also indirectly established that, so far as concerns all the vessels involved in this appeal, except the tug, the owners are within the class entitled to relief; otherwise, they could have no remedy even by a bill in equity. It being established that they are of that class, the nature of the action follows, of course, the nature of the injury and of the relief necessary. We can conceive of no sound principle which, under the circumstances, would give a right to an individual to proceed by a bill in equity, and exclude a right to proceed by a suit at common law for damages. We must also remember that admiralty is not restricted to the narrow rules of the common law, and that it acts on the broad principles of equity. This is so trite that we hardly need cite authorities in its support; but we have expressly applied it in *The Iris*, 40 C. C. A. 301, 100 Fed. 104, 109, and it was stated generally in *O'Brien v. Miller*, 168 U. S. 287, 297, 18 Sup. Ct. 140, 42 L. Ed. 469. Therefore, even if there were no remedy at the common law, the district court, sitting in admiralty, was justified in proceeding on the large principles of the chancery courts.

The tug, however, suffered no direct injury by the fall of draw. The only question in which she is concerned is whether, in consequence of the obstruction of the channel, she probably had a diminished employment in towing vessels. The impossibility of estimating the damages which arise from contingencies of this character, and of computing the contingencies themselves, is such that there are no rules which enable courts to give relief under such circumstances. Therefore the decree of the court below must be modified to the extent of remitting all damages allowed on her account.

Under the circumstances, and on well-settled rules of practice, neither party has prevailed on appeal to such an extent as to justify awarding costs in this court in its behalf.

The decree of the district court is reversed, and the case is remanded to that court, with instructions to enter a decree in favor of the libelants for the damages found by it with reference to all the vessels involved, except the tug *Piscataqua*, with interest to the time of the final decree, and for the costs of the district court, and to deny all damages so far as the tug is concerned; and neither party will recover any costs of appeal.

HARTLEY v. AMERICAN STEEL-BARGE CO.

(Circuit Court of Appeals, Eighth Circuit. April 10, 1901.)

No. 1,423.

NAVIGABLE WATERS—NEGLIGENT OPERATION OF DRAWBRIDGE—INJURY TO PASSING VESSEL.

The owner of a drawbridge across a navigable channel in the Duluth-Superior harbor held liable in damages for injury to a barge in tow, on the ground that the bridge tender negligently failed to give the signal to warn the approaching tug and tow of an obstruction which prevented the opening of the draw until it was too late for the barge to stop, in consequence of which she came in collision with the draw.

Appeal from the District Court of the United States for the District of Minnesota.

M. H. Boutelle (Thomas S. Wood, on the brief), for appellant.

H. R. Spencer (F. E. Searle, on the brief), for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. On June 22, 1899, a barge belonging to the American Steel-Barge Company, the appellee, heavily laden, was being towed down the channel of the Duluth-Superior harbor by a tug called the "Record." On its way down it had to pass through two drawbridges; the upper or most westerly one being a bridge which belonged to the Northern Pacific Railroad Company, and the lower or most easterly one being a bridge which belonged to the Duluth-Superior Bridge Company. This latter bridge spanned the channel between Rice's Point, in the state of Minnesota, and Connor's Point, in the state of Wisconsin, and was used by wagons, street cars, and pedestrians. At the date last named it was in charge of Guilford G. Hartley, as receiver of the Duluth-Superior Bridge Company, the appellant. The two bridges were about 2,078 feet distant from each other. In making the passage through the draw of the Duluth-Superior bridge, the barge came in contact with the swinging span, and was injured to some extent, as the owner of the barge claimed, in consequence of the negligence of the draw tender, who was one of the receiver's employés. To recover the damages which the barge sustained in consequence of the collision, the American Steel-Barge Company exhibited its libel in personam in the district court of the United States for the district of Minnesota, sitting at Duluth, against the receiver, and obtained a decree against him in the sum of \$1,043, to reverse which the present appeal was taken.

On the trial below it was claimed by the libellant, and the same contention is made here, that the bridge tender was negligent in permitting the street car to enter upon and cross the draw after the tug which had the barge in tow had given the usual signal to open the draw, and that such act was a proximate cause of the collision. We have given the testimony on this point careful consideration, and have become satisfied that the draw was closed, and that the street car had received the signal to cross the draw, when the tug sounded its whistle to swing the draw. The tug, with the barge in tow, was

at that time clearing the draw of the Northern Pacific bridge, and was distant at least 2,000 feet from the lower bridge. Abundant time then remained to permit the street car to cross the draw, and to swing it for the safe passage of the approaching tow, if nothing had happened to delay the car. It transpired, however, that the draw tender began to swing the draw before the rear platform of the car had fully cleared the same; the result being that the motion of the draw was arrested by coming in contact with the rear vestibule of the car, and the car was derailed. Some delay was thereby occasioned, to which the collision seems to have been attributable. If the case disclosed no conduct on the part of the draw tender which was culpable other than his permitting the street car to come upon the swinging span before the tow had made the passage, we should be of the opinion that he exhibited no such want of ordinary care as would justify a recovery. The tug was so far distant from the draw when it gave the signal to open the same, and the span could be swung in such a short space of time, that the draw tender was justified in believing that no risk would be incurred in permitting the street car to pursue its journey. It was his duty to act in such a manner as would interrupt travel across the bridge as little as possible, when he could do so without exposing water craft to risk of injury.

The lower court found, however, and in that view we are compelled to concur, that the bridge tender did not exercise reasonable care and diligence after the draw had collided with the end of the street car in the manner above stated. The swinging span of the bridge was provided at its center, where the draw tender was stationed, with a large red ball, which was designed to be raised so as to advise approaching water craft when the draw could not be swung for any reason; and there appears to have been unreasonable delay on the part of the draw tender in raising this ball after the motion of the draw was arrested, and he became aware of the fact. It should have been raised at once when the motion of the draw was obstructed, and it was uncertain how long it would remain obstructed, so as to warn the tow not to approach too closely until the draw was free. The bridge tender admits that he discovered the difficulty of opening the draw when the tow was at least 1,000 feet distant therefrom, or about midway between the two bridges. He claims to have raised the ball at that time, and if he had done so it is probable that the receiver could not have been adjudged guilty of culpable negligence. In opposition to his testimony, however, as to when the ball was raised, there was the testimony of several witnesses to the effect that it was not raised until the tow was within 200 or 300 feet of the draw. The trial court so found, and the weight of testimony confirms that view. When the tow had approached within the distance last specified, and the red ball was raised, every effort seems to have been made by the men in charge of the tow to arrest the forward motion of the barge. The tug began to back up stream, and the barge, which was provided with no machinery for its own propulsion, threw out both of its anchors, but such efforts failed, and the collision occurred.

In an admiralty case of this sort, which involves only questions of fact, we are bound to attach great importance to the finding of the trial judge, who has a better opportunity to judge of the credibility of witnesses, and we cannot undertake to reverse such a finding by the trial court unless it appears to have been clearly against the weight of evidence. The City of Naples, 32 U. S. App. 613, 16 C. C. A. 421, 69 Fed. 794, 796. Not only this rule, but our own view respecting the weight of the evidence, compels us to affirm the decree below upon the ground on which the decree was rested by the trial court.

CONNOLLY et al. v. THE BRANDYWINE GRANITE CO. NO. 6.

(District Court, E. D. Pennsylvania. April 6, 1901.)

Nos. 7, 10.

COLLISION—BARGE AND ANCHORED DREDGE—IMPROPER ANCHORAGE AND INSUFFICIENT LIGHTS.

A dredge lay anchored in the channel of the Schuylkill river, with her two scows abreast between her and the shore, the three occupying over 80 feet in width, when, during a foggy night, a barge in tow of a tug, coming up the river in line with the dredge, came in collision with it, and both were injured. The barge had no rudder, and her movements were controlled entirely by those of the tug, to which she was fastened by two lines. The dredge carried two lights, but they were not such as were required by the Philadelphia harbor regulations, nor so placed, being about 3 feet below the upper deck. She was also in violation of the spirit of such regulations, by lying in the channel with the two scows abreast of her. She had no watch, and gave no signals. She was directly in the path of the tug, and her lights were not seen by the latter, which, however, succeeded in escaping collision after the outline of the dredge was seen, but not in time to save the tow. *Held*, that as between the dredge and barge, the tug not being a party, the dredge was solely in fault for the collision.

In Admiralty. Cross libels for collision.

Frank P. Prichard, for the International.

Curtis Tilton and Andrew C. Gray, for the Brandywine Granite Co. No. 6.

J. B. McPHERSON, District Judge. Nicholas Connolly and Michael Connolly are the owners of the steam dredge International, which was in collision with the barge Brandywine Granite Co. No. 6 on the night of January 25, 1898; and these suits are cross libels between the barge and the dredge, each accusing the other of negligence and asserting her own innocence. At the time of the collision the barge was in tow of the tug Rambler, but as the tug has not been served with process in either suit, and is not before the court, the present inquiry will be confined to the respective liability of the dredge and the barge.

The collision took place in the Schuylkill river, under the following circumstances: The dredge was not employed upon any work at the time, and was taking advantage of her idleness to have some repairs made to the dipper. She was anchored by her four spuds

near the eastern bank of the river, facing down stream. Between her and the shore, the two scows that accompanied her were lying abreast. The dredge is 36 feet wide, and each scow is 25 feet wide, so that, except at low tide, when the innermost scow was upon the mud, the three vessels occupied more than 80 feet of the river, which at this point is not wide. The dredge was in at least 12 feet of water. Her length of hull is 112 feet, and her crane and dipper project 30 or 40 feet further. There is some dispute whether she was lying parallel with the bank, or at such an angle that her crane projected towards the center of the stream; but, in the view I take of the case, it is not necessary to decide this controversy. The dredge has two decks, about 8 or 9 feet apart, and between them, upon the night in question, a lantern was hung at the bow and at the stern, about 3 feet below the upper deck. There was no light above the deck, and the lanterns did not display a clear, uniform, and unbroken light, capable of being seen all around the horizon at a distance of at least one mile. There was no watchman on duty, and, although a fog shut down upon the river towards midnight, no signals were given.

The barge and tug left Christiana creek on the morning of January 25th, the barge carrying on deck a cargo of stone bound for Gray's Ferry Bridge, a point on the Schuylkill above where the dredge was lying. About 5 o'clock in the afternoon, the tow tied up at the mouth of the river because of a severe snow storm, and remained there until half past 11, when the snow ceased, and the captain of the tug believed that the weather was about to clear. Accordingly, he started up the river, being himself in charge of the wheel, having proper lights set, and having a lookout stationed on the bow of the tug, a few feet away from the wheel. One man was on the barge, and he was also on duty as a lookout. The barge was 105 feet long and 30 feet wide, flat-bottomed, with square corners to her bow and stern, and was drawing 7 feet of water. She was fastened to the tug by two lines, one from each bow corner, leading to a bitt at the stern of the tug. The barge had no rudder, and her direction could only be changed by changing the direction of the tug. The tide had recently turned when the tug and tow started, and was flowing up the river. As Penrose Ferry Bridge was reached, a heavy fog shut down, so that objects could not be seen more than a short distance away. The tug was on the eastern or starboard side of the river, where there was plenty of water for the barge and herself, the tug drawing only 6 feet 3 inches; and she proceeded cautiously at very slow speed, making frequent soundings to be sure that she continued to have sufficient water. There are no buoys in the river between the mouth and the spot where the dredge was lying. The tug also gave the proper fog signals, but, of course, as the dredge gave no signals at all, none was heard in reply. Either owing to the descent of the fog or to the improper position of the dredge's lanterns, her lights were not seen, and her presence was not otherwise known to the tug and barge until she appeared as a dark object not far away and directly in front. The tug changed her course immediately and succeeded in escaping, but the distance

was too short to permit the barge to be drawn past in safety, and the barge and dredge came into collision, some injury being done to each.

As I have already said, the tug is not a party to these suits, and I shall therefore refrain from expressing any opinion concerning her culpability, especially as a suit is pending in the district of Delaware between the dredge and the tug, in which their liability to each other will be determined. Between the dredge and the barge, however, I am required to determine the question of fault; and upon this point I am of opinion that the dredge was negligent, and that the barge was not to blame. The negligence of the dredge seems to me indisputable. She was violating the spirit, at least, of the following regulation of the harbor of Philadelphia:

"Vessels must not anchor at any place in the channel of the river Schuylkill, nor lie at any wharf in that river more than two abreast, without the permission of the harbor master."

She was certainly in the channel for vessels of light draft, and, although she was not lying at a wharf, she was taking up more of the navigable portion of the river than this regulation intended to allow any vessel to occupy. She was also violating the letter, as well as the spirit, of another regulation, which provides as follows:

"A vessel under 150 feet in length, when at anchor, shall carry forward, where it can best be seen, but at a height not exceeding 20 feet above the hull, a white light in a lantern, so constructed as to show a clear, uniform and unbroken light, visible all around the horizon at a distance of at least one mile."

The lanterns of the dredge did not obey this rule. The place where they were hung was not where they could best be seen, and neither light could have been visible, even in clear weather, at the distance of a mile. Whether, if the light had been properly placed, it could have been seen in time by the tug, in spite of the fog, it is impossible to decide. But the dredge should have obeyed the regulation, and then, if her light had been so obscured by the fog as not to be visible, she would not have been to blame. As matters stand, while one cannot be sure upon this point, I think the dredge ought to have shown clearly that her fault in this respect had no effect in producing the collision. And, finally, I think the dredge was negligent in not having a watchman on duty, and in not sounding fog signals, as required by the act of congress. It may very well be that the obligation to maintain a watchman upon duty and to sound signals in a fog is not always and everywhere obligatory upon a vessel at anchor; but I think, where a vessel is in a position such as the dredge occupied, in a narrow river, and in water deep enough to be used by vessels in light draft, she certainly had sufficient reason to anticipate some degree of danger, and ought to have taken every means in her power to provide against it. Vessels ascending the river had no reason to expect to find her where she was, and were under no unusual duty to look out for her. But as she was anchored in a river known to be used by vessels of light draft, and was lying in water navigable for such vessels, she was, I think, bound to recognize that there was reasonable danger of collision, and to take proper precaution.

The barge, in my opinion, is without blame, because her movements were entirely under the control of the tug. There was no negligence in permitting herself to be fastened by the two bow lines. This is a usual method of towing, and, moreover, if she had been lashed to the tug, the piers of the bridges over the Schuylkill could not have been safely passed. The barge contributed nothing to the injurious result. She did not control the movements of the tug, nor direct her where to go, nor what to do. So far as appears, the exclusive right to control the voyage rested with the captain of the tug, and the barge was purely passive. She could not change her own course, but was dependent for guidance upon the movements of the tug.

The libel filed on behalf of the dredge is dismissed, with costs. In the suit brought by the barge, a decree may be entered in favor of the libellant.

THE NEW YORK.

(Circuit Court of Appeals, Sixth Circuit. April 2, 1901.)

No. 889.

1. ADMIRALTY—REVIEW ON APPEAL—QUESTIONS NOT PRESENTED TO DISTRICT COURT.

A draft of a decree presented to a district court by a respondent in a suit for collision, to be entered under a mandate from the supreme court, and which was properly refused because it permitted respondent to recoup a portion of the cargo damage awarded in favor of interveners in a manner which made such recoupment, in effect, at the expense of other cargo owners, and for that reason did not conform to the mandate, which required a decree against respondent for all cargo damage, cannot be brought into the record on appeal from the decree entered, to be considered by the appellate court as an application for recoupment presented to the district court on its merits, as a matter arising subsequent to the mandate; and, where no question of respondent's right to recoupment in any manner and to any extent was in any other manner presented to the court, there is no basis in the record for an assignment of error because the court failed to provide for any recoupment.

2. COLLISION—SUIT FOR DAMAGES—RIGHT OF RECOUPMENT.

Where a vessel, libeled for collision by the owners of the other vessel on their own behalf and as bailees in behalf of some of their cargo owners, took no steps to bring in libellant's vessel under admiralty rule 59, or to raise the question of her liability by any pleading, and consequently her liability to her cargo owners under the terms of her bills of lading was not adjudicated, upon a finding that both vessels were in fault the respondent is not entitled to recoup a moiety of the cargo damage against the vessel damage adjudged in favor of libellants; and, for still stronger reasons, there can be no such recoupment, on account of cargo damage recovered by intervening libellants, against that recoverable by libellants on behalf of other cargo owners, the effect of which would be to leave such cargo owners unpaid, since, under the pleadings, they cannot be given a decree therefor against libellants or their vessel.

3. INTEREST—JUDGMENTS AND DECREES—STATUTORY PROVISIONS.

Without the aid of a statute, or an order or rule of court, interest is not a legal incident of either judgments or decrees, and general provisions of a statute, fixing the legal rate of interest, do not apply to judgments or decrees without special provision therefor.

4. STATUTES—CONSTRUCTION—TITLE OF ACT.

While the title of an act should not be altogether ignored, and may be considered to determine the meaning of a very doubtful statute, it cannot

be used to extend the provisions of an act so as to include within its scope that which without such aid would plainly not be included.

5. SAME—REPEAL BY IMPLICATION.

Rev. St. Mich. 1838, c. 6, § 8, as amended in 1855, and carried forward into Comp. Laws Mich. 1897, § 4865, fixing the rate of interest on judgments and decrees at 7 per cent., was not repealed by implication by Act 1891 (Sess. Laws Mich. 1891, p. 197), entitled "An act to regulate the interest of money on account, interest on money judgments, verdicts," etc., which by its terms merely reduces the rate of interest on money generally, and makes no reference to judgments or decrees, and which repeals only "acts or parts of acts contravening the provisions of this act," since the provisions of such act are not contravened by section 8 of the act of 1838, which relates only and specifically to interest on judgments and decrees.¹

Appeal from the District Court of the United States for the Eastern District of Michigan.

In October, 1891, a collision occurred in the Detroit river between the steamers Conemaugh and New York, which resulted in the sinking of the Conemaugh, the total loss of her cargo, and in a slight loss to the New York. The Erie & Western Transportation Company, as owner of the Conemaugh and as bailee of her cargo, filed a libel in the district court against the propeller New York to recover the damages sustained by the Conemaugh and for the damages to her cargo. The Union Steamboat Company, as claimant and owner of the New York, gave a stipulation for the release of the vessel, and filed an answer denying all liability for the collision, and alleging that the steamer Conemaugh was solely at fault. Subsequently, by leave of the court, the Union Steamboat Company filed its cross libel against the propeller Conemaugh, to recover the sum of \$3,000 alleged to be the damages sustained by the New York in the said collision with the Conemaugh. This cross libel prayed process, but none issued, and no answer was ever filed thereto. Upon the reference to a commissioner to ascertain damages, it was, among other things, stipulated "that, in case the matter shall become material, either in this court or in the court of appeals, the loss suffered by the propeller New York in and by said collision was the sum of \$3,391.19," as of November 1, 1891. After the litigation had been started and at different dates various underwriters upon the Conemaugh's cargo intervened, and filed separate intervening petitions against the Union Steamboat Company as owners of the New York, seeking to recover insurance paid by them on said cargo. The remainder of the cargo owners and underwriters continued to be represented by the Erie & Western Transportation Company as trustee or bailee of the cargo claimants. Upon a final hearing, the district court held the New York solely at fault, and condemned her to pay all the loss sustained by the Conemaugh and all the damage to her cargo. Upon appeal to this court that decree was reversed, the Conemaugh being held solely at fault, and a decree was directed against the owners of the Conemaugh for the stipulated loss sustained by the New York in said collision. 54 U. S. App. 248, 27 C. C. A. 154, 82 Fed. 819, and 56 U. S. App. 146, 30 C. C. A. 628, 86 Fed. 814. The case was then taken to the supreme court upon certiorari, where the decree of this court was reversed; that court holding that both vessels were at fault, and that the loss to the vessels should be divided, but that the cargo owners or underwriters were entitled to recover their entire loss against the owners of the New York, notwithstanding the Conemaugh might be also liable for the collision. The case was remanded for a decree in pursuance of the opinion of that court. The case is reported under the style of *The New York*, 175 U. S. 187, 20 Sup. Ct. 67, 44 L. Ed. 126. The district court accordingly rendered a decree requiring the owners of the New York to pay all the damages sustained by the intervening cargo underwriters, aggregating \$19,841.56, and that they should pay to the owners of the Conemaugh, as trustee for the owners of the cargo and their underwriters "other than the interveners," the further sum of \$19,627.67; these two sums being the full loss sustained by the

¹ Repeal of statutes by implication, see note to *First Nat. Bank of Butte v. Weidenbeck*, 38 C. C. A. 136.

Conemaugh's cargo. The court also directed that the owners of the New York should pay to the owners of the Conemaugh the further sum of \$13,083.33, "being one-half of the damage of the said Conemaugh, less one-half the damage suffered by the New York in said collision." The Union Steamboat Company have assigned as error: (1) That the court erred in not permitting the Union Steamboat Company to offset or recoup any part of the damages paid on account of loss or damage to the cargo of the steamer Conemaugh against the claim for damages sustained by the libellant as owner of the steamer Conemaugh; (2) that the court erred in allowing interest on the various sums decreed to be due the libellant and interveners at the rate of 7 per cent.; (3) that the court erred in decreeing that the appellants should pay one-half of the cost of the cause in the circuit court of appeals.

C. E. Kremer, for appellant.

H. D. Goulder, for Transportation Co.

F. H. Canfield, for the owners of cargo.

Before LURTON and SEVERENS, Circuit Judges, and CLARK, District Judge.

LURTON, Circuit Judge, having made the foregoing statement of the case, delivered the opinion of the court.

1. That the decree appealed from conformed in every particular to the mandate of the supreme court has been expressly adjudicated under a petition filed in that court prior to this appeal, praying that court, by writ of mandamus, to compel the district court to set aside the decree here complained of, and "to enter one dividing the damages equally, so that petitioner would not be decreed to pay more than one-half the total damages arising out of the collision between the New York and Conemaugh, with interest not exceeding five per cent. per annum." This was denied, the court saying:

"The only questions decided were as to the respective faults of the two vessels, and the claim of the underwriters upon the Conemaugh's cargo, that they were entitled to a recovery to the full amount of their damages against the New York, notwithstanding the Conemaugh was also in fault for the collision. This claim was sustained, and directions given to enter a decree in conformity to the opinion of this court. Such decree was entered, dividing the damages between the two vessels, and awarding to the underwriters of the cargo a full recovery against the New York. It may be true that the decree holds the New York liable for seventy-six per cent. of the entire damages, and not fifty per cent., but this results from the fact that she was primarily held for the entire value of the cargo. The equal division applied only to the vessels, and, upon the other hand, if petitioner be entitled to the recoupment claimed, it would apparently result in an affirmative decree in its favor. But no question of recouping one-half of such damages to the cargo from the moiety of damages awarded the Conemaugh was made by counsel or passed upon by this court. It is now insisted that, under the cases of *The Chattahoochee*, 173 U. S. 540, 19 Sup. Ct. 491, 43 L. Ed. 801, and *The Albert Dumois*, 177 U. S. 240, 20 Sup. Ct. 595, 44 L. Ed. 751, this should have been done. This may be so; but it is an entirely new question, quite unaffected by the case of the New York, and, if the court erred in refusing to allow such recoupment, the remedy is by appeal, and not by mandamus. Perhaps a mandamus might lie to review the allowance of interest, but that may also be considered on appeal. No disobedience of the mandate having been shown, the petition must be denied." *Ex parte Union Steamboat Co.*, 178 U. S. 317, 320, 20 Sup. Ct. 904, 905, 44 L. Ed. 1084, 1085.

Referring to the general rule, and not particularly to the case in hand, the supreme court, in the same opinion, said: "The inferior court is justified in considering and deciding any question left open

by the mandate and opinion of this court, and its decision upon such matter can only be reviewed upon a new appeal to the proper court." 178 U. S. 319, 20 Sup. Ct. 905, 44 L. Ed. 1085. That this is the proper court to review the action of the district court in respect to matters open to it to consider and decide, as matter subsequent to, and not concluded by, the mandate of the supreme court, we had occasion to decide at a former day of this session in an opinion reported in 104 Fed. 561, under the style of *The New York*. See, also, *Mason v. Mining Co.*, 153 U. S. 361, 14 Sup. Ct. 847, 38 L. Ed. 745.

For appellants it is contended that the question of recoupment could not come on for decision until it was determined that both vessels were at fault, and until the cargo owners and underwriters had recovered their full damages from appellant, and that the district court had, therefore, when entering a decree under the mandate, the right to consider and decide whether or not appellant had then the right to recoup one-half of the cargo damages it was thereby condemned to pay from the moiety of damages awarded the *Conemaugh*, and that any error committed by the district court in denying or granting such recoupment may be reviewed here. To this view of the abstract question we are disposed to assent. But when and how was this matter of recoupment presented to the district court? The decree which the court did enter was in precise conformity to the mandate of the supreme court. The cargo underwriters, having proceeded only against the *New York*, were entitled to recover their full damages against it as the only vessel impleaded.

If the *New York* had availed itself of admiralty rule 59, as was done in the case of *The Beaconsfield*, 158 U. S. 303, 307, 15 Sup. Ct. 860, 39 L. Ed. 993, and brought in the *Conemaugh* as a vessel in fault, which also ought to be proceeded against for cargo losses, the question of the liability of that vessel to cargo underwriters would have been presented, and the cargo damages would have been divided, if it had been found that that vessel was also in fault for the collision, and had no valid special stipulations in her bills of lading relieving her from liability to cargo underwriters. But this course was not taken. By neither cross bill, petition, nor answer was this question of the *Conemaugh's* liability to cargo underwriters presented. Nor does it appear that the question of recoupment, now raised by an assignment of errors upon the decree of the district court, was ever presented to that court by any form of pleading. Since this case was heard, the appellant has applied for leave to supplement the record by adding to it a decree which they prepared and submitted to the district court as a decree in compliance with the mandate of the supreme court, whereby the entire losses were equally divided between the vessels. That proposed decree is the decree which the supreme court refused to compel the district court to enter when appellant applied to it for a writ of mandamus. In substance, the insistence of the *Union Steamboat Company* was that a decree should go against it for \$19,841.56 in favor of cargo underwriters, who had intervened for themselves, and a decree in favor of the *Erie & Western Transportation Company*, as trustee

for cargo underwriters represented by it, for \$12,976.38. That result was reached in this way:

Libellant recovers of the New York one-half of the damages sustained by the Conemaugh.....	\$15,254 23	
Recovers one-half of the amount sustained by it as bailee of the cargo.....	8,813 83	\$24,068 06
Less one-half of amount of Intervener's damages paid to cargo interveners by New York.....	\$ 8,920 78	
Less one-half of amount of damages sustained by New York	2,170 90	\$11,091 68
		<hr/> \$12,976 38

While this plan avoided the necessity for an affirmative decree in favor of the appellant without any pleading asking such relief, it did so at the expense of the underwriters represented by the appellee, whose claims aggregated \$19,627.67,—an amount exceeding the proposed decree in their favor by \$6,651.29. This was clearly and distinctly inadmissible, as not conforming to the mandate of the supreme court, which directed that a decree should go against the New York for the whole of the cargo damages, as the only vessel impleaded by cargo owners or underwriters. Such a decree was not in accordance with the mandate, as the supreme court expressly decided. 178 U. S. 317, 20 Sup. Ct. 904, 44 L. Ed. 1084. The equal division directed by that court applied only to the vessels. No question of recoupment having been presented or decided by the supreme court, it was not competent for that court to compel the district court to enter a decree which was not required by its original decision. It is now sought to inject that proposed decree into this record as a basis for assigning as error the failure by the district court to allow recoupment in some form. The decree never was a part of the record in the court below, and the fact that it was ever proposed as a decree in compliance with the mandate of the supreme court can only be shown by evidence *de hors* the record. No pleading or oral application for recoupment, other than may be inferred from it, was ever made to the court below. It was submitted, not by way of an application to the power of that court over a matter subsequent to the mandate and not concluded, but as a decree required by the mandate. If it were here we could not regard it as an application for recoupment to be granted or refused on its merits as a matter subsequent to the mandate, but as an application based upon a misconception of the mandate. The application for a writ of certiorari is refused.

The right of set-off or counterclaim or recoupment, being in no way presented by any pleading in the case, was not so involved in the nature of the decree rendered as to make it error if the matter was passed *sub silentio*. It was not a defense which the appellant was obliged to then present. The mere fact that there are cross demands will not operate as an estoppel, if in fact the cross demand was not presented and adjudicated. A set-off or counterclaim is generally admissible in equity only when the circumstances are such

as to justify the interference of equity to prevent injustice or avoid circuity of action. Clearly, it was not admissible to set off the decree in favor of the appellee as trustee for underwriters or cargo owners who had not intervened by a claim against the appellee in a wholly different right. *Insurance Co. v. McKown*, 33 C. C. A. 212, 90 Fed. 646. Neither are we aware of any authority which would justify an affirmative decree upon a set-off in the absence of some pleading seeking such affirmative relief. *The Dove*, 91 U. S. 381, 384, 23 L. Ed. 354; *Railroad Co. v. Bradleys*, 10 Wall. 299, 19 L. Ed. 894; *The Ethel*, 13 C. C. A. 504, 66 Fed. 340.

No issue having ever been made as to the liability of the Conemaugh to her cargo underwriters, it would seem altogether possible that an injustice might be done if it should be summarily assumed that because she was found in fault, and liable to the New York for one-half of her damages, she is also liable to the underwriters upon her own cargo. Counsel for the Conemaugh say that there are special stipulations in her bills of lading which they write to set up against the claims of underwriters. Manifestly this court should not foreclose this defense upon a record which fails to show that any such right of set-off or recoupment was ever claimed or asserted in the court below, or that the Conemaugh has ever been called upon to respond to the claims of her cargo underwriters. Not having been passed upon in the court of original jurisdiction, this court is not disposed to hold that the lower court erred in passing the matter over. *Harding v. Giddings*, 19 C. C. A. 508, 73 Fed. 335; *Lloyd v. Preston*, 146 U. S. 630, 13 Sup. Ct. 131, 36 L. Ed. 1111. Neither do we think that innocent third parties should be longer delayed in the collection of cargo damages by the delay incident to sending this case back for the purpose of allowing such pleadings as would properly present the question. The appellants, not being obliged to assert their cross demand or claim for contribution by way of recoupment in this cause, did not do so. This leaves them free to assert their claim for contribution in an independent proceeding against the Conemaugh. No special equity appearing, this will be no injustice. The motion to remand, with leave to amend the pleadings, is therefore denied.

2. We come, now, to the question of the rate of interest upon the decree allowed. The supreme court directed that the district court should enter a decree in conformity with the opinion, "with interest from July 3, 1896, until paid, at the same rate per annum that decrees bear in the courts of the state of Michigan." In fixing 7 per cent. as the rate which decrees bear in the courts of Michigan, the learned district judge held that the eighth section of chapter 6, Rev. St. Mich. 1838, as amended in 1855, was still in force. That section, as thus amended, has been carried forward into the various compilations of the Michigan Statutes, and appears now among the laws in force as 4865, Comp. Laws Mich. 1897. This section reads as follows:

"Interest may be allowed and received upon all judgments at law, for the recovery of any sums of money, and upon all decrees in chancery for the payment of any sums of money, whatever may be the cause or form of action or suit in which such judgment or decree shall be rendered or made; and such

interest may be collected on execution, at the rate of seven per centum per annum: provided, that on a judgment rendered or any written instrument, having a different rate, the interest shall be computed at the rate specified in such instrument not exceeding ten per centum."

The same section is also found in the Compiled Laws of 1857 as section 1317, and in the Compiled Laws of 1871 as section 1635, and in Howell's Annotated Statutes as section 1597. The contention is that this section of the old act of 1838 has been repealed, altered, or amended so that the rate of interest on decrees is now five per cent.

The amounts involved being large, and interest having started in July, 1896, the question is one of much importance to the parties. That the legal rate of interest, in the absence of contract, on money and all forms of contract, is now 5 per cent., is conceded. That judgments and decrees should continue to bear 7 per cent. in Michigan, if true, is a curious anomaly. Odd as it may appear, and harsh as may be the result, it is, nevertheless, a question depending upon the ordinary rule touching the repeal or amendment of laws by implication; for it is not pretended that there has been any express repeal or amendment of the statute we have set out. Without the aid of a statute or the order or rule of the court, interest is not a legal incident of either judgments or decrees. *Creuze v. Hunter*, 2 Ves. 157; *Perkins v. Fourniquet*, 14 How. 328, 14 L. Ed. 441; *Railroad Co. v. Harmon's Adm'r*, 147 U. S. 571, 585, 13 Sup. Ct. 557, 37 L. Ed. 284. Without the special provision made by the eighth section of the Michigan act of 1838, the general provision fixing the legal rate of interest, found in the third section of the same act, would not have applied to judgments and decrees. The third section of the act referred to was in these words:

"The interest of money shall continue to be at the rate of seven dollars and no more, upon one hundred dollars for a year, and at the same rate for a greater or less sum, and for a longer or shorter time: provided, that in cases of money loaned it shall be lawful for the parties to stipulate in writing for the payment of any interest not exceeding ten per cent. per annum."

This section was even carried forward as a distinct section in subsequent compilations of the laws, and constitutes section 1594 of Howell's Annotated Statutes. The act which it is supposed has amended or repealed the eighth section of the act of 1838 is an act passed in 1891, and found in Sess. Laws Mich. 1891, p. 197. That act and its caption is as follows:

"Section 1. An act to regulate the interest of money on account, interest on money judgments, verdicts, etc.

"The people of the state of Michigan enact: That the interest of money shall be at the rate of six dollars upon one hundred dollars for a year and at the same rate for a greater or less sum and for a longer or shorter time, except that in all cases it shall be lawful for the parties to stipulate in writing for the payment of any rate of interest not exceeding eight per cent. per annum: provided, that this act shall not apply to existing contracts, whether the same be either due, not due, or part due."

"Sec. 4. All acts or parts of acts contravening the provisions of this act are hereby repealed."

This act was itself amended in 1899 so as to reduce the rate to 5 per cent. Act No. 207, Pub. Acts 1899. The repealing clause of the

act of 1891 is limited to "all acts or parts of acts contravening the provisions of this act." Confessedly, no act or part of an act is thereby repealed, unless it contravenes the provisions of the act of 1891. Though there are other acts which relate to the subject of interest, yet those acts must stand, unless their provisions are repugnant to the later law.

Counsel for the appellees have called to our attention a number of special provisions of the law of Michigan relating to interest which were in force when the act of 1891 was passed. Thus, section 1195, Comp. Laws Mich. 1897, provides for interest on certain educational funds of the state, and section 1196 provides for interest on the University fund. This last section the supreme court of Michigan, in *University Regents v. Auditor General*, 109 Mich. 134, 66 N. W. 956, held, had not been affected by the act of 1891.

Besides these, there are sections 3912, 10470, Comp. Laws Mich. 1897, one fixing a special rate for money due for delinquent taxes, while the other provides for a special rate in judgments against incorporated banks. To construe the act of 1891 as operating to fix the rate of interest at 5 per cent. upon all obligations requiring the payment of money would alter, repeal, or amend every one of the special acts above referred to, though it is plain that there is no necessary repugnance between those acts and the act of 1891.

Aside from the caption of this act of 1891, it could not be well supposed that the legislature intended to deal with interest upon judgments and decrees. That subject had always been regulated by special legislation, without which neither judgments nor decrees would necessarily bear interest. The caption does refer to interest upon "judgments, verdicts, etc.," but the body of the act makes no more reference to such obligations than did the third section of the act of 1838, which was in substantially the same words. If the whole subject of interest on judgments and decrees was dependent upon this act of 1891, it is quite plain that neither would bear interest by virtue of its terms.

Neither does the caption refer to the subject of interest upon decrees as distinguished from judgments. The act of 1842 (section 966, Rev. St. U. S.) regulates the subject of interest upon judgments. This has been held not to apply to decrees. *Perkins v. Fourniquet*, 14 How. 328, 331, 14 L. Ed. 441; *Hagerman v. Moran*, 21 C. C. A. 242, 75 Fed. 99.

Much stress has, however, been laid upon the title of this act as indicating a purpose to include the subject of interest upon "judgments, verdicts, etc.," meaning thereby "decrees" as of like character with judgments. While the title of an act should not be altogether ignored, and may afford a key to unlock the meaning of a very doubtful statute, yet the title of an act cannot be used to extend the provisions of an act so as to include within its scope that which without such aid would plainly not be included. *Hayden v. Barney*, 5 Wall. 107, 18 L. Ed. 518; *Goodlett v. Railroad Co.*, 122 U. S. 391, 408, 7 Sup. Ct. 1254, 30 L. Ed. 1230; *U. S. v. Palmer*, 3 Wheat. 610, 4 L. Ed. 471. That the special provisions of the Michigan Statutes in respect to interest upon judgments and decrees are not neces-

sarily inconsistent with the provision for the reduction of the general rate of interest upon contracts, implied or express, and not reduced to judgments or decrees, is, to our minds, very plain. The two subjects had always theretofore been regulated by distinct provisions of law. The act of 1891 was plainly intended to displace the existing general law as embodied in the third section of the act of 1838, but we find no such repugnancy to the eighth section of the same statute as to justify us in holding that it has been repealed or amended by the later act. *South Carolina v. Stoll*, 17 Wall. 431, 21 L. Ed. 650; *In re Henderson's Tobacco*, 11 Wall. 652, 20 L. Ed. 235. Section 8 of the act of 1838 was a special act dealing only with the subject of interest upon judgments and decrees, which, without such legislation, would not, as a legal incident, bear interest. The act of 1891 may well be regarded as dealing only with the subject of interest, as regulated by the third section of the same act of 1838. Though both section 8 of the act of 1838 and the act of 1891 deal with the subject of interest, yet they can both stand together without inconsistency. In such circumstances, neither a repeal nor amendment of the older act will occur by implication alone. The purpose of the more general of the two acts relative to the same general subject is not necessarily repugnant to a different intent in regard to interest upon a particular class or kind of obligations. The purposes of the general rule in respect to legal interest in cases not particularly provided for may be effectuated without implying a change of intention in respect of particular matters specifically dealt with in prior legislation. Where two distinct acts relate to the same general subject, one will not repeal the other by implication, unless the later act is plainly intended to cover the whole field, or is manifestly repugnant to the older law. *Rogers v. Railroad Co.*, 33 C. C. A. 517, 91 Fed. 299.

3. It is assigned as error that the district court decreed that the appellants should pay one-half of all the costs of this cause "in the circuit court of appeals." This was error, as those costs were included in the costs taxed in the supreme court, and provided for by another part of the decree below. The decree will in this respect be modified, and in all other respects affirmed.

THE SENATOR D. C. CHASE.

THE NEWARK.

(Circuit Court of Appeals, Second Circuit. March 11, 1901.)

No. 115.

COLLISION—STEAMER AND TOW—TUG AND TOW DRIFTING.

The tug Chase had taken out a tow from the south side of a pier at Communipaw by a line, and, when 150 or 200 feet beyond the end, stopped to make the tow fast to her side. The action of the tide carried both vessels northward some 150 or 200 feet, and about opposite the center of the adjoining slip, which was 300 feet wide. While in that position, the steamer Newark, coming down the river, and desiring to enter the slip, signaled, but received no answer. She made a second signal, and

then slowed, but did not reverse nor change her course until within 200 feet of the tow, and came into collision with it. *Held*, that both steamer and tug were in fault for the collision,—the former, for not reversing sooner, when her signals were not answered, or changing her course, which she might have done by going nearer the piers, and still entered her slip; and the tug, for failing to keep a lookout at the stern while the vessels were being drifted in that direction, and for not giving attention to and answering the signals of the steamer, the duty of care to avoid collision being as imperative in her situation as though she were actually being navigated.

Appeals from the District Court of the United States for the Southern District of New York.

The following is the opinion of the district court (BROWN, District Judge):

In the above case I find the following facts:

(1) That the collision occurred about 150 or 200 feet outside of the slip, between the Communipaw and the Liberty coal docks, Communipaw (piers 8 and 9), and about off the middle of that slip, which is 300 feet wide; that the blow was one of considerable violence, the Newark coming up nearly directly astern of the Starr, and with her stem striking the stern of the Starr, which was in tow and on the starboard side of the Chase; that the blow caused three of the lines to part by which the boats were lashed together, and at the time of the collision both the Starr and the Newark were headed downriver and somewhat towards the shore; the Newark, a little more than the Chase.

(2) That the Newark had come down from Jersey City some 300 or 400 feet off the line of the docks, and was bound for the slip between piers 8 and 9; that when about 1,500 feet above the Chase, the latter was observed to be made fast on the starboard side of the Starr, her stern pointing upward and a little outward, off pier 9, and apparently backing; that the Chase had taken the Starr out from the lower side of pier 9, and in the flood tide was in fact moving upriver at the time she was first seen from the Newark; that the Newark at that time gave a signal of one blast to the Chase to indicate that the Newark desired to go to the right and into her slip; that the Newark was then under a slight port wheel and was rounding somewhat towards the slip; that getting no answer to this signal, she gave another blast of one whistle, when about 500 or 600 feet from the Chase, and slowed her engines, and that getting no answer to this signal, she sounded danger whistles when about 100 or 200 feet from the Chase, and reversed, but struck her nearly end on, as above stated, and was moving ahead at collision.

(3) That the Chase had no lookout astern; her pilot did not notice any signals prior to the danger signal, which he says was when the Newark was within 50 feet of him; that previously to that time the Chase's engines had been put ahead, with a starboard wheel, in order to turn her tow to port; that the Chase did not move upriver more than 200 feet at the most above pier 9, and was not moving upriver at the time of collision.

Upon these facts I find the Newark to blame, (a) for not avoiding the collision by reversing earlier than she did; (b) for keeping on, headed mainly for the Chase and her tow, and not reversing at least as early as her second signal, when that whistle was not answered; and (c) for neither turning to starboard to enter her slip near pier 8, as she might have done, nor checking her speed and porting sufficiently to do so. The inattention of the Chase to the Newark's whistles must have been manifest to the Newark. The Chase, moreover, was incumbered by a heavy tow, while the Newark was under perfect and easy command; so that the collision on the part of the Newark was needless. The Newark's little change of heading prior to collision makes it certain that if her helm was put hard a-port at all, that was not done until very shortly before the collision, and that the master's intimation to the contrary cannot be correct. The wheel was mostly but little to port, as other parts of the Newark's evidence show.

The Chase must also be held to blame for inattention and heedlessness. Though backing upriver, she had no lookout astern and evidently paid no

attention to what was above her. The Newark, being bound for the slip between piers 8 and 9, had the same right to enter the slip that the Chase had to maneuver outside of it. The ordinary rules of navigation in such circumstances are not strictly applicable; but the duty of careful attention to what is going on, and the duty to respond to all proper signals in order to avoid disaster, are equally incumbent upon both. The Newark was coming down in plain sight and her whistles were distinctly given at suitable distances. Inattention by the Chase to everything astern of her while moving up astern and partly across the slip, was inexcusable. I cannot regard this inattention as immaterial. It was important for the Newark to know the intention of the Chase. Had the Chase responded with one whistle, that would have signified that she was going to the eastward and that the Newark might safely go to the right into her slip. A response of two whistles would have indicated the contrary, and the Newark would have been bound to keep off. The Newark was entitled, therefore, to an answer; and the failure to answer both the first and the second signals of the Newark naturally conduced to delay in the Newark's maneuvers though not wholly justifying it; and it was this delay which really brought about the collision. An additional reason why answering signals should have been given by the Chase is that the flats off pier 9 might have made it necessary for the Chase to back further towards pier 8 than she did, depending upon the draft of the Chase or of her tow, which were not known to the Newark; so that the fact that the Chase and her tow were headed downriver was no indication that they were not intending to back up across the slip as far as pier 8 in order to get out into the river. This fact, however, does not lessen the fault of the Newark, but shows that all the more should the Newark have checked her speed earlier than she did, instead of running almost straight upon the barge's stern.

As both contributed materially to the collision, the decree for the libelants should be against both with costs.

De Lagnel Berier, for the Senator D. C. Chase.

James E. Carpenter, for the Newark.

Le Roy S. Gove, for appellee.

Before LACOMBE and SHIPMAN, Circuit Judges.

PER CURIAM. We concur with the district judge in his findings of fact, as we understand them. It is, no doubt, true that after the tug cast off the line by which she hauled the barge out from the south side of dock No. 9, and placed herself alongside her tow, she did not back her engines; but the opinion of the district court does not, as we read it, find that she did. Undoubtedly, however, while she lay there, making fast, with her stern pointing upward and a little outward, she and her tow did move upstream with the tide, and presented the appearance of backing. A majority of the witnesses, including some of the disinterested ones, testify that she did not so move substantially beyond the north line of pier 9, but the district judge who heard them credited the others, who testified to a much longer backward movement; and it is highly improbable that the Newark, bound in from above to a berth on the south side of pier 8, should have run straight across the slip to a point barely 20 feet north of pier 9. We are satisfied, as was the district judge, that the tug moved upward stern-first not only for the width of pier 9, but also for half the width of the slip besides,—more than 150 feet altogether. Upon such a finding, and on the other facts, which are not so sharply disputed, the conclusion of the district judge as to faults of navigation is correct. Decree affirmed, with interest, and one bill of costs to libellant.

WILDER'S S. S. CO. v. HIND et al.

(Circuit Court of Appeals, Ninth Circuit. April 1, 1901.)

No. 662.

FEDERAL COURTS—APPELLATE JURISDICTION—APPEALS FROM SUPREME COURT OF HAWAII.

Act April 30, 1900, providing a government for the territory of Hawaii, provides for two systems of courts in such territory, by establishing a federal district court, having the jurisdiction both of a district and a circuit court of the United States, and over which the circuit court of appeals of the Ninth circuit is given appellate jurisdiction, and by retaining the system of local courts established by the republic of Hawaii, to be known as "Territorial Courts." Section 10 provides that all actions at law, suits in equity, "and other proceedings" pending at the time of the taking effect of the act in the courts of the republic of Hawaii shall be carried on to final judgment and execution in the corresponding courts of the territory of Hawaii. Section 86 provides that "the laws of the United States relating to appeals, writs of error, removal of causes and other matters and proceedings as between the courts of the United States and the courts of the several states, shall govern in such matters and proceedings as between the courts of the United States and the courts of the territory of Hawaii." *Held*, that suits in admiralty pending in the courts of the republic at the date when the act took effect, although not mentioned in terms, were embraced in the provision of section 10, as "other proceedings," which should be continued to final judgment in such courts, and that a decree entered by the supreme court of the territory in such a suit after the act took effect was not appealable to the circuit court of appeals of the Ninth circuit, but was reviewable only by the supreme court of the United States, under the same conditions and upon the same grounds that a judgment of the supreme court of a state would be.

Appeal from the Supreme Court of the Territory of Hawaii.

Kinney, Ballou & McClanahan and Nathan H. Frank, for appellant.
Paul Neumann, Henry Eickhoff, and Curtis H. Lindley, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The question presented in this case is whether this court has jurisdiction to entertain an appeal from the supreme court of the territory of Hawaii in an admiralty case. The suit was begun by filing a libel in admiralty in the circuit court of the First circuit, Hawaiian Islands, Island of Oahu, on February 9, 1900. The case was heard in that court upon April 9, and was decided on May 7, 1900, and thereupon upon that date was appealed to the supreme court of the Hawaiian Islands, in which court a final decree was rendered on November 9, 1900, whereupon notice was given of appeal therefrom to this court. The territory of Hawaii was created by the act of congress approved April 30, 1900, entitled "An act to provide a government for the territory of Hawaii." By its terms the act was to take effect 45 days after the approval thereof. The provisions of the act which may be said to relate to the question which is presented in this case are the following:

"Sec. 2. That the islands acquired by the United States of America under an act of congress entitled 'Joint resolution to provide for annexing the

Hawaiian Islands to the United States,' approved July seventh, eighteen hundred and ninety-eight, shall be known as the Territory of Hawaii.

"Sec. 3. That a territorial government is hereby established over the said territory, with its capital at Honolulu, on the Island of Oahu."

"Sec. 5. That the constitution, and, except as herein otherwise provided, all the laws of the United States which are not locally inapplicable, shall have the same force and effect within the said territory as elsewhere in the United States. * * *

"Sec. 6. That the laws of Hawaii not inconsistent with the constitution or laws of the United States or the provisions of this act shall continue in force, subject to repeal or amendment by the legislature of Hawaii or the congress of the United States.

"Sec. 7. That the constitution of the republic of Hawaii and the laws of Hawaii, as set forth in the following acts, chapters, and sections of the civil laws, penal laws, and session laws, and relating to the following subjects, are hereby repealed." (Here follows a list of the laws repealed. Among the laws so repealed are the laws of the former republic relating to jurisdiction in maritime matters.)

"Sec. 10. That all rights of action, suits at law and in equity, prosecutions, and judgments existing prior to the taking effect of this act shall continue to be as effectual as if this act had not been passed; * * * all criminal and penal proceedings then pending in the courts of the republic of Hawaii shall be prosecuted to final judgment and execution in the name of the territory of Hawaii; all such proceedings, all actions at law, suits in equity, and other proceedings then pending in the courts of the republic of Hawaii shall be carried on to final judgment and execution in the corresponding courts of the territory of Hawaii."

Chapter 4 provides a judiciary for the territory, and establishes the jurisdictions of the several courts composing the same. Section 86 provides as follows:

"Sec. 86. That there shall be established in said territory a district court to consist of one judge, who shall reside therein and be called the district judge. * * * Said court shall have, in addition to the ordinary jurisdiction of district courts of the United States, jurisdiction of all cases cognizable in a circuit court of the United States, and shall proceed therein in the same manner as a circuit court; and said judge, district attorney, and marshal shall have and exercise in the territory of Hawaii all the powers conferred by the laws of the United States upon the judges, district attorneys, and marshals of district and circuit courts of the United States. Writs of error and appeals from said district court shall be had and allowed to the circuit court of appeals in the Ninth judicial circuit in the same manner as writs of error and appeals are allowed from circuit courts to circuit courts of appeals as provided by law, and the laws of the United States relating to juries and jury trials shall be applicable to said district court. The laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several states shall govern in such matters and proceedings as between the courts of the United States and the courts of the territory of Hawaii."

It is contended that the present appeal, being an appeal in an admiralty case, is not comprehended within the terms of the Hawaiian statute regulating appeals from the supreme court of the territory, but that it is one of the cases referred to in section 15 of the act of March 3, 1891, establishing the circuit court of appeals, and conferring jurisdiction upon that court over appeals from and writs of error to the courts of the territories. Upon consideration of the various provisions of the act providing a government for the territory of Hawaii, we are convinced that congress intended thereby to establish in that territory between the federal court created by the act and

the system of territorial courts then existing, and substantially by the act perpetuated, the relation which exists between the courts of the United States and the state courts in the various states. It is not disputed that congress had the power to create in the territory of Hawaii such a system of courts, and to establish such a relation between them. The purpose to do so is manifest from various provisions of the act. By section 10 it was declared that all rights of action, suits at law and in equity, and other proceedings then pending in the courts of the republic of Hawaii should be carried on to final execution and judgment in the corresponding courts of the territory of Hawaii. Conceding that cases in admiralty are a class of cases separate and distinct from all others, and that the constitution extends the judicial power of the United States over three distinct classes of controversies, one of which is "all cases of admiralty and maritime jurisdiction," and that it is true, as stated in the language of Chief Justice Marshall in *American Insurance Co. v. 356 Bales of Cotton*, 1 Pet. 545, 7 L. Ed. 242, that the constitution contemplates these as three distinct classes of cases, and "the grant of jurisdiction over one of them does not confer jurisdiction over either of the other two," still we think it is clear, from the language of section 10, that congress intended to make a general provision in regard to all classes of suits and actions, of whatsoever nature, then pending in the courts of the republic of Hawaii, and to exclude none whatever. The words "and other proceedings" are sufficiently comprehensive, when used in connection with the language which precedes them, to include admiralty suits. The present suit was a case pending in the courts of the republic of Hawaii both at the date when the act was approved and when the act went into effect. It proceeded in those courts to a final judgment of the supreme court of the territory. In section 86 we have the clearly-expressed purpose of congress to provide that the laws of the United States relating to appeals, writs of error, removal of causes, and other proceedings, as between courts of the United States and the courts of the several states, shall govern in like matters and proceedings as between the federal court and the territorial courts of the territory of Hawaii. This can only be construed to mean that final decisions of the supreme court of the territory of Hawaii may be reviewed in a court of the United States only in such cases and upon such conditions as the decisions of the supreme court of a state might be thus reviewed, or, in other words, that no appeal shall lie to any United States circuit court of appeals from the final judgment of the supreme court of the territory of Hawaii, and that the only appeal from such territorial court shall be to the supreme court of the United States, and only in such cases as are appealable to that court from the supreme court of a state. The right of appeal is statutory. If it exists in the present case, it must be found in the letter of the law. We are asked to apply to the statute certain rules of construction, but the language employed is not involved or ambiguous. Its meaning is evident upon the first reading. We must be guided by its plain import. We find therein nothing to authorize the appeal which is here attempted to be taken. If congress had established in the territory of Hawaii

a system of territorial courts only, an appeal from the decision of the highest court of the territory would, of course, be reviewable in the United States circuit court of appeals, under the provisions of the act creating the latter court. But in this instance congress has created two systems of courts,—one a district court for the jurisdiction of federal causes, the other for the trial of all other cases. It has provided specially for appeal to this court from the decisions of the district court. It has made no such provision for appeal from the final decision of the territorial court, but has enacted a general statute, the intention of which and the purport of which was to place the supreme court of the territory upon the basis of the supreme courts of the states in all matters which concern their relation to the courts of the United States. The system of courts created by the act for the territory of Hawaii differs radically from the system of courts which congress had theretofore created for any of the territories. In no other territory has there been a division of jurisdiction between cases which properly belong to courts of the United States and other cases. Congress found in the republic of Hawaii a system of courts already established, whose jurisdiction was complete, and from the highest tribunal of which there was no appeal. To that system congress, by the act, added a district court, conferring upon it the jurisdiction which pertains to the district and circuit courts of the United States, and providing for removing to that court from the territorial courts causes which under the removal acts were removable from a state court to a court of the United States. The fact that the present case is a suit in admiralty, and as such would have been within the jurisdiction of the district court created by the act, if it had been commenced after the date when the act went into effect, cannot affect the question which is before us. The case is purely one of the construction of the terms of the act. We might have disposed of the application to allow the appeal by referring to the fact that the supreme court has not assigned to this court appeals from the territory of Hawaii, but we have preferred to meet the question upon the broader ground above indicated. The motion for the allowance of the appeal must be denied.

BOSTON & M. R. R. v. HURD.

(Circuit Court of Appeals, First Circuit. April 23, 1901.)

No. 360.

1. FEDERAL COURTS—JURISDICTION—DIVERSE CITIZENSHIP.

In so far as diverse citizenship was concerned, an action by a citizen of Massachusetts was properly brought in the circuit court for the New Hampshire district for the death of a resident of the former state against a railroad company incorporated by the concurrent action of several states, including those named.¹

¹ Diverse citizenship as ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249, and *Mason v. Dullagham*, 27 C. C. A. 298.

2. DEATH CAUSED BY NEGLIGENCE—STATUTE AUTHORIZING RECOVERY—PENAL OR REMEDIAL—SUING THEREON IN FOREIGN COURTS.

Pub. St. Mass. 1882, c. 112, § 212, punishes railroad corporations by fine of from \$500 to \$5,000 for negligence causing death, to be recovered by indictment for the benefit of the widow and children and next of kin of decedent. It does not, however, expressly provide how the punishment shall be determined between the two extremes. It further provides that they shall also be equally liable in damages, assessed with reference to the degree of culpability, to be recovered in an action of tort by the decedent's executor or administrator for the use of the same persons specified in case of indictment, but that only one remedy is to be available for the same cause. *Held*, that the statute, while in form penal, was not strictly so, and the civil remedy in the alternative must be regarded as remedial in an international sense, authorizing action to be brought thereunder in the federal courts or the courts of another state.

3. ACTION FOR PERSONAL INJURY—CONTRIBUTORY NEGLIGENCE.

Contributory negligence is no defense under the statute unless it was the true cause of the injury complained of.

4. COMMON CARRIERS—STATUTE AUTHORIZING ACTIONS FOR DEATHS OF PASSENGERS—APPLICATION TO RAILROADS.

Special provision being made by Pub. St. Mass. 1882, c. 112, § 212, for actions against railroads as common carriers for negligence resulting in the death of passengers or employes, section 6, c. 73, providing for actions against common carriers in general for the deaths of passengers does not apply to railroad companies, and should be interpreted as though reading "common carriers other than those especially provided for."

5. ACTION BY ADMINISTRATOR—CAPACITY TO SUE—EVIDENCE—DECREE GRANTING ADMINISTRATION—CONCLUSIVENESS.

Plaintiff, a New Hampshire administrator of the estate of a person who resided in Massachusetts at her decease, brought suit in the circuit court for the district of New Hampshire against a railroad corporation incorporated by concurrent legislation of New Hampshire and Massachusetts, containing a count laid at common law, which was afterwards amended, by the consent of the circuit court, so as to rest on Pub. St. Mass. 1882, c. 112, § 212. Defendant objected to the plaintiff's capacity as administrator on the ground that the intestate left no estate, and that, therefore, in view of the New Hampshire statutes limiting the jurisdiction for granting administration to a probate judge for some county in which the deceased had estate, the probate was void. The only thing on this point which appeared in the record was that the plaintiff testified, in answer to question by the defendant, that the intestate's estate was an "unsettled claim" against the defendant, and that he did not think she had any other estate in New Hampshire. *Held*, first, that that was insufficient to support the claim of the defendant, because, even if the administration could be attacked collaterally, the proofs on that point should be full and exact, covering every ground on which the probate jurisdiction could be sustained beyond reasonable cavil; second, that, as, apparently, there was a bona fide assertion of such an "unsettled claim," that was sufficient assertion of an estate to establish prima facie probate jurisdiction, and to put the defendant corporation on a trial of the merits without permitting it to try out the question of its liability for the purpose of demonstrating that the administration was void.

6. SAME—ASSETS.

It was also *held* that, inasmuch as the record does not show that the habitat of the defendant corporation is limited to any particular county in New Hampshire, it cannot be maintained that a claim against it in behalf of a nonresident is not assets within the county where the administration was granted.

7. ACTION AGAINST RAILROAD—WRONGFUL DEATH—PLEADING—AMENDMENT—DEPARTURE—NEW CAUSE OF ACTION—LIMITATIONS.

The declaration in an action by an administrator in the New Hampshire circuit court stated a cause of action against a railroad company at common law for injuries to plaintiff's intestate, coupled, possibly, in view of

the allegation of death, with some thought of the supplementary damages given by the New Hampshire statutes. By an amendment thereof it declared under Pub. St. Mass. c. 112, § 212, specially authorizing actions against railroads for wrongful death, and limiting actions thereunder to one year from the time of the injury. *Held*, that the amendment was a change of the ground of action, constituting a departure, and that inasmuch as the one-year limitation which followed the remedy under the Massachusetts statute had expired when the amendment was offered, the action was barred. *Railway Co. v. Wyler*, 15 Sup. Ct. 877, 158 U. S. 285, 39 L. Ed. 983, applied.

In Error to the Circuit Court of the United States for the District of New Hampshire.

John S. H. Frink (Edgar J. Rich, on the brief), for plaintiff in error.
Edward H. Savary, for defendant in error.

Before COLT and PUTNAM, Circuit Judges, and BROWN, District Judge.

PUTNAM, Circuit Judge. This suit was brought in the circuit court for the district of New Hampshire by the administrator of Alice M. Hurd, who was a passenger of the Boston & Maine Railroad, and was killed in Massachusetts by one of its locomotives while crossing its track, making connection from one train to another. At the time of her death she was a resident of Massachusetts. The plaintiff below recovered a verdict and a judgment thereon. The declaration alleged that she was "thrown, injured, suffered excruciating agony, and lost her life while such passenger," all by reason of the negligence of the defendant corporation. Administration was obtained in New Hampshire. The plaintiff in error was incorporated by concurrent action of several states, including Massachusetts and New Hampshire, and is of the class of corporations described in *Nashua & L. R. Corp. v. Boston & L. R. Corp.*, 136 U. S. 356, 10 Sup. Ct. 1004, 34 L. Ed. 363, and in *Smith v. Railroad Co. (C. C.)* 96 Fed. 504. The plaintiff below is a citizen of Massachusetts, so that, so far as the mere matter of diverse citizenship is concerned, the suit was properly brought in the district of New Hampshire. The propositions submitted to us by the plaintiff in error in this behalf have been so fully determined as to need no further discussion.

A number of minor questions were raised by the plaintiff in error at the trial, but none of them have been submitted to us in such form as require our attention. The suit was, by amendment, left to rest on a statute of Massachusetts, and the substantial questions which have been argued before us are: Whether that statute is not strictly penal, so that the proceedings which it authorizes cannot be taken in the federal courts, or in courts of foreign states; whether the administration granted in New Hampshire was valid, and whether, under the local laws of New Hampshire, the question of its validity can be raised collaterally; whether the deceased was guilty of negligence, and, if so, whether that negligence is a valid defense; and, finally, whether the case is barred by the limitation contained in the statute of Massachusetts on which it finally rested. We are compelled to direct that the verdict be set aside, and the judgment

of the court below reversed, by reason of our answer to the last question; but, as it is impossible to foresee what phases the case may assume in the future, we deem it advisable to express our views on the other questions which we have stated.

The most important one we have to deal with is whether the Massachusetts statute is strictly penal. It is not sufficient that it is in the nature of a penal statute. The distinction between a statute strictly penal, or *qui tam*, and one in the nature of a penal statute, is pointed out in *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123. The proper test is that, if it is strictly penal, the remedy is subject to the control of the executive of the state by which the proceeding was authorized, and it may be at any time, either before or after judgment, annulled by a pardon. That its essential nature in this respect is not changed by a judgment was determined in *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. Ed. 239.

The statutory remedy on which this suit relies is found in Pub. St. Mass. 1882, c. 112, § 212. The section is divisible into two parts, the first of which provides that the corporation shall be punished by fine. It fixes a maximum and minimum penalty, without any guide for determining where the fine shall rest between the extremes. It is to be recovered by indictment, and prosecuted within one year from the time of the injury. Being by indictment, there is no occasion to indicate in the statute by what rule the court shall be guided in determining the amount of the fine as between the extremes named. In this respect, the court is left, as in ordinary proceedings where a maximum and minimum fine is created by statute, to determine its amount by the degree of criminality. This is peculiarly appropriate to a statute strictly penal, because the question of the extent of a fine or other punishment is properly governed by local considerations, acting upon judicial discretion, thus imposing a duty which a foreign court cannot well perform. The statute further provides that the fine shall be paid to the executor for the use of the widow and child, or, if no widow or child, to the next of kin. This, and all the other peculiarities to which we have referred, are indicia of a strictly penal statute, because, while the next of kin may possibly have an interest in the life of the person deceased, yet they do not necessarily, and the statute admits no inquiry whether or not they may have any.

It is settled that the mere fact that the proceeding is by indictment does not necessarily determine its intrinsic purpose; yet, if the statute stopped there, it would seem impossible that there could be any proceedings in any other state than that where it was enacted. When a state sees fit to interpose its grand jury, and makes that an essential part of the proceeding, it is difficult to perceive how any other state could substitute other process therefor. In the case on which subsequent cases have been built up, *Dennick v. Railroad Co.*, 103 U. S. 11, 26 L. Ed. 439, which held that an administrator appointed under the laws of New York might bring an action for death arising under the statutes of New Jersey, the court was careful to rely on the fact that the right of action was not limited by the statutes

of New Jersey to the personal representatives of the deceased appointed in that state; but this rule is not broad enough to reach a case where an indictment is required. In *Stewart v. Railroad Co.*, 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537, it was held that an action might be brought in the District of Columbia by an administrator there appointed, the action being based on a statute of Maryland giving damages arising out of a death, although the statute directed that suit should be brought in the name of the state. The statute, however, gave an action strictly civil, and for damages suffered by the relatives for whose benefit the suit was to be brought; and the supreme court held that, as the state was only a nominal party, the question of who should be plaintiff was not a substantial one. The opinion, however, reaffirmed the rule stated in *Pollard v. Bailey*, 20 Wall. 520, 22 L. Ed. 376, and in *Bank v. Francklyn*, 120 U. S. 747, 7 Sup. Ct. 757, 30 L. Ed. 825, that, where a statutory remedy is given, and the suit is brought in another state than that which enacted the statute, all its substantial terms must be obeyed.

It is not necessary to go back in the legislation of Massachusetts to the origin of the first portion of section 212, c. 112, of the Public Statutes, to which we have referred. It was re-enacted in Acts 1881, c. 199, from Acts 1874, c. 372, § 163. The civil remedy, which appears in the latter portion of section 212, is first found in sections 1 and 6 of chapter 199 of the Acts of 1881, so that the remedy by indictment preceded the remedy by civil action. Not only, however, does the latter portion of section 212 confine the party prosecuting to elect between an indictment and a civil action, but in *Littlejohn v. Railroad Co.*, 148 Mass. 478, 482, 20 N. E. 103, 2 L. R. A. 502, it was held that the civil action is merely a substitute for the indictment. The various re-enactments contain no substantial changes. The act of 1874 by implication provided that the indictment would lie, although the passenger deceased was not using due diligence. So, also, did section 1 of the act of 1881, giving a civil remedy. This was not in terms repeated in the latter portion of section 212 of chapter 112 of the Public Statutes, but undoubtedly what appears on this point in its first part is intended to cover the whole section. Although the act of 1881 afforded a civil action, it was in all other respects on all fours with the proceeding by indictment. To emphasize that fact, it provided that the damages should be assessed with reference to the degree of culpability of the corporation, which, of course, was not necessary in those portions of the various statutes which related to an indictment. Therefore it would seem that, if one part of section 212 is strictly penal in its purpose, the other must be.

On the other hand, in *Stewart v. Railroad Co.*, 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537, to which we have already referred, it was held that a suit which the statutes of Maryland authorized to be brought, although in the name of the state, was not penal in the international sense. The statute, however, as we have said, limited the remedy to the damages suffered. *Brady v. Daly*, 175 U. S. 148, 20 Sup. Ct. 62, 44 L. Ed. 109, was an action brought for an infringement of an operatic composition, in which it was held that

the statutory amount is not strictly penal. At page 157, 175 U. S., page 65, 20 Sup. Ct., and page 113, 44 L. Ed., the opinion observes that, although punishment of the infringer may be the result of the statute, yet that was not its chief purpose, and that the minimum named in the statute was fixed because of the inherent difficulty of proving by satisfactory evidence the damages actually sustained. Also, in *Railway Co. v. Humes*, 115 U. S. 512, 6 Sup. Ct. 110, 29 L. Ed. 463, where the statute gave a person injured by the omission of a railroad corporation to erect fences double the amount of damages occasioned thereby, the court, at page 522, 115 U. S., page 113, 6 Sup. Ct., and page 466, 29 L. Ed., observes that the legislature may justly award something beyond compensation by the way of punishment, and for that purpose may either fix the amount or prescribe the limits within which the jury may exercise their discretion. These observations in each of these cases are in entire harmony with the decisions of the supreme court awarding punitive damages in civil suits, and they do not go beyond the theory of those decisions. In *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123, already cited, this topic was considered fully, and the result was a liberal rule in favor of holding statutes which may be penal in form to be substantially remedial. Numerous examples are given, commencing at page 667, 146 U. S., page 227, 13 Sup. Ct., and page 1127, 36 L. Ed. At the foot of page 673, 146 U. S., and on page 230, 13 Sup. Ct., and page 1130, 36 L. Ed., the opinion says that whether statutes, in some aspects penal, are penal in the international sense, depends on the question whether their purpose is to punish an offense against public justice or to afford a private remedy to the person injured by the wrongful act. As it is quite apparent that the main purpose of the Massachusetts statute under discussion is compensation, although, for the reasons which we have pointed out, in form and in other respects penal, it must be said that the liberal rules of the supreme court to which we have referred would not prevent our holding it remedial in an international sense, and, in fact, they favor our doing so.

Coming now to the local decisions: Judge Carpenter, in *Lyman v. Railroad Co.* (C. C.) 70 Fed. 409, held this statute strictly penal; and Judge Putnam, in *Perkins v. Railroad Co.* (C. C.) 90 Fed. 321, felt himself bound to follow Judge Carpenter, as no plain error appeared in his decision, and as the same was not inconsistent with any subsequent decision of the supreme court or the circuit court of appeals. *Perkins v. Railroad Co.* referred to *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. Ed. 239, where it was fully determined that in no way can the federal courts take jurisdiction of suits of this character whenever they are strictly penal. On that point there is no difficulty. But there seems to be no authoritative decision which holds that both branches of the statute are strictly penal. The matter has not been directly decided by the supreme judicial court of Massachusetts, and its opinions on that topic use varying expressions. *Com. v. Boston & A. R. Co.*, 121 Mass. 36, 37, states that the leading object of such statutes is to secure some pecuniary provision for those who may be dependent on the deceased,

and, while penal in form, they are largely remedial in character. *Com. v. Boston & L. R. Corp.*, 134 Mass. 211, 213, observes on the fact that the amount to be awarded under the statute of 1874 is greater or smaller according to the degree of blame attached to the corporation, and not according to the loss sustained by the widow and heirs of the deceased. Nevertheless, at page 214, it is said that the proceeding, though in the name of the state, is held to be substantially a civil one to recover damages, and to be governed by the same rules, so far as practicable, as civil actions, and the court cites *State v. Manchester & L. R. Co.*, 52 N. H. 528, as sustaining that proposition. In *Littlejohn v. Railroad Co.*, already cited, the court, at page 482, 148 Mass., and page 104, 20 N. E., states that the action under the statute is "penal in its character"; and lastly, in *Doyle v. Fitchburg R. Co.*, 162 Mass. 66, 71, 37 N. E. 770, the court again says that the amount awarded by the statute is "in substance a penalty, given to the widow and child and next of kin, instead of to the commonwealth." It decides that the right of proceeding cannot be released in advance by the intestate; but whether by this it is intended to say that it cannot be released because it is a criminal proceeding, or because the intestate cannot affect the rights of the widow and relatives, is not positively clear. Certainly the expressions of this court are not so much that the statute is strictly penal as that the amount awarded is "in substance a penalty," which is a qualified expression.

Coming now to *State v. Manchester & L. R. Co.*, 52 N. H. 528, cited by the supreme judicial court of Massachusetts, we find a statute framed in substantially the same manner as the Massachusetts act of 1874. It is given at page 547. The only difference is that it does not contain any implication with reference to the exercise of diligence on the part of the passenger. It says nothing about damages suffered by the widow and children, or the heirs, and imposes a fine within certain limits. In no particular, except that of diligence on the part of the passenger, is there any distinction between the two statutes. The court, at page 548, speaking of statutes of this class, cites a decision of the supreme judicial court of Maine to the effect that their whole object is to obviate the common-law doctrine in reference to human life, and to enable the family of the deceased to recover damages. At page 549 it remarks as follows:

"But in all these different forms of proceeding the same end is to be attained, and substantially the same rules are to be applied, as though they were civil actions for damages."

There can be no question that the court regards statutes of this class as remedial, notwithstanding their form, and even when the proceeding must be by indictment. The effect of the weight which the supreme judicial court of Massachusetts gave this case by its method of referring to it tends to a like result in that state. We may add that *Shear. & R. Neg.* (5th Ed.) § 132, regards the statute in question here as strictly penal. Notwithstanding this, we on the whole conclude that its substantial purpose is remedial. If it still stood as originally framed, and so permitted no form of proceeding except by indictment, we might find difficulty in giving it effect except in the courts of Massachusetts; but the civil remedy, given in the

alternative as we have shown, is a flexible one, and, although the declaration was finally based on the Massachusetts statute, it leaves this case within the jurisdiction of the United States circuit court in the district of New Hampshire.

It is maintained that the deceased was guilty of negligence; but this is not a defense unless it was the true cause of the accident, which is not claimed in the present case. *Com. v. Boston & L. R. Corp.*, 134 Mass. 211, 213. The counsel assume that the action was finally rested on Pub. St. c. 73, § 6. Pub. St. c. 73, § 6, as well as chapter 112, § 212, is a re-enactment from chapter 199 of the Acts of 1881. Both in the Acts of 1881 and in the Public Statutes special provision is made for railroad corporations. Therefore, by plain rules of construction, they are not included in the general language of chapter 73, and that should be interpreted as though it read "common carriers other than those especially provided for." This is clearly the proper construction; and apparently it was so held in *Holland v. Railroad Co.*, 144 Mass. 425, 427, 429, 11 N. E. 674.

The plaintiff in error maintains that the only basis for the jurisdiction of the probate court in New Hampshire is that now found in Pub. St. 1901, c. 182, § 8, which provides that, if a deceased person was not an inhabitant of New Hampshire, the jurisdiction to grant administration belongs to the judge "for any county in which said person had estate"; and it further says that the deceased left no estate whatever. Was the probate void? *Tebbetts v. Tilton*, 11 Post. 273, 288, 289, apparently holds that, in New Hampshire, this question may be raised collaterally. Ordinarily, the question of the capacity of an executor or administrator is waived by pleading the general issue, and can be raised only by a special plea. 1 Chit. Pl. (16th Ed.) 517. The plaintiff in error, however, makes a distinction that this rule does not apply where there was no right of action in the deceased, and where it arose first in the administrator. That may be so, because, where a statute creates a right of action which the common law does not recognize, it generally rests on the plaintiff to prove all the facts which the statute requires. However, we do not find it necessary to determine this point, because, as the case must go back for a new trial, the plaintiff in error may then amend its pleadings so as to avoid it.

The only evidence which we find in the record tending to show that the deceased had no estate in New Hampshire is a statement in the bill of exceptions to the effect that the plaintiff below, in answer to a question by the defendant below, replied that her estate was an "unsettled claim" against the defendant below, and that he did not think she had any other estate in New Hampshire. Very clearly, this is not of the positive character necessary to show that the administration was void, even if the plaintiff in error met the case in all other respects. In order to accomplish that, the proofs should be very thorough and exact, covering every ground on which the probate jurisdiction could be sustained, meeting every point beyond reasonable cavil. However, as this might be met on a new trial, we think we should pursue the matter further.

It will be noticed that the reference which we have made to the

bill of exceptions on this point puts the plaintiff below in the position of asserting that the deceased had "an unsettled claim" against the defendant below. This is in entire harmony with the theory, which we must accept, that the declaration as originally drawn set up a claim at common law. It is possible, however, though this we do not decide, that in bringing the suit the plaintiff below intended to support the claim at common law by resting also on what is now found in Pub. St. N. H. 1901, c. 191, §§ 12, 13. These sections have taken the place of the old remedy by indictment, and they apparently couple the right of action which a deceased person would have had, if he had lingered, with that given by modern statutes to his family, in case of death ensuing, combining the two, and awarding the net result to the widow or next of kin. Under the circumstances, therefore, it is plain that we cannot adjudge the administration void unless we hold that, although the party who applied to a probate court for administration made a bona fide claim that there was an existing estate, either at common law or at common law coupled with the New Hampshire statute to which we have referred, another court, when called on to try the merits of such a claim, could nevertheless interpose, and, by a preliminary investigation, determine its invalidity for the purpose of adjudicating that the administration was void. A proposition of this nature, of course, defeats itself. It being evident that the plaintiff below maintained that the deceased had "an unsettled claim" against the defendant below, and presented his proposition to that effect to the probate court, and obtained thereupon a decree from that court in his favor, this was sufficient to put the defendant below on a trial of the merits, without permitting it to try out the entire question for the purpose of demonstrating that the administration was void. Even if *Tebbetts v. Tilton* goes so far as to permit an administration to be declared void collaterally on plea and proof, it certainly cannot be held to reach this extraordinary result. Inasmuch as the Boston & Maine Railroad is a corporation of New Hampshire, and the record does not show that its habitat in that state is limited to any particular county, it cannot be maintained that a claim against it in behalf of a nonresident was not assets within the county of Rockingham, in which county this administration was granted. It is enough, on this record, that the probate court for the county of Rockingham came to the conclusion that there was "estate" within that county.

The plaintiff in error also maintains that the action is barred by the one-year limitation found in Pub. St. Mass. c. 112, § 212. The declaration contained originally no allegation that there was a widow, or children, or next of kin, and, therefore, no allegation that the suit was brought for their use, which is necessary in one based on the Massachusetts statute. It is a noticeable fact that the ad damnum in the writ is \$30,000, while the maximum under the Massachusetts statute is \$5,000. It is true that the declaration alleged that the deceased lost her life; but it did not show, in the manner required by proper rules of pleading, whether or not she lingered. It set out that she was "struck, thrown, injured, and suffered excru-

ciating agony," which furnished the basis of a common-law action accruing in her lifetime, and which survived under the statutes of New Hampshire. Therefore the declaration originally set out a cause of action at common law, coupled, possibly, in view of the allegation of death, with some thought of the supplementary damages given by the New Hampshire statute. In these aspects the case is on all fours with *Railway Co. v. Wyler*, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. Ed. 983.

We have observed that the Massachusetts statute, on which the suit is now rested, gives the right of action with a qualified provision that it must be brought within one year from the time of the injury. This is undoubtedly based on a matter of local policy, which justly follows the statute wherever it goes. We must be careful to notice that a limitation of this kind, incorporated into a statute giving a cause of action which did not exist at common law, is substantially unlike a general statute of limitations. A general statute of limitations must be pleaded in defense, and it can be replied to in various ways. A limitation in a statute like this under consideration must be met by pleadings on the part of the plaintiff and by the plaintiff's proofs. This subordinate proposition did not arise in *Railway Co. v. Wyler*, because there the statutes in question of both states were general statutes of limitations. Ordinarily a right of action given by statute, and not existing at common law, is not within a statute of limitations. Ang. Lim. § 80. Therefore it can have no limitation except that which is contained in the specific statute itself. So that this right of action, if it is not governed in New Hampshire by the one-year limitation, may be brought there at any time in the future. In any view, one essential purpose of the statute of Massachusetts to which this case relates, and of the policy which the statute indicates, would be defeated unless the one-year limitation is held to have effect everywhere. Generally, it may be said that the case in this particular comes within the rule we have already referred to, shown by *Pollard v. Bailey*, 20 Wall. 520, 22 L. Ed. 376, and *Bank v. Francklyn*, 120 U. S. 747, 7 Sup. Ct. 757, 30 L. Ed. 825, already cited, that, when a suit is brought on a statute of a foreign state, it is governed by all its substantial provisions. It has been universally held that, where a special statute of this character gives a remedy with an expressed limitation in the statute, the limitation is inherent in the right of action, and follows the remedy wherever there is an attempt to obtain it. Some of the authorities are given in Busw. Lim. § 351. Under the circumstances, *Railway Co. v. Wyler* governs the case; and inasmuch as, at the time the amendment was offered, the one-year period had expired, and the defendant below clearly objected and raised the point, both by plea and exception, the court, as the case then stood, should have directed a verdict for the defendant.

The judgment of the circuit court is reversed, the verdict set aside, and the case remanded to the circuit court for further proceedings according to law; and the costs of appeal are awarded to the plaintiff in error.

FULLER v. VENABLE et al.

(Circuit Court, D. Maryland. April 1, 1901.)

STREET RAILROAD—MORTGAGE—FORECLOSURE AND REORGANIZATION—RIGHTS OF BONDHOLDER.

A committee having charge for first mortgage bondholders of the foreclosure sale and reorganization of a street-railroad company were authorized to purchase the road and other property for their benefit, and organize a new corporation to operate it. The bonds concerning which the agreement related were bonds on which there had been a general default on May 1, 1897, and the bondholders agreed to surrender such bonds to the committee, and that the latter should "use the said bonds and coupons" to pay for the property purchased. Bonds were deposited, subject to an order of the committee, pursuant to an agreement under which the holders of receipts for bonds were "entitled to receive for each bond deposited a new noncumulative income mortgage bond [against the new company] for each bond deposited." One of the depositors, though consenting to the reorganization as planned, detached and retained coupons maturing on and after May 1, 1897, and subsequently collected the same from the proceeds of the mortgage sale; thereby obtaining more for himself than the other bondholders, who deposited such coupons for the committee's use in purchasing under the foreclosure. *Held*, that he could not claim bonds against the new organization in the hands of the committee without producing or surrendering the defaulted coupons which he detached, or paying the money collected therefor out of the proceeds of the foreclosure.

In Equity.

Thomas W. Miller, for complainant.

Edwin G. Baetjer and Charles McN. Howard, for defendants.

MORRIS, District Judge. This is a bill in equity filed by the complainant, Fuller, against Venable, Spence, and Graves, a bondholders' committee, having in charge for the bondholders the sale by foreclosure and the reorganization of the Roanoke Street-Railway Company. The bill of complaint is in the nature of a bill to enforce a trust, or to enforce specific performance of an agreement, and the prayer of the bill is that the defendants be required to perform their duty to the complainant by delivery to him, without condition or reservation, the second mortgage bonds of the Roanoke Electric & Power Company, amounting to \$21,000, to which the complainant claims to be entitled as the holder of the deposit certificates for first mortgage bonds of the Roanoke Street-Railway Company, deposited with the Mercantile Trust & Deposit Company of Baltimore under an agreement dated January 10, 1898, between the defendants and the bondholders of the Roanoke Street-Railway Company. The question involved is whether or not the complainant can be required by the defendants, as a condition of his obtaining from them \$21,000 income bonds of the new company, to produce and surrender certain defaulted coupons which had been detached from the old bonds before they were deposited, or be required to pay the money collected by the complainant for those coupons out of the proceeds of the foreclosure sale, or whether the complainant is entitled to keep the money and to demand and receive the new bonds unconditionally.

The rights of the complainant are not based upon the \$21,000 of old

bonds which the complainant originally held. Those bonds he confided to a Mr. Trout to deposit for him under the terms of the agreement between the depositing bondholders and the defendants, first detaching from each bond three semiannual unpaid interest coupons, due as follows, viz. May 1, 1897, November 1, 1897, and May 1, 1898. The bonds were deposited, and the complainant obtained therefor certificates of deposit from the Mercantile Trust & Deposit Company of Baltimore, reciting that each bond had been deposited subject to the terms of the agreement of January 10, 1898, between the defendants and the bondholders, and subject to the order of the defendants, or a majority of them, and that the holder of the certificate assented to the agreement by receiving the certificate. It is clear, therefore, that the complainant can enforce only such rights as he is entitled to under the proper construction of the agreement, and that he is affected by all the equities which the bondholders' agreement gives rise to. The purpose of that agreement was primarily to bring about a foreclosure of the mortgage securing the deposited bonds, and it authorized the defendants to represent the owners in all proceedings instituted for the collection of the bonds, "and to do whatever acts in their judgment may be necessary or desirable for the protection of the interests of the said bondholders." By the agreement, the defendants were authorized to purchase the railway, and also the property, of the Roanoke Electric Light & Power Company, or other property, for the benefit of the holders of the bonds deposited, and to organize a corporation to own and operate the property purchased. In case of purchase by the defendants of the properties mentioned, they were authorized to use the deposited bonds and coupons in making payment therefor, and it was provided that the defendants should have power to mortgage or pledge the properties purchased to carry out any plan of reorganization that might be adopted. It was further stipulated that in any plan of reorganization provision should be made for issuing new first mortgage bonds sufficient to pay the claims of creditors and the expenses of the foreclosure and reorganization proceedings, and that the holders of the old mortgage bonds should receive for each bond deposited a new noncumulative income mortgage bond, junior only to the before-mentioned first mortgage bonds.

It is conceded in the agreed statement of facts that it was the intention of the defendants, acting as said committee, and of the parties actively engaged in the attempt to reorganize the company under the agreement and plan of January 10, 1898,—and that they formulated their plan upon the basis,—that no payment or compensation was to be made for the bonds deposited under said agreement other than the delivery of the new income bonds, nor for the coupons maturing May 1, 1897, and subsequently, and that all the depositors except the complainant did either deposit with their bonds all the coupons then unpaid, including the coupon maturing May 1, 1897, or, upon being notified to do so, did afterwards deliver the same to the said Mercantile Trust & Deposit Company. Proceedings to foreclose the mortgage were instituted by the trustees named therein, and by a decree passed May 1, 1899, commissioners were appointed to sell the mortgaged property, and they were directed, after the payment of costs

and certain preferred claims, to apply the proceeds of sale to the payment of all coupons then due (the mortgage having specially provided that in case of sale the coupons should be preferred to the principal of the bonds), and to apply the residue to the principal of the bonds ratably. The defendants, as such committee, purchased said property at the foreclosure sale for \$150,000, and the power company property for \$31,000, and settled for said property, using in said settlement the bonds deposited with said trust company, and all the coupons deposited therewith, including complainant's bonds and coupons. Soon after the confirmation of the sale, the attention of defendants was for the first time called to the fact that the coupons due May 1, 1897, November 1, 1897, and May 1, 1898, had not been deposited with complainant's bonds, but had been retained by him, and the complainant was notified by them that no provision had been made under the reorganization agreement for payment to depositing bondholders of the coupons due May 1, 1897, and subsequently, and that the complainant could not participate equally with the other depositing bondholders in the issue of income bonds of the new company, unless he first put himself on an equal footing with all the other depositing bondholders by either depositing the coupons retained, or by refunding the money he might collect for them under the decree out of the proceeds of sale. The complainant refused to accede to the defendants' contention as to his rights, and collected, in payment of his retained coupons, from the commissions out of the proceeds of sale, the sum of \$2,115.96.

After the consummation of the purchase of the properties acquired by the defendants as a committee, they called a meeting of the depositing first mortgage bondholders and certain preferred stockholders, at which it was explained that the bad physical condition of the properties required expenditures, which, with the expenditures provided for by the bondholders' agreement, required an increase in the issue of new first mortgage bonds, and thereupon a plan of reorganization was formulated, and issued to the depositing bondholders, dated November 20, 1899, which provided for the issue of \$300,000 first mortgage 5 per cent. bonds, \$190,000 income noncumulative 4 per cent. bonds, and \$200,000 of capital stock, and stated that the income bonds would be distributed to the depositors of the old bonds who had deposited their bonds, together with all the coupons maturing on and after May 1, 1897, or who, in order to equalize all holders of said bonds, refunded the cash received for the retained coupons from the commissioners who made the sale of the Roanoke Street-Railway Company.

It is to be noticed that the bill of complaint does not seek to modify or attack in any way the plan of reorganization which was in fact carried out by the defendants as a committee, nor to question their authority and power, in the emergency presented by the insufficient physical condition of the properties, to increase the issue of the new first mortgage 5 per cent. bonds beyond the amount contemplated by the agreement of January 10, 1898. On the contrary, the bill of complaint sets out and relies upon all that has been done by the committee, and avers that the securities contemplated, dated December

1, 1899, have been issued, and that nearly all the income bonds have been issued and delivered to the holders of the certificates of deposit, and that the committee have in their possession, and are without right withholding from the complainant, the \$21,000 of income bonds to which he is entitled as the holder of his certificates of deposit. The complainant relies upon his certificates of deposit, and upon what the committee has done, as entitling him to come in with the other holders of certificates, and get his share of what has resulted from the plan which was carried through by the committee for the equal benefit of himself and all the other holders of like certificates.

It seems to me that the mere statement of the case discloses the inequality which would necessarily result from yielding to the complainant's demand. It simply would result in his obtaining on his \$21,000 of certificates \$2,115 more than any other holder of a like amount of certificates. No such result could have been contemplated by the other depositing bondholders, and no such result is provided for by the stipulation of the bondholders' agreement. The agreement was entered into with reference to an issue of defaulted bonds, upon which the interest had ceased to be paid when the coupon of May 1, 1897, matured. That was the subject-matter of the whole agreement, and those were the bonds which all depositors were to surrender into the hands of the committee, in order that the action taken for the common benefit should be uniform, and that the committee should "use the said bonds and coupons" to pay for the property proposed to be purchased. Mutuality, equality, and community of interest among all those who contributed their bonds to the scheme was necessarily the fundamental principle of the plan of associating all the bondholders together for joint action. How could it be possible, without the clearest stipulation, and upon some special consideration, consented to by all the others, that one stockholder could be allowed, by simply retaining his coupons, to obtain for himself over \$100 more for each bond than the other depositors.

The complainant rests his demand upon the phrase of the agreement, "Holders of receipts for bonds * * * shall by said plan be entitled to receive for each bond deposited a new noncumulative income mortgage bond." But I think he ignores the fact that the bonds concerning which the agreement was made were defaulted bonds, on which there had been a general default on May 1, 1897, and it was those bonds which the committee were to have and use, and not a less valuable bond, from which the holder, before depositing, had detached the coupons. It is plain that such a construction as the complainant contends for would bring about a result so unequitable that a court of equity would not lend itself to its enforcement by a decree for specific performance; and, if the bill be regarded as an application to enforce the execution of a trust, that the defendants neither contractually nor impliedly came under an obligation to treat, in the distribution of the results of the plan of reorganization, one bondholder differently from another, but, on the contrary, their duty is, in executing their trust, to treat all equitably and ratably, giving to each a return exactly proportioned to the securities actually deposited by each. The bill will be dismissed.

WOOD v. DAVIS et al.

(Circuit Court, D. Montana. January 17, 1900.)

No. 58.

JUDGMENT—RELIEF AGAINST IN EQUITY—FRAUD.

A court of equity may enjoin a defendant from availing himself of a judgment at law in his favor which was procured by his fraud at suit of one who was not a party to the action in which such judgment was rendered; but to authorize the granting of such relief the fraud must be clearly proven, and it must have been the inducing cause of the judgment. Evidence that false testimony was adduced by the successful party is not alone sufficient, unless it appears to a reasonable certainty that, but for such testimony, the judgment would have been different.

In Equity. Suit for relief against a judgment on the ground of fraud.

Charles M. Demond and C. P. Drennen, for complainant.

W. W. Dixon and Forbis & Forbis, for defendants Andrew J. Davis, Jr., and First Nat. Bank.

William Scallon, for defendant James A. Talbott.

William Scallon and John W. Cotter, for defendant Leyson.

E. N. Harwood, for defendant John E. Davis.

BEATTY, District Judge. The complaint alleges that on March 11, 1890, Andrew J. Davis died at his home in Butte, Mont., leaving a large estate and numerous heirs, including complainant, who was one of his sisters; that about June 24, 1890, a paper purporting to be his will, executed July 20, 1866, bequeathing his property to his brother, John A. Davis, was propounded for probate in the proper court; that contests were filed against the probating of such alleged will by part of said heirs, including complainant, which, after a trial, and failure of the jury to agree, were compromised, the will being admitted as genuine, and agreement made by the heirs for a division of the estate, not including, however, the controversy involved in this case; that defendant Talbott was in August, 1890, appointed special administrator, and in March, 1895, was succeeded by defendant Leyson as administrator with the will annexed; that the deceased had owned 950 shares of stock of the First National Bank of Butte; that the defendant Andrew J. Davis, Jr., a nephew of deceased, claimed to own by gift from him, and had possession of, the said shares; that under an order of the state court said Talbott, as such special administrator, about December, 1893, brought an action against defendant Andrew J. Davis, Jr., to have his claim to the stock declared void; that such proceedings were had that in May, 1894, the court held and adjudged said Andrew J. Davis, Jr., the owner of said stock; that appeal was taken from this decision to the supreme court of Montana, which, in November, 1895, affirmed the decision of the lower court (*Leyson v. Davis*, 17 Mont. 220, 42 Pac. 775); that in said supreme court defendant Leyson was substituted in the record for Talbott, whom he had succeeded as administrator. The complaint then charges that a most corrupt conspiracy was entered into between all the defendants and the attorneys for Talbott,

and that through the gross frauds committed by these alleged conspirators the said judgment was recovered by said Andrew J. Davis, Jr. The complainant asks that he be enjoined from enjoying any of the benefits of such judgment, and that he account to the estate for all said stock, and the profits that have accrued therefrom. All the allegations of fraud are denied by the defendants.

It is seldom that a pleading is presented so replete with charges of fraud, deceit, and criminal combination, and couched in diction so direct and uncompromising, as is this complaint; and, if true, most assuredly the complainant's prayer should be granted. In view of the testimony, it must be said that at least some of the charges are most recklessly made. It is true, they are made under the usual allegation that they are upon "information and belief," but when an affiant invokes the protection of this shield he should at least be reasonably sure that his information is from such source, and made under such circumstances, that a prudent person can believe it true. It is not sufficient that the allegation is upon "information," for that is not a license to make any statement that may serve a purpose; the information must be believed to be true. The record in this case is so voluminous that no attempt will be made to refer in detail to the many questions raised, and, before taking up any of those of fact, it may be better to determine the limits of some of the legal propositions to be dealt with. The gravamen of the action is that the judgment recovered in the bank-stock case was obtained solely through the fraud of the parties connected therewith, and that, therefore, said Andrew J. Davis, Jr., may now be enjoined from its enjoyment. There can be no doubt concerning the rule in such cases, and it has been so well defined that it is unnecessary to enter into any special discussion of it. When the action is in the nature of an independent suit, and it is alleged that through fraud a judgment has been recovered in some other proceeding, jurisdiction exists to grant such relief that the unjust judgment may be in effect so controlled that its beneficiary will gain nothing by it. But the court cannot entertain jurisdiction when the action is only so incidental or supplemental to some other proceeding as to be a part or continuation of it; nor can it act as a court of review of the proceedings of some other court, or reconsider questions of law or fact passed upon by it, or review any of the alleged errors committed by the other court. The frequently cited case of *Marshall v. Holmes*, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. Ed. 870, fully states the rule which must govern here, and no other reference to authority need be made.

Complainant's counsel, in his argument, seems to imply that the evidence introduced in the state court in the former case will be considered here with the view of determining its sufficiency to support the judgment there had. Nothing of the kind can be done. Testimony here to show that the testimony there was produced through some fraudulent agreement or combination which resulted in such false testimony as controlled the result may be considered. Upon this, however, the authorities are not in accord. 3 Enc. Pl. & Prac. 630. But that the testimony as given was not sufficient to justify the judgment cannot be considered. The state courts have already

held that it was sufficient, and that conclusion, as well as their construction of the law concerning gifts causa mortis, as before stated, are not now questions for investigation or decision by this court. It is a well-settled rule that the evidence to prove any fraud upon which to found a judgment or decree must be "clear and satisfactory." *Lalone v. U. S.*, 164 U. S. 255-257, 17 Sup. Ct. 74, 41 L. Ed. 425. This rule must be applied with equal, if not greater, vigor in a case in which the object is to annul the judgment of another court because of fraud in its procurement. The fraud must be distinctly and clearly proven; and, not only that, but, if the evidence untainted by fraud was sufficient to justify the judgment, the proof that there was fraud in the case will not affect the judgment.

The chief questions in this case are those of fact concerning the allegations of fraud. What, then, are they, or some of them, and what is the testimony in support of them? It is said of defendant Leyson that he was heavily indebted to the bank of which said Andrew J. Davis, Jr., was cashier and manager; that they were intimate friends; that "by reason of a false, corrupt, and unlawful conspiracy between him and said Andrew J. Davis, Jr., and by reason of the threats of said defendant Andrew J. Davis, Jr., and by reason of a fraudulent agreement between them not to have said judgment reviewed," he refused to take the necessary steps, though requested to do so, to have the judgment reviewed by the supreme court of the United States. It appears that Leyson is one of the most prominent business men of Butte; that nothing whatever appears against his personal character; that he was indebted to the bank in the sum of about \$6,000; that there is no evidence of any threats against him by said Andrew J. Davis, Jr.; that he declined to take the case to the supreme court because his counsel advised him that he had no cause; and that they were correct is shown by the dismissal of the case by that court after it was taken there by some of the heirs, who had the right to do so. *Leyson v. Davis*, 170 U. S. 36, 18 Sup. Ct. 500, 42 L. Ed. 939. It is charged that the bank-stock case was commenced "pursuant to a corrupt, wrongful, and fraudulent conspiracy and agreement" between Talbott and Andrew J. Davis, Jr., both being officers in the bank; that such an agreement embraced, among other things, that Davis should "present to the court full and clear evidences of said alleged gift"; that Talbott should be one of his witnesses, and "should give false evidence with respect to said pretended gift," and that Davis should procure other false and perjured testimony; that all the witnesses called were friends of Davis, and that, "pursuant to said fraudulent conspiracy and agreement, none of said witnesses were asked one word in cross-examination by counsel for said James A. Talbott, and no evidence was offered by him or them to impeach them, or any of them"; that other witnesses, including the United States judge, were permitted to testify without interruption, and were not cross-examined; that witnesses whom Talbott and his attorneys knew could give adverse testimony to said Davis were not called. Also it is repeatedly charged in counsel's brief and argument that Talbott was a man unworthy of belief, a gambler and keeper of

disreputable resorts, a man of low origin; and that no attempt was made to impeach his credibility, or to show his character. The record shows that for about 20 years Talbott had been a confidential business associate with the deceased; that in August, 1890, when an application was pending before the court by some of the heirs for appointment as administrator, Talbott was called as a witness, and, as I understand, was unexpectedly asked about the gift of the stock to Andrew J. Davis, Jr.; that, without being an applicant, he was appointed special administrator, and was able to give a very large bond; that when directed by the court to commence action against said Andrew J. Davis, Jr., for the stock, instead of showing him favor, although associated with him in the bank, and also believing, as he had long before testified, that the stock had been given him, he employed against him the attorneys who had been before employed by those heirs of the deceased whose interest it was to recover the stock and add it to the estate's assets, and the counsel employed had in ability no superiors in the state of Montana. There is no positive evidence to show that Talbott did anything to defeat the action, or acted in bad faith, and the most that can be said is that it might be suspected that he would favor Davis, because of his association with him; but the charges of bad faith and of the various corrupt agreements alleged are not proven. As explained by some of the testimony, there was no attempt to impeach the witnesses referred to because their character was such that they were not impeachable. The objection that had been interposed to the testimony of Judge Knowles was promptly withdrawn when it appeared therefrom that it could be argued that the deceased had not given the stock to Andrew J. Davis, Jr., but only that he had expected to; nor is there any reliable evidence that there was any intentional omission on the part of Talbott's attorneys to call witnesses who could have helped their cause, and at least one—William Wehrspau—whom it is charged should have been called, and who has testified in this case, would, if called, have done little, if any, good, for he corroborated, rather than contradicted, the testimony of Talbott and Davis, Jr., as to the gift. To impeach Talbott, complainant's counsel has in this action introduced Mrs. Neidenhofen, whose deceased son had been married to Talbott's daughter. She testified to Talbott's bad character for truth and honesty; also to a conversation with him, shortly after her son's death, in which they discussed the criminal conduct of the son, while clerk of the court, in the bank-stock suit. She, it seems, was the keeper of some kind of a store; that she had had trouble with Talbott and Davis, and had made threats concerning their lives, of taking the law into her own hands. Her entire testimony considered, suggests that before receiving it as entirely credible, it must be supported, which is attempted by the testimony of her partner in business, E. Potting, who, it seems, took some little interest in her troubles with Talbott. The other impeaching witness is William Wilson, who had known Talbott over 30 years before, when they were partners in the gambling business, and who testified to Talbott's gambling pursuits up to 1876 or 1877, when he quit,

and went into business with the deceased; also that his reputation for truth and honesty was bad. This witness has also had trouble with Talbott, and for many years was himself a gambler. If gambling impeaches Talbott's character, it is difficult to understand why it would not also that of this witness, and especially as his testimony shows that he has not entirely reformed all his wild ways. If Talbott is of the very bad character charged, it is strange that after a long residence in Butte, where he has been engaged in active business, some entirely reputable and unprejudiced witnesses could not be found to say so. Courts cannot hold that the character of a witness is so impeached that his testimony must be disregarded except upon the testimony of witnesses who are themselves above impeachment, and by such unequivocal testimony from them that it cannot be doubted. Also it is charged that one Darnold, after having given false testimony in the former case for Davis, Jr., was removed and kept away from the state, and that while away he was supported by Davis, was by him furnished with \$1,500, besides other amounts, in payment for his false testimony; that prior to giving his testimony he was poor and impoverished, and wholly without means, but that since he has been in prosperous circumstances, and has been from time to time paid large sums of money by Davis, Jr.; that, after returning to Butte, he, on July 6, 1894, sent a letter to Davis, Jr., demanding \$10,000 for his services in giving such false testimony, and that thereafter Davis paid him various sums; that, after returning to Butte, having become repentant for what he had done, he first confessed his sin to J. R. Boyce, Jr., then to Curtis, Boyce's brother-in-law, to Stapleton, and finally, on July 12th, six days after writing the letter to Andrew J. Davis, Jr., he went with Boyce to Helena, and confessed to Talbott's attorneys, who took his affidavit to that effect, which having at their disposal they did not use upon the motion for a new trial, nor did they get the affidavit of Judge Stapleton to so use. There is no clear evidence that Davis, Jr., had Darnold leave the state, and, notwithstanding the statements that much money was paid him by Davis, there is no evidence that he paid him any, but, on the contrary, the testimony shows that he was during all the time of these transactions "poor and impoverished"; that on one occasion Boyce says he saw him at a restaurant, after giving his testimony; that he had some money; did not see any large amount; Darnold paid for their dinner; that Darnold told him after returning from Ohio that one Gansberger had furnished him considerable money on the trip,—\$700 or \$800,—and yet, while on the trip it appears that he drew on one of the Davises for \$25, which was paid; that when they went to Helena to make the affidavit Boyce paid all their expenses, and shortly thereafter loaned Darnold \$75, on which he left the state; and, so far as remembered, this is all that the record shows of his financial condition or operations. The circumstances under which the letter of July 6th, with which said Boyce is closely connected, was sent to Davis, Jr., demand some consideration. It seems that there was a claim against Boyce of about \$60,000 for which the bank sued him, and which he claimed was unjust; that he had some

hopes for a time of getting it compromised through Davis, Jr.; also he thought Darnold was a valuable witness for him concerning this claim; that a letter written by him to Erwin Davis, a brother of deceased, concerning the fraudulent character of the bank-stock suit, probably led to the institution of this action; that, after the complaint was prepared, a copy was furnished him by counsel, and there is some reason to believe that he had some hope that the success of the complainant in this action might lead to the settlement of his claim with the bank; and certainly he is complainant's chief witness in this case, and many things show that he has taken an unusual interest for a witness who is not a party to the litigation. Boyce says the letter of July 6th, referred to, was written by Darnold, who showed it to him; that he advised him that it was not right to send such a letter; that while Darnold was down in town Boyce made a copy of the letter, and then went to his brother-in-law, Curtis, to have him compare and identify the letters; that afterwards Darnold sent a letter to Davis, Jr., to which it seems there was no signature, and he informed Boyce of all he had done, although Boyce had advised him of the wrong of such an act. The very great interest which Boyce took in this matter need only be mentioned, and left without comment. When this letter was sent it would seem that Darnold had not been sufficiently impressed with the heinousness of the sin committed several months before in giving his false testimony, but, after waiting for and getting no response to his letter, he suddenly became convinced of his wrong, confessed it to several, and then Boyce took him to Helena, where the affidavit was made. Complainant's counsel severely criticises the counsel in the former case that they did not use this affidavit on motion for a new trial. The testimony shows that it was made with such conditions attached that it could not be used by counsel without a violation of their promises given Darnold. Instead, however, as the testimony is understood, they procured and used upon the motion for a new trial the affidavits of Boyce and Curtis as to the confession of Darnold that his testimony was false, and they asked Stapleton for his affidavit, but he declined to give it; so that in the record in the state supreme court there is the evidence that Darnold's testimony was false, but that court regarded his testimony as unimportant, and near the close of its opinion (Leyson v. Davis, 17 Mont. 220, 42 Pac. 775), says that, if his testimony were excluded, there "would be abundantly sufficient to sustain the conclusion reached by the district court."

The great majority of the many charges made of conspiracy and fraud are such as could have been carried out only through the direct action and control of Talbott's counsel. The charges made against them, especially in the argument and brief of complainant's counsel, are as unsparing and ruthless in their denunciation as will be found in the record of any court against the boldest conspirators. Notwithstanding the direct and implied charges of professional delinquency and crimes alleged in the complaint against these attorneys, counsel has criticised them for testifying in this case without having been formally subpoenaed. Their testimony is entirely per-

tinient to the issues, and, if it were not, why should they not, by their testimony, repel the assaults made upon their character? A lawyer's good name is about his only heritage for a life of toil and struggle. If he lose that, he is poor indeed. In integrity and honor he should be without rivals. To him the most valued business interests, the highest concern of life, the holiest secrets of men are unreservedly intrusted. He who would betray such sacred trusts would neither be entitled to nor receive the protection of any court. To the honor of the profession, it is true that those trusts are seldom betrayed. The attorneys against whom these most serious charges are made are old citizens of the state. Their reputation for legal ability and high character has gone far beyond the borders of Montana. They have reached that age when life would be too short to re-establish a dethroned character. It is not, therefore, wonderful that they accepted the opportunity to protect that character. It would be if, by their silence, they had invited the conclusion that the charges were true. After a most careful examination of this entire record, it is my undoubted conclusion that there is absolutely nothing therein worthy of belief that sustains the charges made against those counsel, but, on the contrary, so far as can be judged from what is presented of the proceedings of that case, they conducted it with unquestionable zeal and ability. Had they been possessed of all the additional light developed by the experience of this cause, it is doubtful that they could have called any other witnesses who would have materially aided them. Darnold's testimony might have been weakened, possibly entirely overthrown; but they say that Boyce, who made the suggestions of Darnold's false testimony, had so prevaricated in his testimony when placed upon the stand that they had lost faith in his statements.

Before concluding this, which, perhaps, is already too lengthy, let us consider briefly complainant's testimony bearing upon the charges of fraud, especially as to the suppression of testimony. Boyce is complainant's chief witness. He testified that he was present at the bank-stock case trial as a spectator only, but, on hearing Darnold's testimony concerning the gift of the stock to Andrew J. Davis, Jr., that he immediately went to Talbott's attorneys, and told them that the testimony was false; that it could be so shown by some of his account books. Also he says that Darnold had told him before the trial that he intended giving false testimony for the money there was in it, and that he (Boyce) told Talbott's counsel of this. While they admit this, they say, for reasons before stated, that they had lost confidence in all Boyce's statements. Boyce also says that he had the affidavit of Darnold, and that he offered it to those counsel for use, and that they did not use it; but Corbett, an attorney, who was called by complainant, says that, shortly after the affidavit was made, Boyce, Darnold, and McConnell came to his office in Butte with it, but that all said it could not be used, because of the conditions under which it was made, and by their consent Corbett put it in his safe, subject to Boyce's order, where it remained about a year, when Boyce called for and received it. This witness also testifies of conversations he had with Davis, Jr., showing that

the stock had not been given him. Taking all his testimony as substantially true, it would not lead to an undoubted conclusion that the judgment was based upon fraud. When, however, his difficulty with the bank and Davis, Jr., his interest and part taken concerning the Darnold letter of July 6th, his interest in having him make the affidavit, his control of it, his interest taken in the former and in this case, are all considered, his testimony must be doubted. McDougall, a stenographer, was called to show that Davis, Jr., and Talbott had testified in August, 1890, at the application for the appointment of an administrator, that at the interview with deceased in December, 1889,—just before he left on a trip,—he in effect said that Andrew J. Davis, Jr., was to have the bank stock if he did not return. It is claimed that such testimony did not show that a gift had been made, but only showed an intention to give upon the occurrence of a future event, which did not take place; and that this testimony was not introduced is evidence of fraud on the part of Talbott's attorneys. The theory just stated is the one upon which they tried the case, and they did not offer to introduce the testimony of Davis, Jr., lest it would give him the opportunity of explaining and modifying it. As to Talbott, they did, in effect, introduce his statement made in 1890. There is not in all this any evidence of fraud, but only a question of the exercise of good judgment in the management of the trial. Judge Stapleton testified that Boyce, with whom he was acquainted, brought Darnold, with whom he was not acquainted, to his bedroom, at 11 o'clock at night, when he was in bed, to have Darnold make the affidavit, and witness told them to go to Talbott's attorneys in Helena. Curtis says that Toole, one of Talbott's counsel, came to him, and appealed to him—almost forced him—to make an affidavit concerning Darnold's confession of his false testimony. William Wehrspaun testified concerning the time when Talbott and Andrew J. Davis, Jr., were with the deceased in December, 1889, concerning which so much is said in this case, that the deceased, with papers in his hands, coming up to Davis, Jr., said: "This shall be yours. Take good care of them if I do not come back." And the judge [deceased] took these papers, and laid them in the box." He also testified that Darnold was not at the house at the time he testified that he had been; also that Andrew J. Davis, Jr., had told him on one occasion that the deceased had left him nothing; and Mrs. Wehrspaun testified to the latter statement, but said that Davis, Jr., said it in a "joshing" way, and she did not take it as a serious statement.

The foregoing states, I think, the strongest features of complainant's testimony. That the testimony which counsel are charged with fraudulently omitting at the former trial could have been introduced to advantage to their cause is not entirely clear; that they knew of it all is not shown; that they fraudulently omitted any of it cannot be concluded from all the testimony in the case. The conclusion is that it has not been shown that the judgment was procured by fraud; that the complainant's bill in this action must be dismissed, and defendants have their costs; which is accordingly ordered.

HOLTON v. DAVIS et al.

(Circuit Court of Appeals, Ninth Circuit. February 25, 1901.)

No. 624.

1. JUDGMENT—IMPEACHMENT FOR FRAUD—JURISDICTION OF EQUITY.

A court of equity has jurisdiction to enjoin a defendant from availing himself of a judgment in his favor procured by his fraud at suit of one who was not a party to such judgment, but, as such jurisdiction rests upon the ground of fraud alone, it extends no further than to grant relief against its effect, and hence, to authorize the court to act, it must clearly and satisfactorily appear that, but for the fraud, the judgment would not have been rendered.

2. SAME—MEASURE OF PROOF REQUIRED.

To entitle a complainant to relief in equity against a judgment on the ground of fraud, the proof in support of the allegations of fraud must be clear, distinct, and certain. The evidence may be circumstantial, but it must be persuasive; and, if there be any doubt or uncertainty, the relief must be denied.

3. SAME—EFFECT OF FALSE TESTIMONY.

A judgment cannot be impeached for fraud upon proof that a witness testified falsely on the trial of the case, although his testimony was material and important as corroborating other testimony, where the fact of its falsity was shown in support of a motion for new trial, which was nevertheless denied, and when the supreme court on appeal sustained the action of the trial court on the ground that, excluding such testimony, there was sufficient to sustain the judgment.

4. SAME—EVIDENCE OF FRAUDULENT CONSPIRACY—CONDUCT OF COUNSEL.

An allegation of a fraudulent conspiracy between a plaintiff and his counsel and the defendant in an action in the interests of the latter, made to impeach the judgment rendered in his favor, is not sustained or supported by the fact that plaintiff's counsel did not cross-examine certain of defendant's witnesses, nor make any attempt to impeach their testimony, where it does not appear that they knew any facts which would have aided the plaintiff, and no evidence is offered to show that their testimony could have been impeached; nor can such fraudulent conspiracy be predicated upon the fact that plaintiff's counsel failed to introduce certain evidence of which they had knowledge, where the expediency of its introduction was clearly a matter of judgment, and it does not even appear that their action was not for the best interests of their case.

5. SAME.

Proof that a witness, who had been known in the community as a prominent business man for many years, had some 15 years previous to the trial been a gambler, and had conducted a gambling house in the same community, does not tend to show that counsel for the adverse party were guilty of fraudulent conduct because they failed to introduce evidence of such facts for the purpose of impeaching the credibility of the witness, and especially where it was a matter of doubt, at least, whether by so doing they would not have prejudiced their own case.

6. SAME—EVIDENCE CONSIDERED.

Evidence considered, and *held* insufficient to sustain allegations of a fraudulent conspiracy between an administrator, as plaintiff in an action at law, and his counsel, on one side, and the defendant on the other, for the purpose of favoring the defendant in the trial of the action, such as would justify a court of equity in enjoining the defendant from availing himself of the benefit of the judgment in such action.

Ross, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the District of Montana.

Statement of the History and Pleadings.

No solution of the questions involved in this suit can properly or satisfactorily be arrived at without a thorough knowledge of the facts and of the pleadings. The whole case depends upon the conclusions which the court may reach as to the facts. Before engaging in any discussion as to what facts are established by the testimony in the voluminous record before us, it becomes necessary to refer briefly to the litigation out of which the present controversy sprung into existence, and to some of the leading characters therein whose names are conspicuously mentioned in the record.

Andrew J. Davis, a resident of Butte, Mont., died in March, 1890, leaving an estate valued at over \$4,000,000, which he had accumulated from mining, banking, and other business in which he had been engaged. Several years before his death, his nephew (who bears his name) Andrew J. Davis, came from Chicago, Ill., and, after serving in minor positions, was selected by his uncle as cashier of the First National Bank of Butte, the stock of which constitutes the bone of contention in the present suit. Owing to the identity of the uncle and nephew's names, we will adopt the course pursued by counsel, and designate the uncle as the "Judge" and the nephew as "Andy," so as to distinguish one from the other. The judge, for several years before his death, had been extensively engaged in mining, and in that branch of business was associated with James A. Talbott, who was "his right-hand man in his mining transactions." The judge was the owner of the entire capital stock of the bank at the time of its incorporation, and for several years prior to his death had managed its business through a board of trustees, among whom were Hiram Knowles, W. W. Dixon, his attorneys, and James A. Talbott, to whom, with others, he transferred to each 10 shares of the stock in order to qualify them as directors. After the judge's death, his brother, John A. Davis (the father of Andy), made application for letters of administration upon his brother's estate. Objections were made by numerous heirs of the estate to his appointment, and they recommended Henry A. Root for the appointment of administrator. A contest arose between them for the position, which resulted in the appointment by the court of John A. Davis as administrator of the estate. An appeal was taken from the order of the court to the supreme court of the state. Pending this appeal, a will was discovered, in which, by its terms, the entire estate of the judge (except a few small legacies) was left to his brother, John A. Davis. This will was filed for probate in July, 1890, and a contest in regard thereto immediately began between the different parties who claimed an interest in the estate,—John A. Davis and his friends and supporters on one side, and Henry A. Root and his supporters on the other. Able counsel were employed by the respective parties, many of whom figure somewhat conspicuously in the present suit. Messrs. Kirkpatrick, Dixon, Woolworth, and Forbis & Forbis were employed by John A. Davis; Messrs. Toole, Clayberg & McConnell and Corbett & Welcome were counsel for Mr. Root, and at the trial Robert G. Ingersoll and Nathaniel Meyers, of New York City, were added to the array on behalf of Root. The jury disagreed. The case hung fire for several years, and was finally compromised under an agreement, and the will was admitted to probate under the terms of this agreement. The bank stock was not specially involved in this settlement. The balance of the estate was divided among the heirs, claimants, and contesting parties. In this agreement it was expressly covenanted and agreed by and between all the parties thereto "that nothing in this agreement contained, either by reason of the execution hereof by the said Andrew J. Davis [Andy], one of the parties of the first part herein, for himself, or as attorney in fact for any other party hereto, or otherwise, shall be construed, or held, or taken in any wise to affect, or change, or enlarge, or diminish, or impair the respective rights or claims of the said estate of Andrew J. Davis, deceased, on the one part, or of the said Andrew J. Davis, one of the parties of the first part herein, on the other part, of, in, or to certain shares of the capital stock of the First National Bank of Butte, Montana, claimed by the said Andrew J. Davis [Andy], one of the parties of the first part herein, under and by virtue of a gift thereof to him as his individual property by the said Andrew J. Davis, deceased, or in any litigation that may now be pending or may hereafter be instituted relating in any way to the said shares

of said stock; and no grant or conveyance here'in made on the part of or by the said Andrew J. Davis, one of the parties of the first part herein, to any of the parties to this agreement, shall be held or construed to give or grant to any one any right or interest, or to waive any right the said Andrew J. Davis [Andy], one of the parties of the first part herein, has or claims in or to said shares of said stock, or any of them, claimed by him as his individual property under the gift above mentioned; nor shall any of the covenants or provisions of this agreement on his part apply to or affect said shares of stock, unless said shares should finally be adjudged to be the property of the said estate of Andrew J. Davis, deceased."

On March 30, 1891, a written agreement was entered into between W. W. Dixon, M. Kirkpatrick, and Forbis & Forbis, parties of the first part, and John A. Davis, of the second part. After mentioning the pending probate proceedings, and the fact that the parties of the first part had been retained as attorneys for said Davis, had acted as such, and intended to continue in that capacity, the agreement reads: "That said first parties herein hereby undertake and agree that they will devote their time and attention as attorneys in the interest and on behalf of the said John A. Davis in all matters arising out of the estate of Andrew J. Davis, deceased, until a final determination of all such litigation, and until the said estate shall be finally distributed to the parties entitled thereto; and that they will use their best efforts and endeavors for the interests of the said John A. Davis in whatever capacity he may claim the said estate, or any interest or property therein, and all litigation between him and others in reference thereto." In consideration of which services the party of the second part agreed to pay them for their services from the beginning to the end of the litigation a designated sum of money; and in the event that the will was probated, or a compromise or settlement made, they were to receive a further named sum. This was signed by the respective parties thereto, at the end of which appears the following:

"Whereas, I, John A. Davis, on this 30th day of March, 1891, have entered into a contract with W. W. Dixon, M. Kirkpatrick, and Forbis & Forbis, attorneys, copy of which contract is hereto attached, this is to certify that the said W. W. Dixon, M. Kirkpatrick, and Forbis & Forbis, attorneys, have, in making said contract, reserved the right to act as attorneys for my son, A. J. Davis, in any litigation that may arise in connection with his claim to be the owner of the stock of the First National Bank of Butte City, Montana, or that may arise in any other way concerning any interest he may have or claim to have in and to said stock; and I hereby agree that the said Dixon, Kirkpatrick, and Forbis & Forbis shall have the right to act as attorneys for the said A. J. Davis in relation to any such litigation over his claim or interest above named, whether I may or may not be concerned adversely in any such litigation, claim, or interest. * * * John A. Davis."

In 1893, James A. Talbott was appointed special administrator of the estate, and brought suit against Andy and the First National Bank to recover possession of the bank stock which Andy claimed by virtue of a gift from his deceased uncle. In commencing this suit Talbott employed several attorneys who had represented Root in his contest against John A. Davis, as well as others. The real question of fact involved in that suit was whether or not Judge Davis had made a gift *causa mortis* to his nephew, Andy, of the bank stock. The suit was tried in the state district court. Witnesses were examined on behalf of the respective parties. The plaintiff, among other things, put in evidence the by-laws of the bank, a proxy executed by Judge Davis before the date of the alleged gift, and the fact that thereafter this proxy was used at the stockholders' meeting of the bank held in January, 1890. On behalf of the defendant, Talbott was the only witness who testified directly to the gift to Andy of the bank stock, and in fact the whole case was made virtually to depend upon his testimony. No attempt, whatever, was made to impeach him. His testimony was corroborated by one W. C. Darnold, who testified that in the month of February, 1890, Judge Davis told him that he had given the bank stock to Andy. Numerous other witnesses testified that Judge Davis had at different times told them that he intended to give Andy the bank stock. Among others, Judge Knowles testified that shortly prior to

Judge Davis' death he had consulted with him concerning the disposition of his property, etc. The attorneys for Talbott objected to this testimony because of the confidential relations which then existed between Judge Knowles and Judge Davis. This objection was overruled. The sum and substance of Judge Knowles' testimony was that in the consultations referred to Judge Davis told him that Andy was "to have or control the bank." He could not remember the exact words that were used. The attorneys for Talbott then withdrew their objections to the admissibility of the testimony, and thereafter persistently contended that his testimony showed a purpose on the part of Judge Davis to make a gift in the future, and that it could not consistently be relied upon to establish a "perfected gift in the past." James R. Boyce was called by plaintiff, and testified that Darnold was in his employ at the time that he had testified he was out of employment, and had applied to Judge Davis to get a position, and that this was the time that he had the conversation with Judge Davis. The district court rendered judgment in favor of Andy. Talbott applied for a new trial. Among other things, his attorneys procured an affidavit from Darnold to the effect that he had testified falsely on the trial. It is claimed that this affidavit was obtained upon a condition that it should not be used on the motion for a new trial. It was not so used. But the affidavits of two witnesses were procured to the effect that Darnold had told them that he had testified falsely at the trial. These affidavits were used upon the motion for a new trial. They also filed an affidavit of John B. Welcome, which was received too late for the consideration of the court, in which he stated that Darnold had told him, before the trial, that he never had any conversation with Judge Davis after his return from the Coast; that his conversation with Judge Davis was prior to that time; and that Judge Davis then stated that Andy owned the bank. The motion for a new trial was overruled. An appeal was taken to the supreme court, and the judgment of the district court was there affirmed. In the meantime John H. Leyson was appointed permanent administrator, and was substituted for James A. Talbott as plaintiff in the suit. *Leyson v. Davis*, 17 Mont. 220, 42 Pac. 775, 31 L. R. A. 429. A writ of error was taken to the supreme court of the United States, and was there dismissed because no federal question was involved in the case. *Leyson v. Davis*, 170 U. S. 36, 18 Sup. Ct. 500, 42 L. Ed. 939.

The present suit was commenced in the United States circuit court of Montana, February 21, 1898. Its character can best be stated by a reference to some of the most material allegations of the complaint. The bill contains many paragraphs, and sets forth at great length the several proceedings to which we have, in a general way, already referred. The allegations of fraud are all made "upon information and belief." Among other things, it is alleged: That John H. Leysen, at the time of his appointment as administrator of the estate, was heavily indebted to the bank and to Andy. That upon the request of complainant's counsel and of the heirs of the estate he refused to prosecute a writ of error to the supreme court of the United States, and that his refusal so to do was "by reason of a false, corrupt, and unlawful conspiracy between him and the said Andrew J. Davis, Jr., and by reason of the threats of the said defendant Andrew J. Davis, Jr., and by reason of a fraudulent agreement between them not to have said judgment reviewed, and to allow the time therefor to expire, so that the said Andrew J. Davis, Jr., defendant herein, may be secure in his possession of said stock." That the suit instituted by James A. Talbott "was brought pursuant to a corrupt, wrongful, and fraudulent conspiracy and agreement between the defendant James A. Talbott and the defendant Andrew J. Davis, Jr., which agreement, among other things, embraced the following: That the said Talbott should bring said suit, and should allow the defendant Andrew J. Davis, Jr., to present to the court full and clear evidence of said alleged gift; and that the said Talbott should be one of the witnesses of said Andrew J. Davis, Jr., and should give false evidence with respect to said pretended gift; and that the said Andrew J. Davis, Jr., should procure other false and perjured testimony; and that the said Talbott should not cause said witnesses to be cross-examined to any extent, and should not submit any evidence or facts in opposition to the said claim of the defendant Andrew J. Davis, Jr., and should

suppress all evidence in hostility to said claim; and that the said Talbott, as such administrator, should rely solely upon questions of law; and that all said matters were arranged and agreed to between the said defendant * * * and the said James A. Talbott; * * * that said suit, and the trial thereof, and the proceedings thereon all were false, fraudulent, and fictitious, and especially in the following particulars." That witnesses were called on behalf of the defendant Davis to substantiate his pretended claim to said stock, all of whom were friends and intimates of the said defendant, and all of whom were called to testify, and did testify, to the alleged declarations made by the said Andrew J. Davis, deceased, in his lifetime, to the effect that some time in the future he intended to give the bank to the defendant. The names of several witnesses were then given, and it is then alleged: "That, pursuant to said fraudulent conspiracy and agreement, none of said witnesses were asked one word in cross-examination by counsel for the said James A. Talbott, * * * and no evidence was offered by him or them to impeach them, or any of them. That the only witness called on behalf of the said defendant Andrew J. Davis, Jr., to establish the said pretended gift was the said James A. Talbott himself, who, as special administrator, was suing upon the theory that no such gift had been made. * * * That the testimony of said defendant James A. Talbott concerning said pretended gift was false, to the knowledge of both the defendants James A. Talbott and Andrew J. Davis, Jr. That the said James A. Talbott testified that at the time of said alleged gift there was no one present with the decedent except himself and the said Andrew J. Davis, Jr. That, notwithstanding the fact that the said James A. Talbott, in the year 1890, had given evidence in a proceeding in said court to the effect that such pretended gift was conditioned solely upon the said decedent's not returning from a trip to the Pacific coast, and the fact that said decedent had safely returned from said trip, and notwithstanding the fact that such evidence so given in the year 1890 was of the greatest importance to impeach the said James A. Talbott, nevertheless his testimony so given in the year 1890, in pursuance of said fraudulent and corrupt agreement, * * * was not offered in evidence upon the trial of said action. That the only other witnesses called on behalf of the said defendant Andrew J. Davis, Jr., were Hiram Knowles, president of said bank, and W. C. Darnold, a former employé of said bank. That their evidence purported to be concerning declarations of said decedent after the date of said alleged gift. * * * That pursuant to said fraudulent agreement and conspiracy substantially no cross-examination was had of the said Hiram Knowles, nor any objections made to his testimony in chief, wherein he was allowed to make a long and continuous statement, without interruption or objection, not only with respect to transactions in general, but to declarations of the deceased made to him, or purporting to have been made to him, when he, the said Hiram Knowles, was acting as attorney and counsel for the said Andrew J. Davis, deceased, and when such communications were privileged. That the last and only other witness for the defendant Andrew J. Davis, Jr., was the said William C. Darnold. That he testified, in substance, that after his discharge by the firm of J. R. Boyce & Company, of Butte, on or about January 31, 1890, and while seeking employment, between the 1st day of February and the 6th day of February, 1890, he called at the house of the decedent, Andrew J. Davis, when said decedent was very ill, and shortly prior to his death, and that the said decedent told him that he had given the bank to the said defendant Andrew J. Davis, Jr. * * * That the testimony of the said W. C. Darnold was wholly false and perjured, and was known to be such at the time of such trial, both to the defendant Andrew J. Davis, Jr., and to the said James A. Talbott. * * * That said testimony was procured and paid for by the defendant Andrew J. Davis, Jr., knowing it to be false and perjured, and with the knowledge of the said James A. Talbott; and that the said W. C. Darnold was called as the last witness, and was removed from the state, * * * pursuant to said false, fraudulent, and corrupt conspiracy and agreement, and in order that his testimony might not be impeached or he be recalled. * * * That upon the trial of said suit, pursuant to said false, fraudulent, and corrupt conspiracy, the said James A. Talbott, plaintiff therein, purposely failed to call witnesses

of whom he knew, who were within the jurisdiction of said court, and who would have testified that no such gift had been made, as claimed by the defendant Andrew J. Davis, Jr., or who would have testified that said gift was made simply conditioned upon the return of said decedent from a trip to the Pacific coast, and that he did so return, and that said gift therefore never took effect; and purposely refrained from cross-examining or endeavoring to impeach the character or veracity of any of the witnesses called on behalf of the defendant Andrew J. Davis, Jr.; and by reason of said conspiracy the said James A. Talbott neglected and refused to call witnesses of whom he knew, who would have testified that after the date of said alleged gift, if any was made, the said decedent, Andrew J. Davis, wholly rescinded and revoked the same. * * * That, pursuant to said corrupt, fraudulent, and unlawful agreement and conspiracy, the said James A. Talbott, as such special administrator in said suit, intended to call no witnesses at all in opposition to the said claim made by the defendant Andrew J. Davis, Jr., but that, however, one James R. Boyce, Jr., who had been associated in business with said decedent, was present in court, and upon hearing the testimony the said Boyce interviewed counsel for the said James A. Talbott as such administrator, and told them of important evidence against the validity of the claim made by the said Andrew J. Davis, Jr., and requested to be called as a witness. That the said James R. Boyce, Jr., had not been subpoenaed as a witness at said trial at all. * * * That the said James R. Boyce, Jr., advised the said counsel for the said James A. Talbott that the said Darnold, who had been called as a witness for the defendant Andrew J. Davis, Jr., therein, had not been discharged January 31, 1890, by the firm of J. R. Boyce, Jr., & Co., but had continued with said firm until the 1st of March, 1890; and that he, the said James R. Boyce, Jr., had the books of said firm, which would show entries made by the said Darnold throughout the month of February, 1890; but that, nevertheless, and in spite of this, the said James A. Talbott, as such administrator, or his attorneys, pursuant to said fraudulent conspiracy, although they called the said James R. Boyce, Jr., as a witness at his request, purposely neglected to have present in court the said books of said firm, which would have shown conclusively the false and fraudulent statements made by the said Darnold. * * * That the said James A. Talbott and his said attorneys well knew that the date of the alleged call by the said Darnold upon the said decedent was of the greatest importance. * * * Furthermore, the said James R. Boyce, Jr., communicated to the said James A. Talbott, as such special administrator, and to his said attorneys, the further facts that the defendant Andrew J. Davis, Jr., had stated to him on or about March 13, 1890, that the said decedent, Andrew J. Davis, had left him wholly unprovided for; that he was dependent solely upon his salary; and that he was relying upon his friends to help him get the bank stock, inasmuch as some of them had said to him that they had heard said decedent say that he intended to give the stock to him. And the said James R. Boyce, Jr., further communicated to the said James A. Talbott and his said attorneys further conversations had between him, the said James R. Boyce, Jr., and the said Andrew J. Davis, Jr., in March, 1890, wherein the defendant Andrew J. Davis, Jr., had reiterated said statement, and had requested the said James R. Boyce, Jr., to testify that he had heard said decedent say that he intended to give said stock to the defendant Andrew J. Davis, Jr., and the further fact that he, the said James R. Boyce, Jr., had refused to so testify. * * * That the said James R. Boyce, Jr., further communicated to said James A. Talbott, as special administrator, or to his attorneys, the fact that he, the said James R. Boyce, Jr., had had a conversation with the said James A. Talbott, of the city of Butte, in the state of Montana, in March, 1890, wherein the said James A. Talbott had stated that he was present at one time when said decedent handed a box to the defendant Andrew J. Davis, Jr., just prior to said decedent's going on a visit to the Pacific coast, and that the said decedent had said to the defendant Andrew J. Davis, Jr., 'If I don't come back, this is yours;' and wherein the said James A. Talbott had stated to the said James R. Boyce, Jr., that neither he nor the defendant Andrew J. Davis knew what the said box contained; and wherein the said James A. Talbott stated that the said gift was wholly contingent upon the said decedent's not

coming back from the Pacific coast, and that, inasmuch as he did return, no gift had been consummated; and wherein he, the said James A. Talbott, had stated that upon the return of said decedent from the Pacific coast the said decedent retook possession of said box, and restored it to its place in the defendant bank; and wherein the said Talbott had stated that at the time of the alleged gift the said decedent did not give the keys to the defendant Andrew J. Davis, Jr., nor was said box opened at all. That, nevertheless, and in spite of the fact that all of the foregoing matters were communicated to the said James A. Talbott, as such special administrator, or to his said attorneys, prior to the time when the said James R. Boyce, Jr., was called as a witness, he was asked no questions whatever with respect to any such matters. * * * That the failure to examine said James R. Boyce, Jr., upon said matters was due to the false, fraudulent, and corrupt agreement and conspiracy made by and between the said James A. Talbott, as such special administrator, and the said Andrew J. Davis, Jr., as defendant herein. * * * That at the time of said trial there were witnesses in the state of Montana, who knew that no such gift had been made as claimed by the defendant Andrew J. Davis, Jr., and who would have testified that any gift was wholly contingent upon the return of said decedent from the Pacific coast, and that he subsequently returned, and who would have testified that the said Darnold had never called upon the decedent as stated by him; * * * and that any gift or pretended gift had been wholly rescinded and revoked,—all of which facts were known to the said conspirators, James A. Talbott and the defendant Andrew J. Davis, Jr. That not only did the said James A. Talbott fail to call any such witnesses, but, furthermore, he and the defendant Andrew J. Davis, Jr., * * * failed to call such witnesses, and procured some or all of said witnesses to be otherwise engaged or occupied, or to be out of the jurisdiction of said court, at the time of said trial, so that their testimony could not be taken, and so that by no chance might they be examined as witnesses in opposition to said claim. * * * That the said W. C. Darnold, after the conclusion of his testimony in said suit, and prior to the time when the said James R. Boyce, Jr., was called as a witness, confessed to the said James R. Boyce, Jr., that the testimony he had given was false; that the conversation he had, if any, with said decedent was in the year 1886; that the whole thing was a steal anyway, and he was testifying for the money that was in it; that they were trying to steal the bank, and he wanted to get his picking out of it; that he would get from forty to sixty thousand dollars for testifying as he did; and that he would have a competency for life, and would be able to go back among his people, and live well. * * * That, upon the making of said confession, the said James R. Boyce, Jr., stated what the said W. C. Darnold had confessed to him as aforesaid to the said James A. Talbott, or his said attorney and counsel, and offered to testify thereto, but that, although the said James R. Boyce, Jr., was called as a witness, no questions were asked him in regard thereto. * * * That this omission so to do was by reason of the false, fraudulent, and corrupt conspiracy hereinbefore set forth. * * * That after said confession, * * * and before the close of the trial, and at a time when the said witness Darnold might have been recalled, the defendant Andrew J. Davis, Jr., pursuant to the said fraudulent conspiracy, and with the knowledge and approval of the defendant John E. Davis and the defendant James A. Talbott caused the said witness Darnold to be taken without the jurisdiction of the courts of Montana, and away from the said trial, and caused him to be kept away from the state of Montana until on or about the 1st day of July, 1894, and until long after the end of said trial, and until long after the judgment therein had been pronounced; and that during the absence of the said Darnold he was wholly supported by the said Andrew J. Davis, Jr., and the said John E. Davis, and with the knowledge of the said defendant James A. Talbott, and was given or furnished with the sum of about fifteen hundred dollars, in addition to other amounts * * * paid to him by the defendant Andrew J. Davis, Jr., in payment of his false and perjured testimony as aforesaid. * * * That prior to the giving of his said testimony the said Darnold was poor and impoverished, and wholly without means, but that since that time he has been in prosperous circumstances, and has been,

from time to time, paid large sums of money by the defendant Andrew J. Davis, Jr., by reason of his services in giving said false and perjured testimony; * * * and that by reason of such acts it was impossible for any one to have recalled the said Darnold upon the trial of said action, or to have put in his evidence, or to have cross-examined him with respect to his said confession or otherwise. * * * That the said W. C. Darnold, after his return to the city of Butte, Montana, in July, 1894, wrote a certain letter to the defendant Andrew J. Davis, Jr., dated July 6, 1894, a copy of which is annexed hereto, and marked 'Exhibit A,' wherein and whereby the said Darnold demanded of the said Andrew J. Davis, Jr., the sum of \$10,000 in consideration of his false and perjured testimony so given as aforesaid, which said letter was delivered to the said Andrew J. Davis, Jr., at or about the time of its date; and that thereafter, in response thereto, the said Andrew J. Davis, from time to time, has paid to the said W. C. Darnold various sums of money, and has had various interviews with him, all touching the said fraudulent testimony so given by him as aforesaid. * * * That, had it not been for such false, fraudulent, and corrupt proceedings and acts and omissions as have been hereinbefore alleged, the said judgment would not have been rendered, the said motion for a new trial would have been granted, or the said supreme court of Montana would have reversed the said judgment and said order. * * * That said action was substantially undefended by the said James A. Talbott, as such special administrator, as against the claim of the defendant Andrew J. Davis, Jr. That by said fraudulent conspiracy there was substantially no conflict of evidence. That * * * James A. Talbott was the only witness to the gift. * * * That, if the said conspiracy had not existed, other witnesses could have been called to show what occurred at the time of said alleged gift, and to show that there was no such gift; but that such witnesses were suppressed or removed pursuant to said conspiracy by the said defendants. * * * That said supreme court of Montana was passing upon a fraudulent and fictitious record made up by consent with suppression of evidence as aforesaid. * * * That said judgment so rendered as aforesaid, and the affirmance thereof by said supreme court, was based upon a record conceived in fraud by and between the parties to said suit, in the particulars hereinbefore specifically set forth. * * * And your orator alleges that she was not a party to said suit, nor did she have any control over the same; and that none of the matters hereinbefore set forth were brought to the attention of the court, but wholly lay in the knowledge of the said conspirators as aforesaid, and that your orator had no knowledge of any of such facts, or of said fraudulent conspiracy, or any of the matters of fraud hereinbefore set forth, until long after the decision by said supreme court of Montana on appeal, and not until the latter part of the year 1896."

The prayer of the bill is for an injunction enjoining the defendant Andrew J. Davis, his servants, agents, and attorneys, from availing himself or themselves of the judgment or decree whereby the title to said shares of the bank stock was declared to be in the defendant, for a receiver, an accounting, and for such other and further relief as the complainant may be entitled to in the premises.

The letter marked "Exhibit A," referred to in said bill of complaint, and annexed thereto, is as follows:

"Butte, Mont., July 6, 1894.

"H. A. Davis, Esq.—Dear Sir: Having made several unsuccessful attempts to meet and have an interview with you, and failed, I adopt this method of placing before you the circumstance as I see it. You are well aware that in my testimony I strained great point, and in doing so accomplished for you one million and seventy-two thousand dollars, and I feel that any circumstances that might arise that would change or impeach that testimony would be both disastrous to you and myself. In order to avoid that, I desire to place before you the following conditions, to wit: That you deal with me straight, and through no second or third parties, and that I bind myself to carry out every obligation that I have made. There is strong pressure brought to bear upon me to rescind my testimony, or the portion of it as to dates, which I am fully guarantied that if I do will result in nothing disastrous to me.

But, if you will comply with the requirements herein stated, I will quietly leave this country, and under no circumstance return again. * * * I have this proposition to offer you, and it will be final, and it is not a hundredth part of what my—the only direct—testimony in the case, of which I have been assured by the most eminent counsel in this country and Ohio in the case, that my own, and mine alone, was the pivoting and only testimony which gained to you one million and seventy-two thousand dollars. Now, to be candid, and as final to everything connected with these affairs, under no circumstances will it ever arise again through any pressure that may be brought to bear upon me by the opposite party. I will state that I want ten thousand dollars, in consideration of which I agree to go back to Ohio, go into business, stay there, and return to Butte subject to nobody's orders but your own, which may only affect subsequent business of your own; and that, if you will deal with me personally, and with nobody else, I will religiously carry out every stipulation in this instrument. I am very serious in this thing, and want you to know that I have positive assurance that if I rescind my testimony, even to the verge of perjury, that I will be fully protected to any amount. I do not do this in the form of a threat, but only as a reasonable consideration for what I have done for you. Candidly consider this without bias; weigh every point in the case. I place myself in jeopardy in doing this, yet I do it with my eyes open. No other consideration except the above stated will go. Give me a hearing at John Davis' store to-morrow at 2 o'clock p. m., as that is the extreme limit that I have from other sources.

"Yours, truly,

W. C. Darnold."

After hearing the evidence in this case, the court rendered a decree that complainant's bill be dismissed, and defendants have their costs. From this decree the complainant appeals to this court.

The testimony of Mr. Talbott given in the bank suit (referred to in the opinion) is contained in the record in the supreme court of Montana, embodied herein. The testimony, direct and cross, covered 65 pages of printed matter, and sets forth at great length all of his relations with the judge and with Andy, and the relations and close friendship and intimacy between the judge and Andy, and all the minute details and conversations that occurred between the judge, Andy, and himself at the time the gift was made, and the condition of Judge Davis' health at that time, etc. Leaving out the minute details, we here give his direct testimony relating specifically to the gift, as follows: "They [the judge and Andy] understood that there were 950 shares. Andy counted it up. There were 950 outside of what the directors had. Andy passed them over to the judge after he figured up, and showed him what there was of it, and he passed it back again, and he said: 'I have always intended that for you. You take that.' Q. The judge passed it back to Andy? A. Passed it back to Andy; yes, sir. Q. After Andy had figured it up, and handed it to the judge? A. Yes, sir. Q. And said what? A. He said, 'I have always intended that for you.' He says, 'And I want you to take it.' * * * Q. What did Andy do with this stock? A. He put it in his pocket."

Defendants' Exhibits B and C, letters written by Boyce to Darnold, referred to in the opinion, read as follows:

Exhibit B.

"Butte, Montana, Jan. 14th, 1896.

"W. C. Darnold, Esq., Piqua, Ohio—Dear Sir: I wrote you some time ago, but received no reply. The cases of Eastern creditors of the firm of J. R. Boyce, Jr., & Co., will come to trial in the next 60 or 90 days at furthest. Will you give testimony to the facts and truths known to you or not? If so, will you come here, or shall I send depositions to be sent you? I am preparing to follow with a suit against the bank for wrong procedure for the \$60,000.00 investment, under an accounting, which has been twice paid to the bank. * * * I hope to be successful against the bank. Inasmuch as I owe it largely to your knowledge of books in bringing to light the errors contained therein, I feel in duty bound to reimburse you for labor performed in the event I regain the losses sustained in and by the wrongful proceedings of the bank. Your knowledge of the firm books makes you a material witness in righting a wrong. As you know, you will not have to strain a point

in behalf of myself. All that is required is simply to tell the truth as to Davis' business relation with the firm. Your affidavit in regard to correcting a former wrong is safe in my hands. The supreme court has sustained the decision of Judge McHatton, and given Andy the bank. This ungrateful little rascal rolls in the wealth that you have given him, and, unless he has given you something more than he did while you were here for that which he knew was the only testimony that gave him the bank stock, he is inhuman, to say the least of it. * * * He feels his security, however, and apparently fears no danger from either you or me. I have no desire to heap vengeance upon any man, but must say that this is a cold-blooded transaction upon the part of Andy Davis. * * *

Exhibit C.

"Butte, Montana, June 17, '94.

"W. C. Darnold, Esq., Piqua, Ohio—Dear Darnold: * * * I have frequently called attention to Farwell & Co. to the position you held, and intended to mention in behalf of their interests and other creditors, reminding them of your telegram to them, &c., thus placing you before them as not only being worthy of recognition, but fully capable of holding important positions in their employ. I think they will recognize your interest in their behalf, and will be able to aid you in getting a good situation until such a time as you may do better. You well know the great wrong that has been perpetrated upon Eastern creditors and myself, and you cannot conscientiously remain silent from any standpoint, and close your lips against such infamy. I cannot believe that money would induce you to remain away, and thus suppress the truth of your knowledge, particularly as my acts have been uniformly kind and generous in feeling. I had no motive in my kindness and the extenuation of home courtesies further than to bring out the truths, too well known to be suppressed. You well know that my home was always open to you, and you were welcome therein, whether I needed your evidence or not. You also know that there are 'patched up' entries on the books of J. R. B., Jr., & Co., which should be exposed in the interest of truth and honor; that these entries were made by unscrupulous persons for purposes too base to dwell upon; that conscience caused one of them to admit on deathbed that said entries were false, and would, in time, redound to my credit. My faith in you has not been weakened, and I believe that when the time comes you will not be found wanting. I confess that this faith in you is of a character that cannot be shaken until positive proof is shown that you are lower in the scale of manhood than others that have so deeply wronged me. I have always known you as an honest man. You proved yourself as such when in our employ. Now that you are more mature in thought and ripe in experience, it cannot be possible that you would wantonly absent yourself, and thus do me a greater wrong by silence than to be openly and avowedly my enemy. So far as I am personally concerned, it matters but little whether or not I regain my rights. I am willing to go unrewarded so far as this world's goods are concerned, but to suppress the truth—withhold same—to detriment of others' interests, when in your power to restore their rights that so largely rest in us, is a crime against justice, to say nothing of that greater crime against the higher law given us by those God-given powers which form the basis of all transactions both here and hereafter. * * * Of course, I was astonished that you alone held the key of Andy's fate. I well knew of your conversation with the judge, as you related it to me, that occurred in 1887, when Andy discharged you, and you went to the sick room of the judge in that year (1887); but did not know that you were present at the last moments of the judge in 1890. Upon your words 'hung the law and the testimony' and Andy's claim for the bank. Now that he has it, let him enjoy it; but let us not forget to bring out the truth, and make him disgorge wrongful gains, which he holds under the law, but in violation of truth and the facts best known to yourself and myself. Kindly write me, and say if you will return in the interest of justice. I will see that you have transportation furnished, &c., 'both ways.' In the meantime apply to Farwell & Co. for a position, and in the end we will gather strength, and regain our losses and former standing. With kind wishes, I am,

"Yours, &c.,

J. R. Boyce, Jr."

Several letters written by Boyce to Mrs. Darnold also appear in the record, breathing the same spirit, and relating to the same matters, couched in many respects in nearly the same language. It is unnecessary to quote them.

There are nine specific assignments of error, which counsel for appellant in his brief has resolved into three, viz.: "(1) The court erred in finding for the defendant because the evidence clearly showed that the judgment of the state court had been procured by fraud, collusion, and conspiracy between the parties thereto and their attorneys; because the judgment was the result of mistake, accident, or surprise, and was against equity and good conscience; and because the complainant, Harriet Wood, was entirely without fault or negligence. (2) The court was further in error because, although the evidence as given in the state court suit and as disclosed in the present suit clearly prove that no gift causa mortis had ever been made, clearly proved that there was fraud in the cause of action itself, clearly proved that there was a good defense to the cause of action, and although it appeared that the complainant, Harriet Wood, was not a party to the action in the state court, had no control over it, and never had had her day in court, nevertheless, the lower court refused to consider the said evidence with respect to the validity or invalidity of the alleged gift, and refused to re-examine the claim of Andrew J. Davis, Jr., on the merit and irrespective of the questions of fraud extrinsic to the cause of action. (3) Because the court refused to allow complainant to amend her bill of complaint so as to set up facts concerning bribery and corruption which were discovered after the beginning of the suit."

Walter S. Logan, Charles M. Demond, and C. P. Drennen, for appellant.

Forbis & Forbis and W. W. Dixon, for Andrew J. Davis, Jr., and the First National Bank of Butte.

William Scallon, for James A. Talbott.

William Scallon and John W. Cotter, for John H. Leyson.

E. N. Harwood, for appellee John E. Davis.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge, after making the foregoing statement of facts, delivered the opinion of the court.

This suit was instituted by Mrs. Harriet Wood, a sister of Judge Davis, deceased, against Andrew J. Davis, Jr., the First National Bank of Butte, Mont., James A. Talbott, formerly special administrator of the estate of Andrew J. Davis, deceased, John H. Leyson, as administrator with the will annexed of Andrew J. Davis, deceased, and John E. Davis, as administrator of the estate of John A. Davis, deceased, to enjoin the defendant Andrew J. Davis, Jr. (who will be hereinafter designated as "Andy"), from availing himself of a judgment obtained by him in the district court of Silver Bow county, state of Montana, and affirmed in the supreme court of that state, which declared and adjudicated that Andy was entitled to 950 shares of the capital stock of the bank. The theory upon which the suit was brought and tried is that the judgment obtained by Andy in the state court was procured by fraud, conspiracy, and collusion, and that Andy should not, in equity, be allowed to avail himself of or to derive any benefits therefrom. The history concerning the prior litigation, and the essential facts in relation thereto, and the specific allegations in the bill of complaint as to the alleged frauds, conspiracy, collusion, and wrongdoing of the parties defendant herein, and of all the counsel for the respective parties, are set

forth at great length in the general statement we have made, and to which we will have frequent occasion to refer. The case is in many respects peculiar in its character. It is doubtful, to say the least, if any parallel case could be found in the books where so many wholesale charges of corruption, fraud, and conspiracy can be found. To read these charges, independent of the proofs, the mind would be led to believe that all the proceedings in the state court relative to the bank stock were conceived in sin and brought forth in iniquity by Andy and his co-conspirators. Although all the charges are made on information and belief, they are couched in language direct, positive, and clear, and, if proven as charged, would necessarily demand and receive from this court the severest condemnation that language affords to all parties concerned therein, irrespective of their standing and position in the community where they reside, and the relief asked for should be granted without any hesitation.

At the threshold of any discussion herein it becomes necessary to determine the scope of our power and the extent of our duty in the premises, and to ascertain whether or not there is any limit in equity to the inquiries we are herein called upon to make. It is admitted by appellant that this court cannot, in this suit, review or set aside the judgment obtained in the state court. As against the parties in that suit the judgment rendered in the state court is final. But if it be true that it was procured by fraud, of which the complainant had no knowledge, and, but for such fraud, it would not have been obtained, then it would be against equity and good conscience to allow the party who had won his case by fraud, collusion, perjury, or conspiracy to reap any advantage or benefit by such fraudulent acts. Any judgment thus rendered upon a false, fraudulent, and fictitious record does not possess any verity in the law, and can always be assailed in an independent suit brought by any party interested who is not a party to the action, and did not participate in the fraud, or have any knowledge of it until after the judgment was obtained and became final. The general rule upon this subject is well expressed in *Marshall v. Holmes*, 141 U. S. 589, 596, 12 Sup. Ct. 62, 64, 35 L. Ed. 870, 873, as follows:

"While, as a general rule, a defense cannot be set up in equity which has been fully and fairly tried at law, and although, in view of the large powers now exercised by courts of law over their judgments, a court of the United States, sitting in equity, will not assume to control such judgments for the purpose simply of giving a new trial, it is the settled doctrine that 'any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery.' *Insurance Co. v. Hodgson*, 7 Cranch, 332, 336, 3 L. Ed. 362; *Hendrickson v. Hinckley*, 17 How. 443, 445, 15 L. Ed. 123; *Crim v. Handley*, 94 U. S. 652, 653, 24 L. Ed. 216; *Metcalf v. Williams*, 104 U. S. 93, 96, 26 L. Ed. 665; *Embry v. Palmer*, 107 U. S. 3, 11, 2 Sup. Ct. 25, 27 L. Ed. 346; *Knox Co. v. Harshman*, 133 U. S. 152, 154, 10 Sup. Ct. 257, 33 L. Ed. 586; 2 Story, Eq. Jur. §§ 887, 1574; *Floyd v. Jayne*, 6 Johns. Ch. 479, 482. See, also, *U. S. v. Throckmorton*, 98 U. S. 61, 65, 25 L. Ed. 93."

To the same effect, *North Chicago Rolling-Mill Co. v. St. Louis Ore & Steel Co.*, 152 U. S. 596, 615, 14 Sup. Ct. 710, 38 L. Ed. 565.

In 2 Story, Eq. Jur. § 1574, the learned author says:

"The new trial is never granted in terms. There can be, in no such case, anything like another trial in the court of law. The case is effectually ended there. But where there was a distinct and decided fraud in the proceedings by which the judgment at law was obtained,—as by putting in testimony which the party believed to be false; by giving no notice of the suit, or one calculated to mislead the defendant, and thus deprive him of an opportunity to be heard in the trial at law; or, in any similar mode, making the trial at law fictitious or fallacious; and also where the defendant at law, through accident or mistake, and without default in the proper degree of watchfulness and care required of careful men in their own concerns of equal importance, fails to present his defense fully,—courts of equity will, in their discretion, grant relief by re-examining the case upon its merits, * * * enjoining the party from pursuing the judgment at law."

It is equally well settled by the authorities that the mere fact that false testimony was given or procured in the trial of the case in the state court by the successful party is not of itself a sufficient ground for enjoining the enforcement of the judgment, unless it clearly and satisfactorily appears that there is a reasonable certainty that the result of the judgment or of a new trial would have been different if such false and fraudulent testimony had not been given. In *Dringer v. Railway Co.*, 42 N. J. Eq. 573, 581, 8 Atl. 811, 815, the vice chancellor, in reviewing this question, among other things said:

"A court of equity may unquestionably annul a judgment or decree which has been obtained by fraud, but, in order to justify such an exercise of power, it must be made clearly to appear that the judgment or decree has no other foundation than fraud; in other words, it must be made to appear that, if there had been no fraud, there would have been no judgment or decree. An attempt to exercise a wider or more liberal jurisdiction in cases of this class would, it will be perceived, necessarily enlarge the jurisdiction of courts of equity so as to make them practically courts for the review of the judicial acts of other tribunals, and not tribunals with just sufficient power to redress frauds by undoing what fraud has done. * * * A simple statement of the ground upon which jurisdiction in such cases rests shows that, unless the decree assailed is shown to be the sole and direct product of the fraud charged, this court has no authority whatever either to annul or change it, for its jurisdiction is unalterably limited to the simple undoing of what fraud has done. It is therefore clear that, if this decree has any other foundation than the fraud here charged, this court, even if convinced that the decree is unjust according to the real right of the case, cannot disturb it."

The principles announced in these decisions are sustained by numerous authorities, a few of which we here cite: *Ross v. Wood*, 70 N. Y. 8, 12; *In re Griffith's Estate*, 84 Cal. 108, 112, 23 Pac. 528, 24 Pac. 381; *Pico v. Cohn*, 91 Cal. 129, 133, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336; *Smith v. Allen*, 63 Ill. 474; 3 Pom. Eq. Jur. §§ 1362-1364; 1 Story, Eq. Jur. § 252a; 3 Enc. Pl. & Prac. 629, 630, and authorities there cited. In the light of these general principles we will proceed to examine the testimony contained in the record to see what, if any, of the material charges of fraud, collusion, conspiracy, bribery, or corruption alleged in complainant's bill are established by the evidence; and whether or not those which are proven, if any, are of such a character as to justify this court in granting the relief prayed for herein. As to the character of proof necessary to sustain the charges it must constantly be borne in mind that fraud is never presumed. It may, however, be inferred

from facts and circumstances connected with the transactions; but in all cases of this character the fraud, collusion, or conspiracy alleged in the bill must be proven to the satisfaction of the court. The proof upon these points, in order to entitle complainant to any relief, must be clear, distinct, and certain. If there be any doubt or uncertainty, the relief asked for should be denied. 3 Enc. Pl. & Prac. 628, and authorities there cited; *Boyden v. Reed*, 55 Ill. 458, 464; *Doughty v. Doughty*, 27 N. J. Eq. 315, 320; *Baltzer v. Railroad Co.*, 115 U. S. 634, 645, 6 Sup. Ct. 216, 29 L. Ed. 505, and authorities there cited; *Lalone v. U. S.*, 164 U. S. 255, 257, 17 Sup. Ct. 74, 41 L. Ed. 425. In the case last cited the court said:

"The rule is of long standing, and is of universal application, that the evidence tending to prove the fraud, and upon which to found a verdict or decree, must be clear and satisfactory. It may be circumstantial, but it must be persuasive."

It is difficult to separate the various charges of fraud against the different parties so that they can be independently discussed. They are all more or less interwoven with each other, and so blended together as to make it necessary, to some extent, at least, while considering the charge against one, to refer to its association with the acts and conduct of the others. At the bottom of the whole case lies the charge of collusion and conspiracy, which in one fell swoop includes everybody that was in any way connected with the case on the side of Andy. Nevertheless, keeping constantly in mind the relation which each witness and each party bears to the whole case, we will endeavor to classify them under separate heads.

1. As to W. C. Darnold. This witness, as painted in the record before this court, is stained with perjury, bribery, and corruption to such an extent as to justify the statement that his testimony given at the trial of the state court must be considered as wholly unworthy of belief, and absolutely false. If, therefore, the case in the state court rested upon his testimony alone to establish the fact that Judge Davis made a gift *causa mortis* of his bank stock to Andy, it might, of itself, be deemed sufficient to enable the complainant to maintain this suit. But the fact is that the question as to the gift in the state court did not depend alone upon the testimony of Darnold. His testimony was simply corroborative of the testimony of Talbott that the gift was actually made. We have no means of determining what effect his testimony had upon the mind of the district judge in deciding the case in favor of Andy. His testimony was important. Standing unimpeached, it was entitled to great weight, and tended strongly to show that the gift *causa mortis* must have been made by Judge Davis to his nephew, as testified to by Talbott; and it may be that the district court in deciding the case gave full credence to Darnold's testimony. But a motion for a new trial was made, one of the grounds thereof being that Darnold had testified falsely at the trial. In support of this ground the counsel for the plaintiff in that case procured the affidavits of two witnesses,—Curtis and Boyce,—both of whom stated that Darnold had confessed to them that he swore falsely upon the trial of the case in the district court. In addition to this,

they procured the testimony of Boyce, as set forth in the statement of this case, which directly tended to impeach the testimony given by Darnold as to the time—which was highly important—when he had the alleged conversation with Judge Davis wherein the judge told him he had given the bank stock to Andy. Notwithstanding this testimony, which reflected so severely upon the testimony of Darnold, the court refused to grant a new trial, and it ought, perhaps, to be assumed that the court in so doing considered that, without reference to Darnold, there was ample and sufficient testimony to sustain the gift. But, be that as it may, the case was appealed to the supreme court, and in considering the question whether or not the district court erred in refusing to grant a new trial the court said:

"The same evidence produced on this trial, if the testimony of Darnold were excluded, would be abundantly sufficient to sustain the conclusion reached by the district court; and courts will not grant new trials where it is apparent from the record that the result would probably be the same. U. S. v. Biena (N. M.) 42 Pac. 70."

It is therefore manifest that the testimony of Darnold, however false it may be admitted to be, will not warrant any interference with the judgment obtained by Andy. But it is strenuously argued that his testimony was procured pursuant to the conspiracy alleged in the bill to get the bank stock for Andy; that, in furtherance of this general plan, Darnold was held back as the last witness, and then spirited away by means furnished by the chief conspirators acting in collusion with the counsel employed by Talbott; that he was kept away until the trial was over, and during his absence "was wholly supported" by Andy; that, although the counsel were told that Darnold had committed perjury, and informed that he could be impeached by the production of the books of Boyce, where Darnold was employed at the time he testified he was out of employment and had the conversation with Judge Davis, but counsel did not produce the books of Boyce; that Darnold made an affidavit confessing his perjury; that this affidavit, procured at the instance of Boyce, was placed in the hands of the counsel for plaintiff, and was by them suppressed; that other impeaching testimony against Darnold, known to Talbott and his counsel, could readily have been obtained, but, owing to the conspiracy, was not procured on the motion for new trial; that, with the knowledge of Talbott, Darnold was furnished with the sum of \$1,500 in payment of his "false and perjured testimony"; that since that time Andy has paid him "large sums of money" in compensation for his "false and perjured testimony"; that, in response to the letter marked "Exhibit A," Andy "from time to time" has paid "to Darnold various sums of money, and has had various interviews with him, all touching the said fraudulent testimony," etc. What does the testimony in this case show in relation to these alleged acts of collusion and conspiracy? Is there any evidence to sustain these charges, or either of them? What do the proofs show? There is some hearsay testimony as to certain declarations alleged to have been made to Boyce by Darnold, and by others, that are well calculated to create suspicion "of

foul play" or "improper interference" by somebody. There is no evidence whatever to show that Andy ever gave Darnold large, or any, sums of money before or after the trial, or before or after the motion for new trial was made or disposed of, on account of his testimony, or of anything else. The only things, which do not rise to the dignity of evidence, bearing in the remotest degree upon this point, rest principally upon hearsay statements made to Boyce, and vivid imaginations of counsel drawn therefrom. For instance, the record shows that Darnold went away with one Genzberger, and Genzberger told Boyce that John Davis, a brother of Andy, sent him \$25 while he was away. The only exception as to the hearsay evidence about money is found in the testimony of Boyce on behalf of complainant as follows:

"Q. You say Darnold had been living with you some months before the bank trial? A. Yes, sir. Q. What was his condition as to clothing and money at the time he was living with you? A. He was impoverished; destitute condition. Q. After giving his testimony at the bank trial, did you notice whether he had any money? A. He had some money. Q. At the time he made his confession to you, was that at some restaurant in Butte, do you remember? A. Yes, sir. Q. Who paid for the dinner? A. Darnold did. Q. Did you see him have any money? A. I did not see any large amount. He had some money."

Boyce further testified that, after Darnold had signed the affidavit admitting that he had sworn falsely, he was so "afraid of the law" that he (Boyce), out of pity, more than anything else, gave him \$75, and took his note therefor, payable on demand, and afterwards received a "paper from him that he considered it settled" on account of "work I have done for you and will do for you on these books." It does not appear that Andy ever replied to the letter exhibit A; that he ever paid any money to Darnold on account of the matters therein referred to. This letter is peculiar. It shows, according to its story, that there were two parties deeply interested in Darnold. One party had used him. The other party wanted to have like favors from him. If granted, they stood ready to compensate him for such services. They only wanted him to tell the truth. But they were willing to protect and shield him if he would rescind his former testimony, "even to the verge of perjury," and that they would see that "he was fully protected to any amount." It does not appear who gave this assurance,—whether it was complainant, the witness Boyce, or other persons. He prefers, however, to give Andy the first call, and only demands the "one-hundredth part" of what his services in giving the false and perjured testimony in his own estimation were worth, to wit, \$10,000, and in a friendly spirit, "not in the way of a threat," informs him the money must be paid to him "personally," and that, if it is so paid before "to-morrow," assurance is given that he would be able to resist "any pressure that may be brought to bear upon him by the opposite party." The letter speaks for itself. It needs no interpretation. Boyce, who is complainant's chief witness, knew all about the letter at the time it was written. On the trial he produced the original letter, signed by Darnold, and testified that a copy thereof was sent by a messenger and delivered to Andy, who gave a receipt for it; and that the copy

thus sent was not signed by Darnold. Why was it sent? What was the motive upon the part of Darnold and Boyce in sending it? Are there not other facts and circumstances set forth in the testimony that will give some light upon this subject? After the receipt of this letter by Andy, he was seen walking and talking with Darnold; and at one time they were seen going into the bank together after office hours, and the blinds were then pulled down. This is deemed a strong circumstance, if not conclusive evidence, of the conspiracy. On no other theory can it be explained, argue counsel, why Andy should be seen talking to a confessed perjurer on the public streets, instead of prosecuting him for an attempt at blackmail. It is true that men are sometimes known by the company they keep. But those who live in glass houses ought to be careful not to throw stones; to judge not, lest they themselves be judged. The witness Boyce, who furnished to complainant all the information which he himself possessed as to Darnold's perjury and of all other suspicious circumstances told to him by others, with full knowledge of Darnold's character, was not ashamed to be seen walking and talking to Darnold on the public streets of Butte, and inviting him to his house. He did not deem it to be derogatory to his own character to be seen in such company. He poses as a man whose only motive was to assist the ends of justice, in order that the truth might prevail, and fraud and perjury be condemned. His every effort was to reform Darnold; to induce him to be a man among men; to hold up his head, and tell the truth. Incidentally, however, it appears that Boyce and Andy had some misunderstanding about an account of \$60,000 which Andy claimed Boyce & Co. owed the bank; that they could not agree; that an attachment was issued by the bank to secure the claim; that Boyce & Co., by means thereof, were, as Boyce states, ruined; that Darnold had knowledge of these transactions, and Boyce was anxious to secure Darnold's evidence with reference thereto. He was always friendly to Darnold. He procured from Darnold the affidavit that was placed in the possession of Talbott's counsel. Darnold insisted it should not be used unless he was guarantied full protection. Counsel could not or would not give the guaranty. If it was not used on motion for a new trial, it was to be held subject to Boyce's order. After the new trial was denied, Boyce demanded that the affidavit be returned to him, which was done. Boyce's interest in the bank proceedings is fully shown in the letters written by him to Darnold, set forth in the statement in this case, from which it will be seen that, notwithstanding his knowledge of the falsity of Darnold's testimony, he recommended him as one he had always known as an honest man, who had proved himself as such "when in our employ," and recommended him to Farwell & Co., Eastern creditors of Boyce & Co., "as not only being worthy of recognition, but fully capable of holding important positions in their employ." These letters, like the one sent to Andy, speak for themselves, and shed much light upon all of the transactions in which Darnold participated. We have made this reference to Boyce's relation with Darnold and Andy because without it the facts of this case could not be fully understood. Both

sides must be placed before the camera in such a position that the picture, when developed, will present them in their true attitude, and enable the court to determine the effect of all the testimony, and the source from which the "information and belief" was obtained by complainant, and the grounds which existed for the charges made in the bill. The charges against counsel of withholding the testimony that would impeach Darnold ought never to have been made. Why should they have used Darnold's affidavit admitting that he had sworn falsely? They received it under a promise from Judge McConnell that it should not be used unless full protection should be given him. They kept faith with him, and did not use it; but they did procure the affidavits of Boyce and Curtis that Darnold had confessed to them that he had sworn falsely. These affidavits were not impeached. What more was needed? Welcome's affidavit, if it had been received in time, was simply cumulative evidence as to Darnold's perjury. Wehrspau's testimony, if it had been obtained, would have simply added another link to the fact that Darnold had sworn falsely, which was already clearly proven. If everything in relation to Darnold had been produced, its only effect would have been to compel the court to give no heed to his testimony in the consideration of the case; and we have already shown that the supreme court declared that, if his testimony was excluded from the record entirely, it would not change the result. It is unjust and absurd to claim that the proofs of Darnold's perjury were withheld in pursuance of any conspiracy. The charges made in this regard have no reasonable foundation, and are wholly unsustained by the testimony in the record.

2. As to the failure of counsel to cross-examine certain witnesses. Under this head we will refer to the witnesses who testified that they had heard Judge Davis state that he intended to give the bank to Andy. Upon this point but little need be said. The record does not show that there were any facts within the knowledge of any of these witnesses that could have been brought out upon cross-examination that would have been of any benefit to the plaintiff's case in the bank suit. The truth is that the complainant in this suit did not introduce any testimony whatever reflecting in any manner upon the veracity of any of these witnesses. Complainant's counsel, speaking of these witnesses, say:

"They were almost universally old friends, or depositors in the bank. * * * Mr. Toole should have cross-examined these witnesses on the bank trial to find out their relations to Andy, and the fact of their indebtedness to him or the bank. * * * Substantially, no cross-examination was had of any of the witnesses, and absolutely no cross-examination of most of them. No attempt was made to impeach them, or contradict them, or show their relations to Andy. They passed before the court with their statements uncontradicted. This fact itself is suspicious."

The truth is that, notwithstanding complainant's counsel, aided by Boyce, whom they term their "co-counsel," had scoured the country in search of testimony that would impeach any or all of Andy's witnesses, they found nothing whatever that would impeach, or tend to impeach, any of these witnesses, and they stand in the record before us, as they did in the state court, "with their state-

ments uncontradicted." This fact is not suspicious. It shows very clearly that their testimony in the bank suit was entitled to full credit. And it also shows that the failure to make any extended cross-examination of these witnesses on account of any fraud or conspiracy of counsel with Andy or Talbott is absolutely without any foundation whatever. The same is true of the criticism of Talbott's counsel with reference to the course pursued by Mr. Toole and his associates relative to the testimony of Judge Knowles.

3. As to the acts of Leyson. Mr. Leyson was not appointed administrator of Judge Davis' estate until long after the trial of the action in the state court about the bank stock. His act which is alleged to show the conspiracy lies in the fact that, after the decision of the supreme court affirming the judgment of the district court in favor of Andy, he refused, upon the request of parties interested, to sue out a writ of error to the supreme court of the United States, assigning as a reason that he had consulted with his own counsel upon this subject, and had been advised by them that there was no federal question that would justify him in taking a writ of error. This action by Leyson did not prevent the other parties who made the request from taking the case to the supreme court on a writ of error, or deprive them of any of their rights. In fact, they did take the case to the supreme court, and that court held it had no jurisdiction, because no federal question was involved. *Leyson v. Davis*, 170 U. S. 36, 18 Sup. Ct. 500, 42 L. Ed. 939. This fact clearly proves that the administrator was fully justified in the course he pursued. The charge of conspiracy or fraud in this connection is too flimsy to require further comment.

4. As to Andy. It is claimed that when the bank suit was begun Andy knew that he had no right to the bank stock, and had so declared to numerous persons after the date of the alleged gift; and that the new evidence introduced upon this point clearly shows that Judge Davis never made the gift of the bank stock to Andy; that the whole claim on his part is fraudulent and fictitious, etc. What is this new evidence? Complainant first introduced a letter dated February, 1890, written by Andy to his uncle Calvin Davis. This is set forth in full in the record. It is a family letter. The only portion relied on reads as follows:

"Dear Uncle: * * * Uncle Andrew has been very sick, but is improving, and I hope will soon be himself again. * * * His condition worries him. And again he worries considerably because he has not fixed his business so it will be settled according to his wishes after he is gone. He says it is too late to fix matters now. I have consulted Judge Knowles and Dixon, and they say he is not in fit condition to fix his affairs at present. I hope he will soon gain his reason, and fix his affairs to suit himself, and then take a trip, and try and enjoy some of the money he has worked so hard for."

If there was no business that worried Judge Davis except the bank stock, it might be inferred that he was its owner at the time this letter was written. But the fact is that he was possessed of other property to the value of about \$4,000,000. This was of itself sufficient to worry any man, whether in good or poor health. Moreover, the testimony herein shows that the judge had been in con-

sultation with Judge Knowles and Dixon about fixing his business; that he was anxious to make certain gifts of small amounts to a few friends. These things worried him. It was not the bank stock, because during these consultations he told Judge Knowles that "Andy was to have or control the bank." To understand Andy's letter, it is necessary to consider all the surroundings existing at or about the time the letter was written. The reference therein made that he (Andy) had consulted with Judge Knowles and Dixon as to his uncle's condition shows the necessity of considering all the circumstances that were discussed by Judge Davis with his counsel; and in the face of these undisputed facts, if we are permitted to draw presumptions and inferences from the language used, it would be that his uncle was worried as to what he should do with his business affairs independent of the bank stock. There is not a word in the letter inconsistent with the theory that Andy then had the bank stock; that the gift *causa mortis* had then been made. It was purely a family letter, and concerned the state of his uncle's health. He was not writing of his own affairs. In addition to the extract above quoted, he states to his uncle Calvin:

"Please write me, and instruct how to address a telegram, for fear I may have to wire you. We are taking good care of Andrew, and the doctor says all we can do is to keep strangers away from him, and not let him get excited. He is with the German family who have taken care of him for years."

This letter does not in any manner impeach the making of the gift as claimed by Andy, but is, in its entirety, consistent therewith. Does it seem reasonable that Andy, in such a letter, would have advised his uncle Calvin that the judge had made a gift *causa mortis* of the bank stock to himself? The probabilities are all the other way. His uncle Andrew, the judge, might possibly recover. If the gift had been made, it was, nevertheless, subject to revocation at any time before the judge's death. Why should he advise Calvin of the gift? Common sense—which is the soul of reason—plainly indicates to the thinking mind that he would not have done so. But it is claimed that Andy, in common-place conversations with other parties, and evidence given by him in open court after the death of the judge, absolutely admits that no such gift was made; that these matters were deliberately suppressed by the collusion of Talbott's counsel with Andy. Can this claim be sustained? Mr. Wehrspau testified upon the trial of this suit that Andy, the day after he returned from the burial of Judge Davis, about the 14th or 15th of March, 1890, came to his residence, and took therefrom certain trunks, books, field glasses, and a pair of blankets that belonged to the estate of the judge, and thereafter took a fur robe, and lion skin, and some other things. It appears, in this connection, that Andy's sleeping apartments at the bank had been burned out, and that Andy said he had use for the blankets.

"Q. What did he say about having use for the blankets? A. He said there was not any testament. He did not know if the judge had left him anything. Q. How did he connect that statement with the blankets? A. * * * I think he made this remark: He did not know if the judge had left him anything or not, and he took the blankets. He said he had need for them."

Mrs. Wehrspaun, in corroboration of her husband, testified:

"Well, Andy took the blankets. He says: 'I do not know. I have not got very much. I will need these blankets. I do not know whether my uncle left me anything or not.'"

On her cross-examination she said:

"Andy was always joshing a great deal. He took the blankets, and said: 'I will need these. I do not know whether the judge left me anything or not.' Q. That was about the remark he made? A. In a joshing way. Q. You did not understand he said that seriously? A. No. I did not think he meant it seriously. Q. You understood it was a sort of a joking remark? A. Andy was there most of the time. He was like one of the family. I did not pay much attention to what he said. Q. You took the remark in that way, however,—in the way of a joke? A. Yes, sir."

Comment on this incident seems unnecessary. The reply of Mrs. Wehrspaun sufficiently explains the whole conversation. No one ought to be solemnly bound in a court of justice by such idle, casual, and joshing remarks. And counsel for Talbott in the bank suit should not be censured and charged with collusion and conspiracy because, with knowledge of the facts, they failed to consider the conversation of sufficient importance to be introduced at the trial of the bank suit. The charges in this respect are not sustained.

The day of the funeral of Judge Davis, Mr. Boyce had a conversation with Andy, and with reference thereto testified as follows:

"Did you have a conversation with Andrew J. Davis, Jr., on the day of the funeral of his uncle? A. I did. * * * Q. Now, Mr. Boyce, you may give in full that conversation you had with Andrew J. Davis, Jr., on the day of the funeral. A. Well, it was only a brief conversation. I shook hands with Andy. I was a pallbearer, and simply asked Andy this question: 'I suppose that the judge has provided for you, Andy?' Andy says to me that he had not; that he was solely dependent upon his salary; left solely dependent upon his salary."

This conversation, like the last, proves nothing. It was brought out by the inquisitiveness of Boyce at a time and occasion when such a subject might seem out of place. Boyce and Andy were not intimate friends. The motive of the inquiries must be looked at, as well as the falsity of Andy's answer, if it were false. It was not made under oath, nor to a friend in confidence, when the truth would naturally be told.

In *Hewitt v. Lucas*, 42 Ill. 296, 299, the court said:

"We should be establishing a most dangerous precedent if we were to hold that random expressions, used in casual conversations, sworn to after a long lapse of time, and improbable in themselves, can be made a sufficient basis for awarding a new trial."

Boyce, immediately after his statement as to the conversation on the day of the funeral, gave the following testimony:

"Q. Did you have other conversations with him in the bank, in March, 1890, as to the proposed testimony to be given by you in the bank suit? A. I had two conversations with him after in the bank, up in his room. Q. You may state those, please. A. In one of these—the first one—I have the original. I have a diary of it as to the date and what was said. * * * Q. State, if you can recollect, the substance of the conversation, if you can remember. A. Well, I have got the exact words; but I cannot recall them at this particular time, because I feel a little bit worried, and I want to testify to what I know are the exact words as far as I can. * * * Q. Have you got this memorandum with you to-day? A. No, sir; I have not."

This matter was then passed over until the next day, when it was again brought up, and Boyce testified that:

"I had two talks with Mr. Davis in the bank, in his room upstairs. I was making a deposit, and he called me upstairs in his rooms, and I had a private talk with him. Q. State what you said and state what he said at that time. A. Well, Andy opened the conversation with me in this matter. He said that there were certain persons had heard Judge Davis say that he intended to deed—give—him the bank stock, and, in view of my intimacy with the judge, that he had no doubt I had heard him say this, and, if I had, it would be of material benefit to him; that if he could prove by Mr. Talbott and myself and some others that we had heard Judge Davis say that he intended to give him this bank stock, or had given him this bank stock, that he could set up a claim for this; that he was so advised, etc. Q. Did you have another talk a few days afterwards with Mr. Andrew J. Davis on the same subject? A. Yes, sir. Q. State what occurred then. A. He called me up again into the same room. Asked me if I had considered this matter, and that if I could so state that I had heard Judge Davis say he had intended to give the bank stock to him, or anything of a similar character. I told him, 'No, I did not.' Q. What, if anything, was said by him in that connection, as to your affairs, if you could give this testimony? A. Well, he did not say anything directly except this: that, of course, in view of my intimacy with the judge, and the relationship that existed between us, that there would be no particular advantage in regards to myself. No promises further than it would be quite a favor that I could confer upon him, which I understood would be reciprocated to a certain extent. Q. * * * You did not tell Mr. Toole about these talks at the trial? A. No. Q. Did you tell Mr. Toole about these talks with Andrew J. Davis, Jr., before you made your affidavit? A. I did."

There is nothing unnatural in these conversations; nothing to indicate by thought, word, or deed that the gift had not been made. We must place ourselves in Andy's situation in order to ascertain the meaning and the extent of these conversations, and the effect that should be given them. Judge Davis was dead. It was supposed he had died intestate. He had many heirs. He was possessed of a vast estate. Nothing would be more natural than to anticipate litigation in regard thereto. Whatever gifts or other disposition he had made, if any, during his last illness, would undoubtedly be contested, and a bitter legal fight was sure to be made in regard thereto, as well as to the balance of the property. Andy knew, as he told Boyce, that there were several people who had heard the judge say that he intended to give the bank to him. He knew that Boyce was intimately acquainted with the judge, and thought that Boyce might have some knowledge as to the judge's talks with him upon the subject. What could be more natural than to find out the facts whether they should be in favor of or against him? Whether the information should come from friend or foe? There is not anything mysterious or suspicious about these conversations. Nothing whatever to furnish even a suggestion that Andy was trying to obtain any testimony from Boyce that was not true. No promise was made by Andy. No inducement whatever was held out to Boyce tending in any degree to have him make a false statement. The conversations are not susceptible of any interpretation which would lead to the belief that Andy did not at that time claim that a gift of the bank stock had been made to him. In the very nature of things, he must have known, if the gift had been made, that Talbott was the only witness to that transaction. All that he

could possibly do was to find out, in a legitimate and proper way, whether or not Judge Davis had made any statement of his intention to other parties to make the gift. This would, if true, tend strongly to support Talbott's testimony that the gift had been made. It is apparent that, if this testimony had been produced at the trial of the bank suit, it would not have changed the result. The same can be said of the testimony of Wehrspaun as to the conversation Andy had with him about the bank stock shortly after the death of Judge Davis, when Andy asked him if he knew anything about the disposition which the judge had made, or intended to make, of the bank stock. All that Andy wanted to know was whether the witness had heard or knew anything about the disposition of the bank stock. Upon this point the sum and substance of Wehrspaun's testimony is that he saw Andy, Judge Davis, and Talbott—and the little tin box—in the judge's room at his house; that while they were talking about the contents of the box (the bank certificates of stock) he had occasion to go into the room to fix the fire, and while there fixing the fire he saw Judge Davis holding up these papers, and said (to Andy), "These shall be yours if I do not come back;" that he then left the room, and did not hear any other conversation about the matter. This does not contradict the testimony of Talbott, and, had it been introduced, would certainly not have changed the result in the bank suit.

This brings us to the testimony of Andy given in the administration proceedings to ascertain the value of the judge's estate, in April, 1890, in order to enable the court to determine the amount of the bond which the special administrator should give. It is claimed that this testimony was suppressed at the bank trial, and that it proves there was never any gift causa mortis of the bank stock, and tends to show fraud in the cause of action itself. The stenographer who had taken the testimony of Andy read from his notes on the cross-examination of Andy by Mr. Meyers, of counsel for Mr. Root in the contest by the heirs for the estate:

"Q. Are there in that bank at the present time any certificates of stock of the First National Bank of this city standing in the name of the deceased? A. The stock ledger shows there is stock in his name. Q. Are there any certificates contained in that bank in the name of the deceased? A. No, sir. Q. Were there, at the time of his death, certificates of bank stock? A. There may have been in the bank vault; yes, sir. Q. Do you mean to say you are in doubt about it? A. Yes, sir; they may have been in my pocket. Q. At the time of his death? A. Yes, sir. Q. When are you sure they were in the bank and not in your pocket? A. Last night. Q. With reference to the time of his death, when did they first come into your pocket, as far as you can recollect? A. December, 1889. Q. Who gave them to you then? A. The deceased. Q. Where? A. At his room, at his residence. Q. What did he tell you to do with them? A. He told me to take them and keep them. Q. For whom? A. For myself. Q. Did he say that? A. Yes, sir. Q. Why do you hesitate? A. I hesitate to think. He did not say it in just those words. Q. What words did he use? A. As near as I can remember, he told me to take these certificates and keep them. We had quite a talk, and it was a very affecting talk. He gave me to understand that he was just carrying out his promise. Q. Kindly tell us to the best of your knowledge what he said on that occasion? A. He was preparing to go away. He asked me to bring his little tin box down. That is this one in court. He opened it, and started through the box. He had been talking two or three days before

about going away, etc., and he took out some of the certificates, and asked me how many shares were represented in this, and I told him. Q. How many did you tell him? A. I do not know how many I told him. I figured it up, and told him how many were there. I told him there was more in his name. He asked me if that was all. I said, 'No,' there was many shares more. I started through the box then after I put them altogether folded them up, and handed them to him. He took them, and handed them back to me. He told me they were the stock. He wanted me to take it and keep it. He told me he was going away, and he did not know as he should ever return. He gave me to understand that life was uncertain. He might meet with an accident, and he had promised it to me; that I had worked for it, and deserved it. That is what he said on that occasion. I may have left one word out. I cannot repeat it word by word exactly what he told me. He wanted me to take it, and keep it. It was mine in case anything should happen to him. * * * Q. Are you sure that he said it was yours if anything happened to him? A. Yes, sir. He referred to different things,—railroad accidents and death,—and he was not feeling well when he left here. * * * Q. Did he indorse any of the certificates in writing? A. No, sir. Q. Do you know why not? A. I think I do; yes, sir. * * * Q. Do you know why not? What did he say to you on that subject? A. Nothing. Q. What fact is there within your own knowledge explanatory of his failure to sign them? A. Well, I do not know, unless it is that he intended, as long as he was alive, to have that stock for himself. * * * Q. Do you mean that he gave it to you, in common phrase, 'with a string to it'? A. I might call it that way. Q. Then he gave it to you, and yet retained ownership in it himself? A. I suppose he wanted it to stand in his name; wanted no other person to own it until after his death. * * * Q. What did he say? A. I do not remember exactly what he did say. Q. Give it altogether as near as you can. A. Of course, it would take me some time to think of it. You do not understand the relations between Judge Davis and myself, and do not understand what I thought of him, and what these moments meant. It was talk that happened before two or three times,—talk that he was about to die, being sick. And I would always try and encourage him,—tell him that it was not so; and for that reason I would only catch a word once in a while. I would not hear it all. And, besides that, Judge Davis' speech was not clear. I could understand it, but he would muffle. He could not control the right words when he got to talking on these subjects, and really I could not say what he said about dying at this particular time. Q. Tell us as near as you can. A. He gave me to understand that he was going away to take a trip for the benefit of his health,—that he really did not want to go,—to see if he could not improve some; and that he did not care about going. He would just as lief remain home, but thought it was necessary to prolong his days. He started out in that way, and I would brace him up about that. He would say there might be a railroad accident, or something of that kind. I am not sure about it word by word. This is just the incident. Q. Of course, this is a matter to which you have given some thought since his death? A. Yes, sir."

At this point in the testimony there was an objection interposed that this witness was only offered as to the valuation of the property. The court then said:

"The testimony has gone far enough to show that there will be a controversy about this, and the court is not called upon to pass upon this controversy. The court will take into consideration this question, and the possibilities of the case."

The testimony proceeded as follows:

"Q. Who was present at the time of this conversation? Your answer was, 'Mr. Talbott,'—and who else? A. No person. Q. And you have told the conversation as near as you can recollect it? A. Of course, other conversations might refresh my mind; but this is all I remember. Q. Was there any meeting of stockholders or election of stockholders after that? A. Yes, sir. Q.

When? A. Along in January some time. Q. Who voted that stock? A. John E. Davis. Q. Your brother? A. Yes, sir. Q. Under a proxy? A. Yes, sir. Q. From whom? A. A. J. Davis, my uncle."

Upon his redirect examination by John Forbis, the following testimony was given:

"Q. What did he [Judge Davis] say about the gift? Was it to take effect at that particular minute, or when was it to take place? A. When he was dead. Q. That gift was to take effect upon his death? A. Yes, sir. Q. Did he say anything about who would manage the stock during his lifetime for the bank? A. No, sir."

It will be observed that there is much in this testimony that corroborates the testimony of Talbott, and tends to show that the gift was actually made. Some questions were asked and answered as to what he thought the judge meant or thought at the time, and it is in this respect that complainant's counsel contend that his answers admit that there was no gift causa mortis made at that time. It is apparent, independent of any reference to other testimony upon the subject, that Mr. Meyers, in his cross-examination of Andy, was, in common parlance, "on a fishing excursion," hoping to find something that might aid the heirs in bringing a suit to recover the stock from Andy. The court might very properly have said sooner than it did, whether any objections were made or not, that it would not hear any testimony concerning the merits of that case. The simple fact that there was liable to be such a suit was of itself enough to enable the court to determine what the amount of the bond should be, and that was the only question to be determined in the proceedings then before the court. It is seriously charged, however, that this evidence was willfully suppressed by the counsel for Talbott in pursuance of the fraud, collusion, and conspiracy alleged in the bill of complaint. In limine, we pause to consider for a moment the position in which counsel for Talbott were placed with reference to the introduction of this testimony. It must be remembered that Andy was disqualified under the laws of Montana (Comp. Laws, §§ 646, 647) from introducing himself as a witness to establish the gift, and that, if they introduced his testimony in the probate proceedings, he could be called upon in his own behalf to explain this testimony. Was it policy to do so? This was the suggestion evidently presented to their minds. Was it their duty to do so? Upon this point men may differ in opinion. If they introduced the evidence, they would have to take the chances of an explanation being given by Andy that might result disastrously to their contention that no gift causa mortis was ever made. Moreover, it was a doubtful question, at best, whether the testimony of Andy given at such hearing was susceptible of being construed in favor of their contention. Under these circumstances counsel were called upon to determine their duty in the premises. They decided that the risk was too hazardous, and came to the conclusion that it was the better policy not to introduce it. They were called upon in advance to exercise their best judgment, and, if they did, and had no other motive, and were not guilty of any fraud or conspiracy, it cannot be said that the course pursued by them, even if they erred (which we do not

admit), would furnish any ground whatever for enjoining the judgment rendered in the state court.

Complainant relies, among other things, upon the testimony of one Corbett, who was an attorney for the heirs in their contest for Judge Davis' estate. Waiving all the objections that were made to the admissibility of Corbett's testimony, we shall proceed to consider it. Mr. Corbett testified that he had frequent consultations and conversations with Messrs. Toole & Clayberg and other counsel during the trial of the bank suit, and then gave the substance of the conversation had with Mr. Clayberg, as follows:

"Q. State whether or not Mr. Toole or Mr. Clayberg ever informed you as to whether or not this declaration of Andrew J. Davis, Jr., was offered in evidence at the trial. A. Mr. Clayberg informed me that it was not. Q. Did you hear anything stated by Mr. Clayberg at any time as to why not? A. Yes, I did. Q. Will you please state it? A. * * * I made some complaint that it had not been introduced, and asked why it had not been introduced. I remember the answer being something to this effect: 'Well, if your client don't want you to do a thing, what are you going to do about it?' That was about the size of the expression or the effect of the expression. I think in fact that they were his very—very near the—exact words."

Mr. Clayberg, when called as a witness, and asked what he had to say about Corbett's statement upon this point, replied:

"I think Mr. Corbett is mistaken in regard to it. I have no recollection of ever making any such statement as that. * * * Q. Would you or not remember, Mr. Clayberg, if you had made such a remark as that? A. I think I would."

Mr. Clayberg, in answer to other questions, testified as follows:

"Q. What would you have considered it as proper to do, as an honorable attorney, in a case like the bank-stock case, where your client and the plaintiff was acting in a fiduciary capacity, if he had advised or requested you to omit any testimony that was material? A. I do not think I would have paid any attention to it. All of us insisted that Mr. Talbott's testimony was directly against us, and our instructions were to go ahead, and do the best we could in the case. I don't think we would have listened to any suggestion he might have made as to the putting in of testimony. Q. Did he at any time give you any directions or instructions as to what testimony you should put in or leave out? A. He never did to me. I don't think he did to any one. Q. In the matter of admitting this testimony of Andrew J. Davis, did you or the other counsel in the case, so far as you know, follow anybody's direction or advice, or did you act upon what you thought was best for the interest of your clients in the case? A. I don't think anybody gave us any directions in regard to it at all. We acted according to what we believed to be the best interests of the case."

Mr. Toole, was called as a witness, and testified as follows:

"Q. Was the testimony of Andrew J. Davis, Jr., in the proceedings on application for letters of administration used on the trial of the bank-stock case in the district court? A. It was not. Q. Why was it not? A. Well, sir; at the time the testimony of Mr. Davis and Mr. Talbott was taken I think I was quite particular to draw out of them everything they knew in reference to the alleged gift, and that, if there was anything wrong about it, it would probably take them at a time when they had not thoroughly examined it. I got up, and went over to Mr. Meyers, * * * and suggested that fact to him. * * * We managed to get out about all that was possible to get from Mr. Davis, * * * and we did it for the purpose of ascertaining the exact condition of things with a view of the institution of suit on behalf of the heirs to determine the right to this bank stock. The question arose in a collateral way; that is to say, the examination as to the ownership

of this stock pertained solely to the question of the amount of bonds that was to be given in the case by whoever was appointed administrator of the estate, and was not in any proceeding to make a final adjudication or determination of the title to the stock. It was collateral to that extent. The testimony was taken down by the stenographer, and copies furnished, as I have stated. Q. Did Mr. Andrew J. Davis, Jr., testify in the bank-stock case, do you know? A. Upon the trial of the bank-stock case he did not. Q. Did he offer to testify? A. He offered to testify, and we objected to his giving testimony on the ground that he was not a competent witness under the statute, and the court sustained the objection. Q. * * * I believe you did not get through in regard to the first question I asked you, as to why? A. I did not complete that. * * * We held divers consultations upon the propriety of introducing the testimony of Andrew J. Davis, Jr., that had been given upon the trial in the probate matter, and came to the conclusion that it was not policy to do so. We were all unanimously of the opinion that if we sought to introduce any portion of that testimony, that they would have the right to have it all introduced; and we were also of the opinion that it would render Mr. Davis a competent witness to go in and explain any matters that would appear ambiguous or uncertain, and also give him an opportunity to make statements as to other matters which he had offered to state. For this reason we did not deem it policy to introduce the affidavit, or, rather, testimony, that he had given on the trial of the bank-stock case, and for this reason we objected to him as being an incompetent witness. We were further of the opinion that his testimony would be damaging to us. As it was, it rested solely upon the testimony of Mr. Talbott, and we got a number of circumstantial facts which we considered tended to disprove his statement as to the actual execution of the gift and control of the bank."

Who can say, in the teeth of all the facts, conditions, circumstances, and surroundings to which we have called attention, that counsel were not acting in good faith, and guided solely by the best motives, and in the exercise of sound judgment? Certainly, no impartial mind can say that there was any fraud or collusion in withholding any of the testimony herein referred to upon the part of Andy or of Talbott's counsel.

5. As to Talbott, special administrator, and his counsel. Talbott, as shown in the statement of facts, was appointed special administrator of the estate of Andrew J. Davis, deceased. He was thereafter directed by the court to bring an action against Andy to recover the bank stock which Andy claimed belonged to him. In bringing this action he employed the attorneys who had represented Root in his contest on behalf of certain heirs against John A. Davis for appointment as administrator of Judge Davis' estate. These counsel, if they were honest, upright men, would naturally do the best they could within the range of their legal ability to secure the bank stock for their former client, and to faithfully represent the special administrator in his effort to recover the bank stock from Andy. It was natural for Talbott, as special administrator, if he desired to do his duty in the premises, to employ these counsel. His act in so doing was evidently satisfactory to the heirs who were represented by Mr. Root, and to Mr. Root himself. No complaints were made by them, or either of them, or by any of the parties interested, as to the employment of these counsel by Talbott. Throughout the trial of this suit Mr. Root, who is an attorney, frequently consulted with Talbott's counsel as to the best course to be pursued, and in many—not all—of the charges of alleged fraud and conspiracy against Talbott's counsel of failing to cross-examine wit-

nesses or to introduce testimony, etc., approved the action pursued by Talbott's counsel. There is no pretense that Root was acting in bad faith, was guilty of any wrong, or a party to any fraud, collusion, or conspiracy in favor of Andy. Talbott informed the counsel when he employed them that he would be called as a witness on behalf of Andy, as he was present and heard the conversation between the judge and Andy about the bank stock. To quote the language of Mr. Toole, Talbott said he "had selected us to represent the interests of the heirs, and that it was his desire that we should take hold of it in their interests, as if we had been employed by them; and that on account of this relation of his to the case as a witness that he left the entire matters in our hands to conduct. From that time on we conferred with Mr. Root, and he was the man that assisted us in the prosecution of the case. * * * Q. I ask you, Mr. Toole, if either Mr. Talbott or Mr. Leyson, in this bank-stock case, ever told you or intimated to you that they desired you to do anything whatever that would favor Mr. Davis' claims in the matter? A. Certainly not. If he had done such a thing I do not believe there was an attorney in the case that would not have withdrawn from it at once." The most important charge of conspiracy made by the complainant to be here considered is that:

"When Talbott testified at the bank trial for Andy, Mr. Toole and the attorneys for the plaintiff in the suit knew that he was a man unworthy of belief, a gambler, and keeper of disreputable resorts; and nevertheless deliberately refused to impeach him, although he was the sole witness to establish for Andy a million dollar gift."

What are the facts as shown by the testimony in relation to this charge? Complainant in this suit introduced three witnesses—Mrs. Niedenhofen, Ed. Potting, and William Wilson,—who each testified, in substance and effect, that they knew Talbott's reputation in 1894, and at the time they gave their testimony, for truth, and for honesty and integrity, in the community where he lived, and that "it was bad." It incidentally appears from their testimony that two of them had had differences with Talbott in certain transactions, and that ill feeling existed on account thereof. Waiving, for the time being, the objections made to the admissibility of their testimony, we proceed to consider it. Mrs. Niedenhofen was engaged in business as a merchant. Potting was her friend and partner in that business. She had known Talbott for about 20 years, but had only known him intimately for about 2 years. Her son married Talbott's daughter in 1896. The son died one year and nine months after he was married. The difficulty she had with Talbott related to the burial of her son. There was a controversy between the families as to where he should be buried. Mr. Wilson testified that he had known Talbott for over 30 years; that Talbott, in 1865, resided in Virginia City, and was "running a kind of a gambling joint—gambling house—at that time"; that he knew Talbott in Bear-town, in 1869, and that "he was running a small gambling house at that time"; that he knew Talbott in Deer Lodge, Mont., between 1870 and 1872, and that he was then engaged in "the same occupation, * * * keeping a gambling house and saloon"; that he

knew Talbott at Butte, Mont., between 1876 and 1877, and that he then kept a "gambling house." On his cross-examination this witness testified:

That he had fallen out with Talbott about two years ago, and had a pretty bitter feeling against him ever since. That he had run a gambling house himself at Deer Lodge and Butte, Mont., in 1870 or 1871. "That he never dealt anything but faro, * * * but they were square games. Gambling is different now to what it was then. Q. Will you please state what your own reputation is for truth and veracity in Butte? A. Of course, I say it is good. * * * Q. Mr. Wilson, do you consider that you are entitled to rank as a man of truth, honesty, and integrity in spite of the fact that you kept a gambling house? A. Yes, sir. * * * Q. Were you ever connected with Mr. Talbott in any of his gambling houses? A. Yes, sir. Q. You were a partner with him? A. Yes, sir. Q. Where? A. In Deer Lodge. Q. Whenever he run a gambling house there, you were in partnership with him? A. Yes, at one time. Q. That was the same character of a gambling house he ran afterwards? A. That he ran; yes, sir. Q. The same character? A. The same exactly in Deer Lodge. They were very similar. Q. Is it not a fact that that was a first-class gambling house? A. Square gambling at that time, both of them; that is, in my house, anyhow, it was square. * * * Q. Mr. Talbott was connected in the early days here with the most respectable gambling house in Butte? A. One of them; yes, sir. Q. Was it not the most respectable at the time he was in it? A. It was one of the most. It was a very respectable house, as far as that is concerned. Q. It was as good as any of them? Everything was on the square? A. Oh, yes."

This witness was then asked as to his knowledge about Talbott having been employed in connection with the business of Judge Davis:

"Q. Do you know that he remained as a confidential man of Andrew J. Davis, deceased, up to the time of his death? A. I know he has been a very confidential man with him. Q. In mining matters? A. Yes. Q. And that he did not gamble after that time? A. I never seen him gamble after that. Q. At the time that Mr. Talbott ran a gambling house here, gambling was a legitimate business, authorized by the law of the state,—licensed,—was it not? * * * A. Yes, sir."

The district court in rendering its opinion herein very properly said:

"If gambling impeaches Talbott's character, it is difficult to understand why it would not also that of this witness, and especially as his testimony shows that he has not entirely reformed all his wild ways. If Talbott is of the very bad character charged, it is strange that after a long residence in Butte, where he has been engaged in active business, some entirely reputable and unprejudiced witness could not be found to say so. Courts cannot hold that the character of a witness is so impeached that his testimony must be disregarded, except upon the testimony of witnesses who are themselves above impeachment, and by such unequivocal testimony from them that it cannot be doubted."

Why should counsel in the bank suit have attempted to impeach Mr. Talbott? Judge McConnell was called as a witness in this case, and upon his cross-examination was asked by complainant's counsel several questions touching Talbott's character:

"Q. Was the question of impeaching Mr. Talbott by reference to his early record a matter of discussion at all between the attorneys? A. Mr. Talbott was discussed between Mr. Clayberg and myself a good deal. * * * I remember his history being discussed in connection with this lawsuit, and that it was developed very much as Mr. Toole has described it in his testimony. His days of gambling were a considerable period before the time this lawsuit

was instituted, and took it practically so far back that it might be said to have brought it within the statute of limitations; in other words, that the period of business life had existed, and a number of years had intervened, so that practically that part of his history that contained that had nothing to do with the lawsuit. * * * Q. You do not mean to say that all good, religious, church members in Montana approve of a man who has been engaged in gambling? A. I do not think any men of that class approve of gambling. * * * If they had known he kept a gambling house ten or fifteen years before, and had absolutely quit it, I do not think they would condemn him. They would rather applaud him, because he had quit. I don't think it would be brought against him. I believe that the Christian law of forgiveness would have been the doctrine that the best people would have adopted with regard to that class of men."

When asked upon cross-examination whether, from his knowledge of the conditions in Montana, if the fact that a man has been a gambler would affect his credibility as a witness, he replied: "A. That depends entirely upon what class of a gambler he is." Assuming, then, that the witness is a man who is engaged in business of a legitimate character, and has been so engaged for years past, and as a business man stands high before the community since he has ceased gambling? "A. A man of that description, and such as Mr. Toole describes Mr. Talbott to have been, could not be discredited in this country before a court or jury, in my judgment, by bringing up his past history for gambling, where he had quit it, and established a business reputation for honesty in business of a number of years' standing between the period he indulged in gambling and the time he is sought to be impeached. The truth is, to go back and take up that kind of a charge against a man of that character would prejudice your case."

The reasons given by this witness for his opinions were in strict accordance with the views frequently expressed by the courts upon the same or similar subjects.

In *Baker v. Com.* (Ky.) 50 S. W. 54, 56, the court said:

"We do not understand that the entire past lives of witnesses are liable to be ransacked and exposed, and the whole history of their lives laid bare. We are of opinion that the period concerning which the inquiry is made should bear some reasonable relation to the time at which the testimony is given, and that a period of fifteen years is too remote."

In *Greenl. Ev.* (15th Ed.) § 459, the author says:

"The examination being governed and kept within bounds by the discretion of the judge, all inquiries into transactions of a remote date will, of course, be suppressed; for the interests of justice do not require that the errors of any man's life, long since repented of, and forgiven by the community, should be recalled to remembrance, and their memory be perpetuated in judicial documents, at the pleasure of any future litigant."

See, also, *State v. Gesell* (Mo. Sup.) 27 S. W. 1101; *State v. Parker*, 96 Mo. 382, 390, 9 S. W. 728; *State v. Houx*, 109 Mo. 654, 663, 19 S. W. 35; *Whart. Cr. Ev.* § 472.

Why should we be called upon to answer complainant's question? The mere fact that a man had in his early life been engaged as a gambler does not of itself establish the fact that he is unworthy of belief. It depends upon the man. There are men who move in good society, and are members of the church, whose reputation in the community where they reside for truth and veracity is bad, and whose reputation for honesty and integrity is not good. On the

other hand, there are gamblers who have been engaged in that business for many years, who mingle mostly with men engaged in the same occupation, whose reputation for truth, for honesty, and integrity is not bad. A man may indulge in many vices to such an extent as to destroy his general character, yet his truthfulness and veracity may be absolutely unimpeachable. When it is considered, as this record shows, that Talbott had quit gambling; that he had the confidence of business men; that he was trusted in the management of extensive mining operations; that he had held positions of trust, and had never betrayed the confidence reposed in him; that for years he had been the special administrator of Judge Davis' vast estate, and had so managed it, and at the close of the compromise thereof he had accounted for the same, and turned it over as required by law, without even a suggestion of any wrongdoing, and without a murmur of dissent on the part of any of the numerous heirs against any of his acts or conduct in relation thereto,—we are irresistibly led to the conclusion that Judge McConnell was right when he said in his testimony that for counsel to go back and present a charge "against a man of that character" would only prejudice his case.

In *State v. Larkin*, 11 Nev. 314, 330, the court had under consideration the question whether the district court had erred in refusing to give the following instruction:

"The jury may, and it is their duty to, take into consideration the chastity or want of chastity of any witness for the state in determining the credibility due such witness."

In discussing this question, among other things, the court said:

"This instruction is not confined to any particular witness. It was, as we think, intended to mislead the jury, and was properly refused. It tells the jury, in effect, that want of chastity is sufficient to destroy the credibility of a witness. As a general proposition, to be applied indiscriminately to all cases, this is not true. A witness may be unchaste, and yet be truthful. A witness may be chaste, and yet be untruthful. The law affords ample remedies for testing the credibility of witnesses without introducing testimony of specific acts of immorality, and in particular instances allows greater latitude than in others, owing to the special facts and circumstances that surround each individual case. There are, perhaps, exceptional cases where it might be proper to show the utter depravity of the moral character of a witness in order to establish the fact that such a witness is not entitled to any credit. But we are not dealing with the exceptions. The general rule, as recognized by a majority of the decided cases, is that evidence of bad character for chastity, where such character is collaterally, not directly, in issue, is not admissible for the purpose of impeaching the credibility of a witness."

To the same effect, see *People v. Un Dong*, 106 Cal. 83, 88, 39 Pac. 12; *Matthews v. Lumber Co.* (Minn.) 67 N. W. 1008; *Calkins v. Railroad Co.* (Mich.) 78 N. W. 129; *Rhea v. State*, 100 Ala. 119, 122, 14 South. 853; *Thrawley v. State*, 153 Ind. 375, 381, 55 N. E. 95.

6. The wholesale charges of dishonesty and conduct unbecoming attorneys in accepting fees on both sides is hardly worthy of any reply. *Forbis & Forbis* and *Dixon & Kirkpatrick*, of counsel for Andy, are virtually charged with unprofessional conduct because they accepted fees both from John A. Davis and from Andy. We have set forth in the statement the facts in relation thereto. The agreement made by counsel and the additional agreement signed

by John A. Davis of themselves honorably acquit these counsel from any blame, wrongdoing, or improper conduct in the premises. They are not deserving of any censure or criticism, and need no further justification. The charges against Toole, Clayberg & McConnell, of counsel for the estate, are wholly unfounded, and have no support from any evidence contained in this voluminous record. There is nothing that reflects upon their honor as lawyers, or upon their integrity as men. They may have made some mistakes in the trial of the bank suit. But, in view of all the surroundings, we are unwilling to say, as a matter of fact or of law, that they did. They had to act from all the circumstances within their knowledge, without knowing what the particular result might be. They exercised their best judgment; and, after all is over, looking backward, it is easy for the parties interested, who lost the case, to say that it might have been better if counsel had acted differently. That can always be said by the losing party in the trial of any case. But we are not prepared to say that they ought to have pursued any other course than what they did. Certain it is that there was not anything in their conduct or management of the case that tends to show, in the remotest degree, that they acted as they did in pursuance of any fraud, collusion, or conspiracy of any kind with anybody.

7. We decline to discuss the motion made by complainant in the court below that she be allowed to amend her complaint so as to include additional charges of bribery and corruption. In the light of all the circumstances disclosed in the record in relation thereto, it is sufficient to state that, in our opinion, the court did not err in refusing the motion.

8. There are numerous other specific points made by complainant, and many pages of testimony in regard thereto, which we deem unnecessary to discuss. It is enough to say that we have examined each and all of them as carefully as the points we have discussed, and have arrived at the conclusion that upon the whole record, notwithstanding the peculiar and suspicious circumstances contained therein, the appellant has failed to make out a case that would justify this court in granting the relief prayed for. The decree of the circuit court is affirmed, with costs.

ROSS, Circuit Judge, dissents.

MEYER v. PENNSYLVANIA LUMBERMEN'S MUT. FIRE INS. CO.

(Circuit Court, W. D. New York. April 22, 1901.)

No. 17.

FOREIGN CORPORATION—ACTION—SERVICE ON DIRECTORS.

Where a foreign corporation is doing business in the state, service made on a director of the corporation within the state, having his permanent residence in the state,—the cause of action having arisen in the state,—is valid, under Code Civ. Proc. § 432.¹

¹ Service of process on foreign corporations, see note to *Eldred v. Car Co.*, 45 C. C. A. 3.

Heman W. Morris, for plaintiff.
Harris & Harris, for defendant.

HAZEL, District Judge. This is a motion to set aside service of the summons upon the defendant. Service was made upon a director of the corporation within the state of New York. The director has his permanent residence at Rome, in this state. The cause of action arose within the state. Moreover, I am of the opinion that the company is doing business within this state, and therefore a director of the defendant is a proper officer upon whom service of the summons can be effected. Code Civ. Proc. § 432; Insurance Co. v. Spratley, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569; Childs v. Manufacturing Co., 104 N. Y. 477, 11 N. E. 50. The opinion of Judge Wallace in Good Hope Co. v. Railway Barb-Fencing Co. (C. C.) 22 Fed. 635, bears out this contention. The case of Goldey v. Morning News, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517, relied upon by defendant's counsel, is clearly distinguishable from the case at bar. In that case the officer served was temporarily within the jurisdiction of the state of New York, and had no permanent residence or domicile therein. The motion to set aside service of the summons is denied.

GENERAL ELECTRIC CO. v. JONATHAN CLARK & SONS CO.

(Circuit Court, W. D. New York. January 18, 1901.)

No. 25,374.

1. EVIDENCE—ADMISSIONS IN PLEADINGS.

Admissions or declarations of defendant contained in a pleading served by him on the adverse party in another pending case may be offered in evidence by plaintiff in the case at bar, though not a party to the action in which the pleading is served.

2. PRIVILEGED COMMUNICATIONS.

A communication to a counselor, in the course of his professional employment, by persons other than the client or his agent, is not privileged.

Clark H. Timmerman, for plaintiff.
Adelbert Moot, for respondent.

HAZEL, District Judge. This is an application under section 869, Rev. St. U. S. It is claimed by the plaintiff that the defendant proposes to offer in evidence upon the trial of this case a portion of the record in an action now pending in the supreme court of the state of New York, in which the Ball & Wood Company is plaintiff and the Comstock Company, Jonathan Clark & Sons Company, and others are defendants. The plaintiff further claims that the answer to the amended complaint in that action served on the attorneys for the Ball & Wood Company may not be offered in evidence on the trial of this case by the defendant, because it contains admissions and declarations favorable to and corroborative of plaintiff's contention. Such admissions or declarations contained in a pleading served upon the adverse party in a pending case are material, and may be properly offered in evidence by the plaintiff in this case, although not a party

to the action in which the pleading is served. The fact that the pleading sought to be produced and offered in evidence by the plaintiff is a copy of the answer, does not take from it the character of an admission or declaration made by the defendant, which may become, under the circumstances claimed by the plaintiff, competent and material evidence. The question here is whether a communication made to a counselor in the course of his professional employment by persons other than the client or his agent is privileged. The privilege extends only to communications by or on behalf of the client. *Randolph v. Quidnick Co. (C. C.) 23 Fed. 278.* "The principle of the rule does not apply to the discovery of facts within the knowledge of an attorney or counselor which were not communicated to him by the client, although he became acquainted with such facts while engaged in professional duty as the attorney or counselor of his client. It is held that an attorney is bound to produce letters communicated to him from collateral quarters, and to answer as to matters of fact as distinguished from matters communicated to him by his client in professional confidence." *Crosby v. Berger, 11 Paige, 379, 42 Am. Dec. 117.* The motion by the plaintiff, General Electric Company, that Adelbert Moot be directed to appear and produce before William F. Strasmer, the commissioner appointed by the circuit court of the United States for the Northern district of Illinois, Northern division, in obedience to the subpoena duces tecum already issued out of this court, the copy of the answer to the amended complaint interposed in the Ball & Wood Company action by the defendant, Jonathan Clark & Sons Company, is granted, and an order may be entered requiring Adelbert Moot to appear before the commissioner, and produce said answer, on a day to be agreed upon by the parties, or, if they cannot so agree, upon a day to be fixed by the court. In accordance with this view, the application of Adelbert Moot for an order vacating the order under review, to show cause why he should not produce the answer referred to, must be denied.

KAUFFMAN v. RAEDER et al.

(Circuit Court of Appeals, Eighth Circuit. April 10, 1901.)

No. 1,473.

1. CONTRACT—CONSTRUCTION—PURPOSE AND INTENTION OF PARTIES MUST PREVAIL.

The situation of the parties when a contract is made, its subject-matter, and the purpose of its execution are always material to determine the intention of the parties and the meaning of the terms they used, and when these are ascertained they must prevail over the dry words of the agreement.

2. CONTRACT—ACCEPTANCE OF PARTIAL PERFORMANCE BARS RESCISSION.

Where one party to a contract has received and retained the benefits of a substantial partial performance thereof by the other party, he cannot rescind it, but the contract must stand, he must perform his part of it, and his remedy for the breach of complete performance by the other party is limited to compensation therefor in damages.

3. CONTRACT—ACTION MAINTAINABLE UPON PARTIAL, WITHOUT COMPLETE, PERFORMANCE.

A party to a contract, who has conferred upon the other party thereto the benefits of a substantial partial performance thereof, but who has not

completely performed the agreement, may maintain an action against the other party for specific performance, or for damages for the latter's failure to perform, upon plea and proof of his own partial performance, without plea or proof of his complete performance, and the defendant in such an action may recoup his damages for the plaintiff's failure of complete performance, or may recover them in an independent action therefor.

4. CONTRACT—DEPENDENT COVENANT—BREACH.

The breach of a dependent covenant, a covenant which goes to the whole consideration of a contract, gives to the injured party the right to rescind the contract, or to treat it as broken and to recover damages for a total breach.

5. CONTRACT—INDEPENDENT COVENANT—BREACH.

A breach of an independent covenant, of a covenant which does not go to the whole consideration of a contract, but which is subordinate and incidental to its main purpose, does not constitute a breach of the entire contract, or warrant its rescission by the injured party. The latter is still bound to perform his part of the contract, and his only remedy for the breach is compensation in damages.

6. COMMERCIAL CONTRACTS—INTERPRETATION—PERFORMANCE.

Commercial contracts must be interpreted in the light of commercial usages, and their performance must be such as business men would naturally contemplate.

7. CONTRACT—OFFER OF DELIVERY OF PERSONAL PROPERTY—WHEN SUFFICIENT.

All that is ordinarily required of a party to a contract who has agreed to deliver personal property upon the payment of a debt or price is that he shall put the property in some convenient place, subject to the disposal of the payor upon his compliance with the terms of the contract, and that he shall notify the promisor of the fact.

8. SAME.

Nine parties agreed to pay \$35,000 and interest to A. on or before a day certain, and A. agreed to assign and deliver certain stock in a corporation to them when they paid the money. A. deposited the stock in a bank in the city of St. Louis, where the contract was made, and more than 40 days before the day certain caused the obligors to be notified that the stock was in the bank, subject to their disposition, upon their payment of their debt. Some of the nine parties resided and conducted business in St. Louis; others, in Chicago. *Held*, this was a reasonable, fair, and sufficient offer of performance of his contract by A.

Taylor, Circuit Judge, dissenting.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

This is an action on a contract. At the close of the evidence the court directed a verdict in favor of the defendants. The writ of error challenges the judgment which followed that verdict. The material facts established when the court directed the verdict were these: The plaintiff in error, John W. Kauffman, was in 1895 the owner of certain real estate in the city of St. Louis, Mo., at the northwest corner of Ninth and Olive streets. On June 19, 1895, he made a lease of this property to the Central Realty & Improvement Company, a corporation, for a rental of \$35,000 per annum, payable quarterly on August 1st, November 1st, February 1st, and May 1st in each year. In July, 1895, the Century Building Company, a corporation, was organized for the purpose of taking an assignment of this lease and constructing a building on these premises. On July 19, 1895, the lease was assigned to the Century Building Company, and that corporation assumed the payment of the rents reserved therein to the plaintiff, Kauffman. After the lease of June 19, 1895, had been made, the defendants in error and their associates, for the purpose of relieving the Century Building Company of the payment of the rent on this lease for one year, and of securing the payment and satisfaction of the first \$35,000 payable upon this lease, made the following contract with John W. Kauffman:

"This agreement, made and entered into in triplicate this 19th day of June, 1895, by and between John W. Kauffman, of the city of St. Louis, party of the first part, and Henry Raeder, Jonathan Clark, B. S. Crocker, and A. S. Coffin, of the city of Chicago, state of Illinois, and C. W. Wall, A. O. Rule, and R. F. Kilgen, of the city of St. Louis, state of Missouri, and the McCormick-Kilgen-Rule Real-Estate Company, a corporation organized under the laws of the state of Missouri, of the city of St. Louis, state of Missouri, parties of the second part, witnesseth: That whereas, the said parties of the second part propose and intend to organize a corporation under the laws of the state of Missouri, and particularly under Act March 21, 1891, of the general assembly of said state, with a capital stock of one million dollars (\$1,000,000), six hundred thousand dollars (\$600,000) of the same to be preferred and to draw a preferred dividend of six per cent. (6%) per annum, said company to be known and styled the 'Century Building Company,' or such other name as may be hereafter agreed upon, said company to be organized for the purpose of acquiring a certain lease, dated the 19th day of June, 1895, entered into between said party of the first part and the Central Realty & Improvement Company, which lease covers certain premises in the city of St. Louis, at the northwest corner of Ninth and Olive streets, in said city, and to which lease reference is hereby made as part hereof, and also for the further purpose of erecting a building on said premises, including the premises covered by the Durning lease, referred to in said last-mentioned lease; and whereas, the said parties of the second part have requested, and do hereby request, the said party of the first part to accept and receive from said proposed corporation, or the said parties of the second part, in payment of four (4) installments of rent provided for in said lease,—said four (4) installments being respectively due August 1, 1895, the first day of November, 1895, the first day of February, 1896, and the first day of May, 1896, and aggregating thirty-five thousand dollars (\$35,000) and being for eight thousand seven hundred and fifty dollars (\$8,750) each,—three hundred and fifty (350) shares at par of the preferred capital stock of said proposed corporation, or thirty-five thousand dollars (\$35,000), divided into four (4) installments equal to said installments of rent; and whereas, the said party of the first part has agreed to accept said shares of stock for said installments of rent, at and upon the times they become due, upon the condition that the said parties of the second part agree, on or before the 1st day of July, 1898, to purchase said shares of preferred stock from said party of the first part, at and for the price of thirty-five thousand dollars (\$35,000), and in addition thereto an amount equal to interest at the rate of six per cent. (6%) per annum on the said several installments of rent from the time they become severally due and payable, less any dividend which the said party of the first part may have received on account of said preferred stock: Now therefore, the said parties of the second part do hereby agree and bind themselves to purchase said preferred stock from said party of the first part, as hereinbefore recited, and to pay therefor the price hereinbefore set forth; and the said party of the first part agrees to sell and transfer to said parties of the second part the said stock at the times and for the price hereinbefore set forth. This contract shall be binding on the said parties, respectively, and as well their respective heirs, executors, administrators, and assigns.

"In witness whereof, the said parties have hereunto set their hands the day and year first hereinbefore written.

"[Signed]

John W. Kauffman.

"Henry Raeder.

"Jonathan Clark.

"B. S. Crocker.

"A. S. Coffin.

"C. W. Wall.

"A. O. Rule.

"R. F. Kilgen.

"McCormick-Kilgen-Rule Real-Estate Co.,

R. F. Kilgen, V. Pres.,

"A. O. Rule, Secy."

"[Corporate Seal.]

Kauffman satisfied the debt and discharged the lessee and its assignee from their liability for the \$35,000 rent which fell due on and before the 1st day of

May, 1896, and took the 350 shares of the preferred capital stock of the Century Building Company according to his covenant in this agreement. Some time in 1897 he assigned this stock and delivered the agreement to the Merchants-Laclede National Bank, a corporation engaged in a general banking business in the city of St. Louis, Mo., as collateral security for an indebtedness which he owed the bank. In September, 1898, he paid his debt to the bank, and redeemed and recovered possession of the certificates and the agreement. During all the time between the execution of the agreement and the trial of this action the stock and the agreement have been under his control, and he has been able, willing, and ready to assign and deliver them to the defendants, upon their payment of the \$35,000 and interest, pursuant to the terms of their agreement. On May 16, 1898, he caused the cashier of the Merchants-Laclede National Bank to send the following letter to each of the obligors in this agreement to pay the \$35,000, and each of them received the letter in the ordinary course of the mail:

"Dear Sir: As collateral security to a loan made to John W. Kauffman, we hold 350 shares of the preferred stock of the Century Building Co., together with an agreement, signed by you and others, agreeing to pay for said stock \$35,000, with interest, amounting to \$4,313.74 to July 1st next, the maturity of the agreement. We desire to notify you that we hold the stock and agreement, and to request you to arrange to take up your agreement on the date named, namely July 1st, 1898.

Yours, truly,

"[Signed]

George E. Hoffman, Cashier."

On July 18, 1898, the attorneys for Mr. Kauffman wrote to the defendant Jonathan Clark that the contract had not been performed on his part, that Mr. Kauffman proposed to take immediate measures to enforce his rights as defined in the agreement, and asked him to advise them if it would be necessary for them to resort to the courts to assert the rights of their client. Three days later Mr. Clark answered that he was ready at any time to perform his part of the contract, that he supposed that if legal action was necessary to collect the claim that action must be taken against all the parties to the contract, so that it would be of no avail for him to pay his proportion of the amount due, but that if Mr. Kauffman would accept the proposition he would pay him \$5,000 and permit him to retain his proportion of the stock, provided he would release the writer from any further obligation on the contract. In October, 1898, one of the attorneys of the plaintiff in error again demanded of Mr. Clark the payment of the amount owing upon the contract, and he declined to pay or take any further action in the matter, and waived a tender or production of the certificates of stock and their assignment. He declared that he did not intend to do anything about performing the contract, and that it would make no difference in his decision if the certificates of stock were presented. Upon this state of facts the court below directed a verdict for the defendants on the sole ground that no tender or offer of the certificates of stock and an assignment thereof to the defendants was made by the plaintiff or waived by the defendants on or before July 1, 1898, although it was conceded that they were in the control of the plaintiff, who was ready and willing to transfer them during this time, and that within four months after July 1, 1898, a proper demand of performance was made of the defendant Clark, and he refused to perform and waived the production and offer of the certificates and assignment.

Shepard Barclay and J. E. McKeighan (M. F. Watts, on the brief), for plaintiff in error.

Wm. E. Garvin (R. L. McLaran and Jas. P. Dawson, on the brief), for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

May one party to a contract, who has accepted and retained the benefits of its substantial performance by the other party, retain and

enjoy these benefits, and still rescind the agreement, and escape all the burdens and liabilities of the contract, because the first party has failed to perform at the exact time stipulated therein a subordinate covenant, incidental to the main purpose of the agreement, which goes only to a part of the consideration, and whose breach may be compensated by damages? This is the most important question which this case presents. It will be conducive to brevity and perspicuity to obtain a clear idea of the relations of the parties to the agreement to be considered, their respective covenants therein, and the moving considerations which induced them to make their stipulations, before entering upon the discussion of this issue. This conception must be secured by the light of the fundamental rule that the situation of the parties when the contract was made, its subject-matter, and the purpose of its execution are material to determine the intention of the parties and the meaning of the terms they used, and that when these are ascertained they must prevail over the dry words of the stipulations. *Accumulator Co. v. Dubuque St. Ry. Co.*, 64 Fed. 70, 74, 12 C. C. A. 37, 41, 42; 27 U. S. App. 364, 372; *City of Salt Lake City v. Smith* (C. C. A.) 104 Fed. 457, 462.

On June 19, 1895, when this agreement was made, the plaintiff, John W. Kauffman, had made a lease of the valuable premises in the heart of the city of St. Louis involved in the negotiation to the Central Realty & Improvement Company for a term of years, whereby he was secured—First, by his legal right to eject the lessee and to take back the premises upon default in the payment of any installment of the rent; and, second, by the covenant of the lessee, in the receipt during the year then ensuing of a rent of \$35,000 in quarterly payments. The defendants had formed the project of organizing a corporation, the Century Building Company, of purchasing this lease from the lessee, of assuming its covenants, and of constructing a building on the leased premises in the name of this prospective corporation. They could derive no rents or income from the premises during the year then ensuing, while the building was in course of construction, and they desired to carry the time of payment of this \$35,000 forward to a period when the building would be completed and the property would be yielding an income. For this purpose they induced the plaintiff to make the contract under consideration. In this agreement the plaintiff and the defendants made certain covenants with each other. By the dry words of the contract the plaintiff covenanted to accept preferred stock of the Century Company at its par value for the \$35,000 rent which was coming due in the then ensuing year, and to assign and transfer this stock to the defendants and their associates for \$35,000 and interest thereon at 6 per cent. per annum from the time that the rent fell due by the terms of the lease. On the other hand, the defendants covenanted to pay this \$35,000 and interest to the plaintiff on or before July 1, 1898. The legal effect, the real meaning, of the agreement was that Kauffman covenanted to release (1) the security of his right to eject the lessee and its assignee, and to recover back the premises, for a failure to pay any installment of this rent, and (2) the security of his lessee's agreement to pay it, and to accept in lieu of this

security the personal covenant of the defendants that they would pay the rent, with interest, on or before July 1, 1898, and the preferred stock of the prospective corporation, which he agreed to hold and to deliver to the defendants upon their performance of their covenant to pay the rent. The considerations which Kauffman agreed to give to the defendants for their covenant to pay the rent and interest were (1) the use by the prospective corporation of the leased premises for a year without the payment of any rent; (2) the release of the premises from Kauffman's right to retake them for the failure to pay any installment of this rent; (3) the release of the realty company and of its proposed assignee, the Century Company, from liability to pay this rent; and (4) the assignment and transfer of the 350 shares of stock. The single consideration which the defendants agreed to give to the plaintiff for all these covenants was the payment of the \$35,000 and interest on or before July 1, 1898. Thus it will be seen that the main purpose of the contract was the novation, the release by the plaintiff of the leased premises, of the lessee and of its proposed assignee from liability for the rent, and the covenant of the defendants to pay it with interest. The desideratum which induced the agreement and which went to the whole consideration of both sides was this novation. Without that the contract would never have been made. The covenant of Kauffman to take, to hold, and to assign and transfer the stock to the defendants was subordinate and incidental to the main purpose of the agreement, never induced its making, and went only to a part of the consideration. It was not their prospective procurement of this stock that induced the defendants to promise to pay the \$35,000 and interest, but it was the use of the premises by their corporation without the payment of rent for a year, and the release of the leased premises, of the lessee, and of its proposed assignee from liability for this payment. They contemplated organizing the proposed corporation and issuing its stock themselves, and they were not hiring strangers to purchase this stock for them. Nor was it the prospective acquisition of this stock, which this contract compelled Kauffman to hold in trust and to transfer to the defendants, that induced the plaintiff to agree to release his property, his lessee, and its proposed assignee from liability for the rent; but it was the personal covenant of the defendants to pay it. The plaintiff was not desirous of purchasing the stock, but the defendants, by means of their covenant to pay the rent and interest, hired him to accept and hold it until they paid it. The terms of the agreement are not conditioned by either the market price or the agreed value of the stock as in a contract of sale, but solely by the amount of the rent and the interest upon it. Thus the situation of the parties when the contract was made, the ends they sought to attain, and the very terms of the agreement compel the conclusion that its main purpose was the novation, that the stipulation concerning the stock went only to a part of the consideration and was subordinate and incidental to this purpose, while the covenants which went to the whole consideration of the agreement, those which actually induced the contract, were, on the one hand, the promise of the plaintiff to release the property, the lessee, and

its assignee from liability for the rent, and, on the other, the covenant of the defendants to pay it, with interest, on or before July 1, 1898.

Now the plaintiff has performed the substantial parts of his covenants, and the defendants have accepted and retained the substantial benefits which they sought to secure by the performance of his covenants, while they have refused to perform any portion of their own. The plaintiff has released his property, his lessee, and its assignee, the Century Company, from liability for the \$35,000 rent, has furnished the use of his property to the defendants' corporation for a year without the payment of any rent, has accepted and held the preferred stock from 1896 until the present time, and has offered and still offers to assign and deliver it to the defendants, as he agreed to do. The defendants have accepted, enjoyed, and still retain the use of the leased premises by their corporation during that year without the payment of rent, and the release of the property, of the lessee, and of its assignee from liability for this \$35,000. They have received and retained the great desiderata which induced them to make their promise, and yet they refuse to pay a dollar for these benefits and insist that they are absolved from all liability because the plaintiff did not offer to assign and deliver the stock to them in accordance with every legal technicality on the very day when their obligation matured, although he was always ready and willing, and within four months thereafter he offered to do so in compliance with every requirement of the law which the defendants did not waive. Can a party to a contract retain all the benefits of a substantial performance of it by the other party, and then escape all its burdens and repudiate all his obligations by means of such a technicality as this? There are two principles of law which forbid such a manifest injustice and compel a negative answer to this question. This issue will be considered and discussed on the assumption that the defendants' theory of this case is sustained by the facts,—on the assumption that the plaintiff made no sufficient offer to assign or deliver the stock until after July 1, 1898, and that his failure to make this offer was never waived by the defendants. The evidence, however, is conclusive that within four months after that date an adequate offer on the part of the plaintiff to complete his performance of the agreement was made, and still the defendants refused to pay any part of the \$35,000 and interest.

One of the rules of law which compels a negative answer to the question now under consideration is that when a contract has been partially executed, and one of the parties has derived substantial benefits or has imposed upon the other material losses through the latter's partial performance of the agreement, then the first party cannot rescind the contract on account of the failure of the second party to complete his performance, but the agreement must stand, the first party must perform his part of it, and his only remedy for the failure of the second party to completely perform is compensation in damages for that breach. *German Sav. Inst. v. De La Vergne Refrigerating Mach. Co.*, 70 Fed. 146, 150, 17 C. C. A. 34, 38, 36 U. S. App. 184, 190; 1 Chit. Pl. (16th Am. Ed.) *333; *Barbee v. Willard*, 4 Mc-
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Lean, 356, 359, Fed. Cas. No. 969; Hunt v. Silk, 5 East, 449; Hammond v. Buckmaster, 22 Vt. 375; Brown v. Witter, 10 Ohio, 143; Dodsworth v. Iron Works, 13 C. C. A. 552, 557, 66 Fed. 483; Swain v. Seamens, 9 Wall. 254, 272, 19 L. Ed. 554; Beck v. Bridgman, 40 Ark. 382, 390; Andrews v. Hensler, 6 Wall. 254, 258, 18 L. Ed. 737; Conner v. Henderson, 15 Mass. 319, 321; Teter v. Hinders, 19 Ind. 93; Howard v. Hayes, 47 N. Y. Super. Ct. 89, 103; Welsh v. Gossler, Id. 112; Underwood v. Wolf, 131 Ill. 425, 23 N. E. 598; Brown v. Foster, 108 N. Y. 387, 15 N. E. 608; Vanderbilt v. Iron Works, 25 Wend. 665; Lyon v. Bertram, 20 How. 149, 153-155, 15 L. Ed. 847; Clark v. Steel Works, 3 C. C. A. 600, 53 Fed. 494, 499; Voorhees v. Earl, 2 Hill, 288, 294; Barnett v. Stanton, 2 Ala. 181; Churchill v. Holton, 38 Minn. 519, 38 N. W. 611; Treadwell v. Reynolds, 39 Conn. 31; 21 Am. & Eng. Enc. Law, 557, note 2. It is only when the parties to the agreement can be placed in statu quo that one may rescind or repudiate the entire contract for the failure of the other to perform it. When one party has received the benefits of substantial performance by the other without paying for them the price agreed on, and he cannot or does not return these benefits, it is manifestly unjust to permit him to retain them without paying or doing as he promised to pay or do on account of his receipt of them. In order to avoid such an injustice, the party who has substantially performed may enforce specific performance of the covenants of the other party, or may recover damages for their breach without plea or proof of complete performance, while the defendant, on the other hand, may recover by counterclaim or by an independent action the damages which he has sustained from the plaintiff's failure to completely fulfill his covenants. This rule is settled. In German Sav. Inst. v. De La Vergne Refrigerating Mach. Co., 70 Fed. 146, 150, 17 C. C. A. 34, 38, 36 U. S. App. 184, 190, this court considered its reason, its justice, and its application to cases of the nature of that now in hand at considerable length, cited many authorities in its support, reviewed some decisions that illustrate it, and, without repeating that discussion here, we content ourselves with a reference to the opinion in that case, and with the following apt and terse statement of the rule and its reason from 1 Chit. Pl. *333:

"Where the plaintiff's covenant or stipulation constituted only a part of the consideration of the defendant's contract, and the defendant has actually received a partial benefit, and the breach on the part of the plaintiff might be compensated in damages, an action may be supported against the defendant, without averring performance by the plaintiff; for, where a party has received a part of the consideration for his agreement, it would be unjust that, because he had not had the whole, he should enjoy that part without paying or doing anything for it, and therefore the law obliges him to perform the agreement on his part, and leaves him to his remedy to recover any damage he may have sustained in not having received the whole consideration."

An application of this rule to this case will not permit the injustice of allowing the defendants to deprive the plaintiff of the \$35,000 rent and interest which is justly his due, while it will enable them to reduce his recovery by the amount of any damages which they sustained because the plaintiff did not legally offer them the assignment and delivery of the stock on July 1, 1898, when they ought to have

paid and he ought to have delivered the stock. The case falls far within the rule. The covenant on account of the technical breach of which the defendants sought to repudiate all liability—the covenant to assign and deliver the stock to them—was a part, and only a small part, of the consideration of their covenant to pay the rent and interest. The largest part of the consideration, nay, the real consideration, for that covenant, was the use of the leased premises by their corporation for a year without the payment of rent, and the release of the land, of the lessee, and of its assignee from liability therefor. This moving consideration the defendants have received, and they have thus derived not only a partial benefit, but all the substantial benefits of a performance of the contract. The record does not disclose the market value of the stock, or whether or not it ever had any actual value, and the only intimation upon the subject is that one of the nine parties who were bound to pay the \$35,000 and interest offered the plaintiff \$5,000 and his share of the stock to release him from his liability under the agreement. The breach by the plaintiff of his contract to deliver the stock on July 1, 1898, can be readily compensated in damages. Those damages are simply the diminution in the market value of the stock between July 1, 1898, and the day in October when it is certain that a sufficient offer to assign and deliver it was made. The rule which we have been considering prohibits the defendants from retaining the benefits of the substantial performance of this contract by the plaintiff, and then escaping all its substantial burdens on account of his technical failure to offer them the stock on the day when they agreed, but failed, to pay him the \$35,000 and interest, and its application to this case will prevent injustice and work no wrong or inequity to any of the parties to this agreement.

There is another principle of law which equally prohibits the maintenance of the theory of the defendants in this case. It is stated by Lord Mansfield in *Boone v. Eyre*, 1 H. Bl. 273, in these words:

"Where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other; but where they only go to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent." *Ritchie v. Atkinson*, 10 East, 295; *Stavers v. Curling*, 3 Bing. N. C. 355; *Lowber v. Bangs*, 2 Wall. 728, 736, 17 L. Ed. 768; *Hague v. Ahrens*, 53 Fed. 58, 3 C. C. A. 426, 3 U. S. App. 231.

The breach of a covenant of the first class—a dependent covenant, one which goes to the whole consideration of the contract—gives to the injured party the right to treat the entire contract as broken and to recover damages for a total breach. *Leopold v. Salkey*, 89 Ill. 412; *Keck v. Bieber* (Pa. Sup.) 24 Atl. 170; *Parker v. Russell*, 133 Mass. 74; *Railroad Co. v. Van Deusen*, 29 Mich. 431; *Richmond v. Railroad Co.*, 40 Iowa, 264, 275. But a breach of a covenant of the second class, an independent covenant, a covenant which does not go to the whole consideration of the contract and is subordinate and incidental to its main purpose, does not constitute a breach of the entire contract, does not authorize the injured party to rescind the agreement, but he is still bound to perform his part of it, and his only remedy is a recovery of damages for the breach. *Union Pac. Ry. Co. v. Travelers' Ins. Co.*, 83 Fed. 676, 679, 28 C. C. A. 1, 4, 49 U. S. App. 752,

759; *Pordage v. Cole*, 1 Saund. 320, note; *Campbell v. Jones*, 6 Term R. 570, 573; *Surplice v. Farnsworth*, 7 Man. & G. 576, 584; *Obermyer v. Nichols*, 6 Bin. 159, 160, 164; *Burnes v. McCubbin*, 3 Kan. 221, 226; *Butler v. Manny*, 52 Mo. 497, 506; *Turner v. Mellier*, 59 Mo. 527, 536; *Pepper v. Haight*, 20 Barb. 429, 440; *Appalachian Co. v. Buchanan*, 43 U. S. App. 265, 20 C. C. A. 33, 73 Fed. 1007. Now, the covenant of the plaintiff to assign and transfer the stock to the defendants did not go to the whole consideration of the contract, but was subordinate and incidental to its main purpose, as has already been shown. Its breach was susceptible of compensation in damages. Therefore, even though the plaintiff committed a technical breach of it, the defendants, who had accomplished the main purpose of their contract, and had accepted the benefits of the plaintiff's performance of that part of his covenants which went to the whole consideration of the agreement, the use of the leased premises by their corporation for a year without payment of the rent, and the release of the premises, of the lessee, and of its assignee from liability therefor, were still bound by their agreement to pay this rent and interest, and their only remedy for the plaintiff's breach was compensation in damages.

The application of the two rules which have now been considered to the trial of this case will eventuate in a fair, just, and equitable result. The plaintiff will receive the rent and interest which the defendants agreed to pay him, less any damages which the defendants have sustained by the diminution in the market value of the stock between July 1, 1898, when he should have offered to assign and deliver it, and the day thereafter when he did make a sufficient offer to do so. The defendants will receive the stock which the plaintiff agreed to hold and to assign and to deliver to them, and they will pay the \$35,000 and interest, less any damages they sustained by the failure of the plaintiff to make his offer to complete the performance of his agreement in time. The manifest justice and equity of this result vindicate the purpose and the wisdom of the principles of law which compel it, and commend them to the reason and the judgment.

Counsel for defendants in error have cited and discussed a large number of decisions which illustrate established and salutary rules of law that properly govern the cases in which those decisions were rendered, but which are inapplicable to the case at bar. One class of these decisions is well represented by *Norrington v. Wright*, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366, *Bowes v. Shand*, 2 App. Cas. 467, 468, *Bordenave v. Gregory*, 5 East, 107, *Bank v. Hagner*, 1 Pet. 455, 7 L. Ed. 219, *Telfener v. Russ*, 162 U. S. 170, 16 Sup. Ct. 695, 40 L. Ed. 930, and *Kelley v. Upton*, 5 Duer, 336. The opinions in these cases relate to the performance of executory contracts of sale, under which the defendants had received no benefits from partial performance by the plaintiffs for which they had not paid; and it is there properly held that without performance or offer of performance at the date by the plaintiffs they could not maintain actions, upon the principle, already adverted to, that where the plaintiff defaults and the parties can be put in statu quo the defendant may rescind. The distinction between these cases and the case in hand is that the defendants in the former had not received and retained any benefits derived from the

partial performance by the plaintiffs for which they had not paid the contract price, and the covenants which the plaintiffs had failed to perform were dependent covenants, which went to the whole consideration of the contract, while the defendants in this case have received and enjoyed the benefits of a substantial performance by the plaintiff without paying the agreed consideration therefor, and the covenant of which the plaintiff has committed a technical breach is a subordinate, independent covenant, incidental to the chief object of the agreement, and his breach may be readily compensated in damages. This distinction is noted by Mr. Justice Gray in his opinion in *Norrington v. Wright*, where he says:

"This case wholly differs from that of *Lyon v. Bertram*, 20 How. 149, 15 L. Ed. 847, in which the buyer of a specific lot of goods accepted and used part of them with full means of previously ascertaining whether they conformed to the contract." 115 U. S. 188, 205, 6 Sup. Ct. 12, 29 L. Ed. 366.

It is clearly pointed out by this court in *German Sav. Inst. v. De La Vergne Refrigerating Mach. Co.*, 17 C. C. A. 34, 70 Fed., at page 154, and by the circuit court of appeals in the Third circuit in *Clark v. Steel Works*, 53 Fed. 494, 498, 3 C. C. A. 600, 603, 3 U. S. App. 358, 364, in these words:

"If the defendants in *Norrington v. Wright* had retained and used the railroad iron delivered to them after they had discovered the seller's failure to ship the stipulated quantities in February and March, they would not have been justified in rescinding their contract."

Another class of authorities upon which counsel for the defendants rely is illustrated by *Waterman v. Banks*, 144 U. S. 394, 403, 12 Sup. Ct. 646, 36 L. Ed. 479, *Kelsey v. Crowther*, 162 U. S. 404, 408, 16 Sup. Ct. 808, 40 L. Ed. 1017, *Doloret v. Rothschild*, 1 Sim. & S. 590, and *Henderson v. Wheaton*, 139 Ill. 581, 28 N. E. 1100. These are cases upon option contracts, upon agreements in which the liability of the parties on one side is not fixed by the covenants in the contracts at the time they are signed, but they simply agree that they will become liable to do certain acts or to pay certain moneys if within fixed times the parties upon the other side of the contracts choose to give certain notices or to do certain acts. They are governed by the indisputable rule that time is of the essence of such an offer to make an agreement, and that unless he who has the option to fix the liability of the opposite party to the contract exercises it, and does the act or gives the notice prescribed to evidence his choice in the time and manner specified in the contract, the liability never comes into being, and no action can be maintained upon it. The rule upon this subject which has received the sanction of the supreme court is stated in *Waterman v. Banks*, 144 U. S. 394, 403, 12 Sup. Ct. 646, 36 L. Ed. 479. It is in brief that, where one agrees to sell and deliver and another agrees to buy and pay for property on a certain day, time is not of the essence of the contract, and the fact that the day fixed passes without payment or delivery, or offer to do either, will not entitle either party to refuse to complete it; but that, when one party to a contract agrees to do some act if the other chooses to give a specified notice or to perform a specified deed or act within a time certain, there time is of the

essence of the contract, and a failure to give the notice or do the act prevents the creation of the liability, because the contract in its inception is a mere offer to become liable on certain terms, and, if the offer is not accepted, of course no liability is created. Cases of this character have no bearing on the questions at issue in this case (1) because the defendants in them have not received the benefits of a partial performance of the covenants of the plaintiff, (2) because the options which the plaintiffs failed to exercise went to the entire considerations of the contracts, while the covenant which the plaintiff has broken goes only to a part of the consideration of this agreement, and (3) because in those cases the parties upon one side of the contracts were by the terms of their agreements given the choice of creating or refusing to create the liability of the parties upon the other side of the contracts, by certain prescribed acts which they might do after the contracts were made, while in the case at bar neither the plaintiff nor the defendants secured any such option. The moment this contract was made all the rights and all the liabilities of the parties to it were irrevocably fixed by the covenants it contained. The plaintiff agreed absolutely to release the leased premises, the lessee, and its assignee from liability for rent for the year 1895-96, to take the preferred stock, and to assign and deliver it to the defendants. The defendants covenanted unconditionally to pay the rent and interest on or before July 1, 1898. One who undertakes by a promissory note to pay a sum of money on or before a certain day makes as absolute a contract to pay it as when he agrees to make his payment on a day certain. When the parties to this agreement had signed and delivered it, their rights and liabilities under it were absolutely fixed. Neither party had any choice or option to fulfill or accept the fulfillment of any covenant in the agreement. Either party could maintain an action for the breach of any covenant made by the other, and no choice or option of liability was left to either. The decisions upon option contracts have no relevancy to the issue presented in this case, and they are here dismissed.

Cases have also been cited in which by the express terms of the contract time is made of the essence of the agreement, as in *Shinn v. Roberts*, 20 N. J. Law, 435, where there was an express stipulation that the deed should be ready on a day certain at 10 a. m., and that if the vendee did not pay the price at that time he forfeited all his rights under the contract of purchase. Other cases have been reviewed in which by express stipulation the fulfillment of one covenant was made a condition precedent to the performance of another, as in *Washington v. Ogden*, 1 Black, 450, 458, 17 L. Ed. 203, where the entire agreement was made "dependent on the surrender and cancelment of said contract with said Wright" within the 60 days limited for its performance. In these cases the courts properly held, in the one case that performance or an offer to perform, and in the other that surrender or cancellation of the contract with Wright, was indispensable to the enforcement of the agreement. But decisions of this character are irrelevant to the questions here in hand, because there are no express stipulations in the agreement in suit

that time shall be the essence of the contract, or that the performance of any act or the fulfillment of any covenant shall be a condition precedent to the exercise or to the fulfillment of any other, because in those cases the defendants had not received and retained the benefits of a partial performance by the plaintiffs, and because the covenants there broken were dependent covenants which went to the whole consideration of the contract.

A large number of cases have been discussed which simply hold that, before a party to mutual dependent covenants which are to be performed at the same time can maintain an action for the breach, he must perform or offer to perform his part of them, unless the offer is waived by the other party to the contract. *Bailey v. Lay*, 18 Colo. 405, 33 Pac. 407; *Thorpe v. Thorpe*, 1 Salk. 171; *Hill v. Grigsby*, 35 Cal. 656; *Ackley v. Richman*, 10 N. J. Law, 305; *Barbee v. Willard*, 4 McLean, 356, Fed. Cas. No. 969; *Johnson v. Wygant*, 11 Wend. 48; *Summers v. Sleeth*, 45 Ind. 598, *Frey v. Johnson*, 22 How. Prac. 316, 325. But none of these decisions hold that a failure of one party to perform or to offer to perform on the day fixed releases the other party from his obligation to fulfill his covenants. But one of them discusses the question whether it is necessary for one who has partially performed his covenants to the other to allege complete performance or offer to perform in order to maintain his action, and in that case (Fed. Cas. No. 969) the court cites *Chit. Pl. *333*, and declares that the true doctrine undoubtedly is that he is not required to do so. Moreover, the question these cases presented is immaterial to a decision of this case, because the fact is clearly established by the evidence and conceded by counsel for the defendants that a sufficient offer of complete performance was made by the plaintiff before this action was commenced.

This brief review of the leading cases upon which defendants' counsel rely will serve to show why they do not convince us that their clients ought not to be permitted to retain the plaintiff's substantial performance of his agreement and to entirely escape from its burdens. None of the decisions they cite were conditioned by such a partial performance, by the receipt and retention by the defendants of the benefits of the plaintiff's substantial performance, or by so slight a technical breach of a covenant so subordinate and incidental to the main purpose of the contract as those in the case at bar; and the principles of law which controlled the cases upon which they rely are irrelevant to the issues in this case, and, if applied, would work a great and manifest wrong. The facts of this case bring it squarely under the salutary rules that (1) when a covenant goes only to a part of the consideration of a contract, is incidental and subordinate to its main purpose, and its breach may be compensated in damages, such a breach does not warrant a rescission of the contract, but the injured party is still bound to perform his part of the agreement, and his only remedy for the breach consists of the damages he has suffered therefrom, and (2) where one party to a contract has received and retained the benefits of a substantial partial performance of the agreement by the other party, who has failed to completely fulfill all his covenants, the first party can-

not retain the benefits and repudiate the burdens of the contract, but he is bound to perform his part of the agreement, and his remedy for the breach is limited to compensation in damages. The first party, upon plea and proof of his substantial partial performance, and without plea or proof of his complete performance, may maintain an action either for specific performance or for damages on account of the failure of the second party to perform, and the latter may secure his damages for the plaintiff's breach either by counterclaim or by an independent action. The failure of the court below to try this case in accordance with these established principles of the law necessitates a reversal of the judgment in favor of the defendants and another trial of this case.

The conclusion which has been reached renders it unnecessary to consider many of the questions which were presented and argued at the hearing of this case. It is based on the assumption that the plaintiff made no sufficient offer to assign and deliver the stock on July 1, 1898, when the defendants were bound to pay their debt. Counsel for the plaintiff in error insists that this assumption is not well founded in fact or in law, and this question will now be briefly considered. On May 16, 1896, the plaintiff caused the cashier of the bank which held the stock and the contract as collateral to a loan which it had made to him to notify each of the obligors in the covenant to pay him the \$35,000 and interest, that the bank held this stock and agreement as collateral security, and to request each of them to take them up pursuant to their covenant. This notice was susceptible of but one meaning, and that was that the stock and the agreement were in the bank, which was situated in the city of St. Louis, subject to the disposition of the obligors in the contract, upon their payment of the \$35,000 and interest. It is contended by the defendants that the law required the plaintiff to seek out each of the defendants at his residence or place of business, and tender or offer him the stock on July 1, 1898, or to suffer the penalty of a default in the performance of his obligation. There are authorities which sustain this contention, but they are inapplicable to the facts and circumstances of this case. The law never requires the unreasonable, the impracticable, or the impossible. There were nine obligors in this covenant to pay the \$35,000 and interest. There were nine different parties who were entitled to receive this stock upon the payment of this money. Their contract was to pay it on or before July 1, 1898. Some of them resided and were engaged in business in Chicago. Some resided and were engaged in business occupations in St. Louis. The cities are more than 300 miles apart. Each one of these obligors had the right under his contract to wait until the last moment of the business day of July 1, 1898, before he was called upon by the agreement to pay the debt. If the contract required the plaintiff to search out each of these obligors at his residence or place of business, and to tender him the stock on the last moment allowed him to pay the debt, in order to hold him liable upon his obligation, then its performance by the plaintiff was clearly impossible. It is said that if this is true it is the fault of the contract and the misfortune of the plaintiff,

and that the court cannot make a new contract for the parties. But the defect is not in the contract, but in its interpretation. It is the failure to apply to its construction the familiar rule that that interpretation which sustains and vitalizes an agreement, rather than that which paralyzes and destroys it, must be adopted. There is also a settled legal presumption, which conditions the interpretation of the contract and the intention of the parties to it, which should not be ignored. It is that they must have intended to make a valid and practicable contract, not one that was void or that could not be performed, and that, if there is any rational interpretation of the agreement which will render its performance practicable, that construction should prevail. Moreover, the parties to this agreement were not farmers or ranchmen, but they were business men, residing in great commercial cities, familiar with and practicing commercial usages. Now, let the contract be read in the light of these rules and presumptions, and in the light of the situation and knowledge of the parties when they signed it, and let us see how they intended that it should be performed. The subject-matter of the contract was in the city of St. Louis. The agreement was made, and was presumably to be performed, in that city. The creditor, Kauffman, and a part of the debtors, resided in St. Louis, while the remainder were residents of the city of Chicago, more than 300 miles distant. The parties to the agreement were men engaged in business in large cities. Such men are not accustomed to transact their business, to make the delivery of personal property, or to pay their debts at their places of residence. They ordinarily conduct such transactions at convenient banks, in offices, or in shops during the business hours of the day. These debtors knew all these things when they made this agreement, and they also knew that it was impossible for their creditor to search out and tender this stock to each one of them on the last moment of the business day in such a way as to charge more than one of them, and yet each and all of them promised to pay this debt, and they intended to perform that promise and to make a valid and practicable agreement. The conclusion is irresistible that they never intended to require, and Kauffman never intended to agree to make, any tender or delivery of the stock to each one of them at their several places of residence or of business on the day when they agreed to pay the debt. The conclusion is irresistible that all they intended to require, and all that Kauffman agreed to do, was that he should make such a reasonable delivery, or such a reasonable and practicable offer to deliver the stock, as business men under such circumstances would naturally contemplate. The vendor of personal property is not ordinarily required to carry it to the vendee and there to tender it to him, and the reason is that such a requirement is unnecessary and unreasonable. It would have been far more unnecessary and unreasonable to have required the plaintiff to search out each one of these nine debtors and to tender or offer to deliver to them the stock on the last moment of the business day of July 1, 1898, and the contract called for no such performance.

Commercial agreements must be interpreted in the light of com-

mercial usages, of reason, and of justice. It must be presumed that the intention of the parties to them regarding their performance, as well as their terms, is reasonable, fair, and practicable; and where a commercial contract between business men requires personal property, such as certificates of stock in a corporation, to be delivered to several parties at the same time that it requires them to pay a sum certain to the holder of the stock, and no place of delivery is named in the agreement, a deposit of the property in a convenient business institution in the city in which the contract was made, in which its subject-matter was situated, and in which it was presumably to be performed, and a timely notice to the debtors that it has been so deposited, is a fair, reasonable, and sufficient tender and offer of delivery by the holder of the property. *Benj. Sales*, §§ 679, 707; *Tied. Sales*, §§ 94, 96, 207; *Carpenter v. Holcomb*, 105 Mass. 280, 284; *Wilks v. Smith*, 10 Mees. & W. 355; *Heard v. Lodge*, 20 Pick. 53, 60; *Cobb v. Hall*, 33 Vt. 233, 238; 2 Kent, Comm. *505. The plaintiff notified each one of the defendants, by means of the letter of the bank, that he was ready and willing to surrender the stock and the agreement upon the payment of the defendants' obligation, and that the stock was in the bank at their disposal whenever such payment should be made. They did not pay. They suggested no other way for the performance of the agreement. They were silent. They neither performed nor offered to perform their part of the agreement, nor did they object in any way to the time, the place, or the manner of the plaintiff's offer. They knew, from the letter which they received, not only that the plaintiff offered them the stock, but that he had placed it in the bank subject to their disposal upon their payment of the debt they had promised to discharge. In view of the facts that the defendants in this case were bound under the law to pay this debt on or before July 1, 1898, whether the plaintiff completed his performance or not; that there were nine promisors in this covenant to pay; that each one was entitled to the last moment of the business day of July 1, 1898, in which to perform his promise; that each one was entitled to the stock or a part of it when he paid; that their residences and places of business were more than 300 miles apart; that the contract was made, that it was presumably to be performed, and that its subject-matter was located in St. Louis; that the letter of May 16, 1898, informed the defendants that the plaintiff had placed the stock in a convenient business institution in that city subject to their disposal upon the payment of their debt; and that they neither objected to the course he pursued, nor performed nor offered to perform their agreement,—our conclusion is that the plaintiff's offer of performance was fair, reasonable, and sufficient. The judgment below is accordingly reversed, and the case is remanded to the court below, with instructions to grant a new trial in accordance with the views expressed in this opinion.

THAYER, Circuit Judge (dissenting). I am not able to concur in the foregoing opinion, and accordingly express the reasons for my dissent, doing so with as much brevity as possible. The opinion

of my associates, as I view it, deals for the most part with principles of the law of contract, which, however correctly stated and reinforced by authority, are not in my judgment applicable to the case in hand. By the terms of the agreement out of which this controversy arises the plaintiff below agreed to take certain shares of preferred stock in the Central Building Company "in payment for four installments of rent" under his lease, as the same became due. I can perceive no sufficient reason for saying that the delivery of these shares of stock did not operate as payment for the four installments of rent, and that the plaintiff merely held the stock when delivered in trust and as collateral security for the rent, as the majority of the court seem to hold. This view is not only opposed to the language of the agreement, which recites that the defendants had requested the plaintiff to take the stock "in payment of four installments of rent," and that he had agreed to do so, but it is not in harmony with the conduct of the plaintiff himself, since it appears that he hypothecated the stock to secure his indebtedness to the Merchants-Laclede National Bank and that it remained hypothecated with that institution for at least two months after the defendants' option to purchase the stock expired; that is to say, for two months subsequent to July 1, 1898. In view of the language of the agreement and the conduct of the parties, I am of opinion that the stock became the absolute property of the plaintiff as soon as it was delivered to him; that it was taken in payment of the rent, and extinguished the same; that the plaintiff had an undoubted right to hypothecate it; and that there is no substantial foundation for the novation theory which is outlined in the opinion of the majority. As I feel constrained to construe the contract, the parties entered into the following stipulations: The plaintiff agreed to accept the preferred stock in payment for certain rent which was to accrue, his motive being, doubtless, to aid in the construction of a valuable building on the leasehold premises, which would insure the payment of many future installments of rent that were to accrue under his lease, and at the same time greatly enhance the value of his property. On the other hand, the defendants agreed, if the stock was taken in payment of the rent, to purchase it from the plaintiff "on or before the 1st day of July, 1898," for a sum equal to the amount of rent which it had discharged, and the plaintiff agreed to sell the stock at that price. The result was an executory agreement for the sale of the stock, by virtue of which the defendants had the option to buy it at any time before July 1, 1898, when their obligation to take it and pay the purchase price became absolute. The plaintiff on his part had the right to call for performance on July 1, 1898, but not before that time. The contract in question is not essentially different from many contracts for the sale of stock and other securities which are daily made, whereby a vendee acquires the right to exact performance at any time intermediate the making of the agreement and a certain future date, whereas the vendor acquires the right to call for performance only at the latter date. The real question in the case, therefore, as I view it, is not the one stated at the commencement of the majority opinion, and declared to be

"the most important question"; but the question is whether the plaintiff's admitted failure to tender the stock on July 1, 1898, and to demand payment therefor, released the defendants from their obligation to perform. This was the question which was decided below in the affirmative, and, as I think, rightly decided. This is not a case, as I view it, where a question arises concerning the right of a person, who has accepted and retained the benefits accruing from a substantial performance of an agreement, to decline to pay for what he has received because of some slight default by the opposite party which may be compensated in damages. When the stock was accepted by the plaintiff, it paid for the installments of rent, because such was the express agreement of the parties, and presumptively, at least, the stock was adequate payment. After the stock was delivered the plaintiff held the defendants' obligation to buy it on or before July 1, 1898, at a given price; but to maintain an action on this obligation it was his duty to do whatever would be required of any other vendor of stock who agrees to sell and deliver the same on a certain future day, or on any intermediate day if the vendee elects to call for an earlier delivery. In such cases the rule is that on the day when the option expires the vendor must tender the stock and demand payment; time being of the essence. To put the vendee in default there must be an offer of the security sold and a demand for payment, or a waiver of the tender by the vendee. *Waterman v. Banks*, 144 U. S. 394, 12 Sup. Ct. 646, 36 L. Ed. 479; *Norrington v. Wright*, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366; *Kelsey v. Crowther*, 162 U. S. 404, 408, 16 Sup. Ct. 808, 40 L. Ed. 1017; *Kelley v. Upton*, 5 Duer, 336; *Summers v. Sleeth*, 45 Ind. 598; *Doloret v. Rothschild*, 1 Sim. & S. 590; *Shinn v. Roberts*, 20 N. J. Law, 435, 444, 43 Am. Dec. 636; *Stilwell v. Bowling*, 36 Mo. 312; *Henderson v. Wheaton*, 139 Ill. 581, 28 N. E. 1100.

I do not understand that this rule of law is disputed, but the effort seems to be to differentiate the case at bar from those cited, and to show that the rule is inapplicable, on the ground that the contract in suit was not a contract of sale. Now, on the day when the plaintiff had the right to tender the stock in question and exact payment therefor, no such tender or demand was made. The plaintiff did not even have possession of the stock, but the same was then hypothecated to a third party, and remained in its hands for more than two months thereafter. The letter which was written by the pledgee of the stock on May 16, 1898, did not advise the defendants whether the Merchants-Laclede National Bank held the stock as the absolute owner or as pledgee. Neither did it advise the defendants that the bank was acting as agent for the plaintiff, or request the defendants to appoint a suitable place for the delivery of the stock on the day when the plaintiff was entitled to exact payment. The letter was silent on each of these essential points, and for that reason it imposed no liability on the defendants and called for no action on their part. The letter was entirely consistent with the view that the bank had become the absolute owner of the stock; and, if such was the fact, then the defendants were under no obligation to take the stock from it and pay for the same, since an executory agreement like the one in hand

is not assignable, and the plaintiff's assignee could not have enforced performance of the agreement to purchase. *Boykin v. Campbell*, 9 Mo. App. 495; *Lansden v. McCarthy*, 45 Mo. 106; *Lawson*, Cont. § 352. The letter of the bank was at most a mere notice that the plaintiff had parted with the stock, and, as it did not state that the bank was acting as agent for the plaintiff, the natural presumption would be that it was acting for itself and of its own volition. In my judgment, therefore, the letter in question did not alter the legal relations of the parties to any extent; and as there was no waiver by the defendants of their right to have the stock tendered to some one of them on the day the obligation to purchase became absolute, and as no request was made by the plaintiff to have them designate a place for delivery, I am of opinion that the trial court properly held that there could be no recovery, and that the judgment below should be affirmed.

**BUNKER HILL & S. MINING & CONCENTRATING CO. v. EMPIRE STATE
IDAHO MINING & DEVELOPING CO. et al.**

(Circuit Court, D. Idaho, N. D. May 4, 1900.)

No. 138.

1. MINING CLAIMS—PRIORITY OF LOCATION—EFFECT OF PATENT.

A patent for a mining claim is not conclusive as to the date of location, such fact not being one which it is essential for the land office to determine in issuing the patent; hence the failure of the owner of an adjoining claim, where the two overlap, to contest the application, is not an admission on his part of the priority of location of the patented claim which concludes him and debars him from thereafter contesting the question in the courts.

2. SAME—OVERLAPPING CLAIMS—LIMIT OF UNDERGROUND RIGHTS.

The law contains nothing granting, under any circumstances, to a claim owner, a greater length of the discovered ledge underground than he owns of its apex; hence where two claims overlap along the apex of a ledge, although the end lines of the senior location converge, and meet within the other claim, so as to terminate the rights of its owner at that point, the owner of the junior claim cannot take up the ledge in its downward course beyond such point, and continue to follow it within the limits of his own end lines, but his underground ownership of the ledge is bounded by the extension of the plane passing through the line of the senior claim, which bounds his rights along the apex, where such line and his own end line, which marks his other boundary, converge in the direction of the dip of the vein.

3. SAME.

Ledges may be followed between the end-line planes of a claim without any limitation as to their dip or course.

At Law. Action to determine mining rights.

Lindley & Eickhoff, John R. McBride, Albert Allen, and J. H. Forney, for plaintiff.

Heyburn, Price, Heyburn & Doherty, for defendants.

BEATTY, District Judge. The question involved in this action is the right of possession of or title to an underground portion of a mineral-bearing ledge, which is claimed by plaintiff through its own-

day of location, they differ as to whether it was the 17th or 18th. The testimony shows that, on the day prior to the location of the Stemwinder, Divine and three of the Last Chance locators—Flaherty, Smith, and Carlin—were in the country several miles east of the locality of these claims, and in the evening of that day they met in camp on Jackass prairie, about two to three miles northerly from such locality. They had heard of the location of the Bunker Hill, which lies next south of the Stemwinder, and Carlin reported that he had found it. The next morning all these parties repaired to that neighborhood, and Divine discovered and located the Stemwinder, and, as he claims, before the other parties had discovered the Last Chance. He also claims that as late as the 20th he passed over the ground of the Last Chance; that no location of it had been made; that he was at the tree on which he subsequently saw the notice, and that then there was no notice on it. On that date—the 20th—he located the Tyler, and, while he says the ground now covered by the Last Chance, and lying between the Stemwinder and Tyler, was vacant, and while he must then have known, or at least had strong reason to believe, the ledge passed through it, he did not locate it, but left sufficient space between his two claims for the Last Chance,—a fact strongly suggesting that it had already been located. In addition to Divine's detail of the movements of the parties, which indicate that he was on the Stemwinder ground before they were on the Last Chance, and his direct statement of his prior location, the facts that, when he found a Last Chance stake on his ground, he protested until they removed it,—which Smith admits was done,—and that the Last Chance lies further up the hill than the Stemwinder, have some tendency towards the conclusion that the Stemwinder was the first located.

Smith, one of the Last Chance locators, says that on the day they came from Jackass prairie—which he says was the 17th—the four named parties went up the hill where these claims are; that he went down into the gulch, leaving the others on the hill; that in about an hour Flaherty and Carlin came down, saying that Divine had located the Stemwinder, and that they wanted two notices written for the Emma and Last Chance; that the notice of the Emma referred to it as lying north of and adjoining the Stemwinder, and that of the Last Chance as lying north of and adjoining the Emma; but says that, instead of putting up these notices immediately, they were not posted until the 19th. His testimony is a clear admission that the Stemwinder was first located, but that all were discovered on the same day, which he says was the 17th, and not the 18th, as Divine says. The defendants criticise Smith's testimony, alleging that he had recent trouble with the owners of the Last Chance; but a comparison of his present testimony with that given by him in a former case involving the date of the Last Chance location does not suggest any material change in his testimony. The testimony of Carlin given in a trial between the Last Chance and Tyler was introduced, but it was in relation to the relative date of the Last Chance and Tyler, and throws but little light upon the exact time when the Stemwinder was located. My impression from

all the testimony is that both the Last Chance and Stemwinder were discovered on the same day, and at nearly the same time, but that the Stemwinder was prior in discovery and location. Considering the movements of these prospectors, and the fact that the Last Chance locators were in the country at least a day before Divine, it is possible that they may have been on the Last Chance ground before Divine located the Stemwinder. While the preponderance of the testimony seems to be in favor of the priority of the Stemwinder, yet, all the circumstances considered, there is reason for doubt. It is therefore hoped that the reviewing court may find it consistent to disregard the usual rule of following the findings of fact adopted by the trial court, and examine the testimony independent of this conclusion.

Does the granting of the patent conclusively fix the date of location of the Last Chance claim as at the time named in the location notice? The view that it should is not without reasonable support. The location notice is a necessary paper in the patent proceedings. We cannot imagine a valid notice without a date. The date then appears in the proceedings. It is generally placed on the posted notice, but, even if not published or posted, it can be known by an examination in the land office. It seems to me that the existence of a notice, and the date of it, is as much a fact to be settled by the land department in issuing a patent as any fact connected with the application. There may be a few cases in which this rule would work a hardship upon adjoining claimants, but there are many more in which the hardship to the patentee is greater. If the question of date is forever left open, his patent in this most important particular is but a snare to him. He may at any time be called upon to prove his title, and often after the witnesses are dead, and the means of proof are lost. The law, in granting a patent, intends to change the unstable possessory title into one fixed and unassailable. Although Justice Field in the Eureka Case said that it "is something upon which its holder can rely for peace and security," and that "in its potency it is ironclad," yet it does not seem that all questions connected with the patent record are yet conclusively settled by judicial decision, and among them is that of the date of location of the patented claim. In *Smelting Co. v. Kemp*, 104 U. S. 640, 641, 26 L. Ed. 875, the court says that the officers of the land department are authorized to settle matters of fact in patent applications, that their action in such matters is in its nature judicial, that "their judgment as to matters of fact properly determinable by them is conclusive," and "that all requirements preliminary to its issue have been complied with," besides referring to the hardship on the patentee of submitting the same question to successive juries, and discussing the unassailable character of the patent; but the question of what those "matters of fact" and "requirements preliminary" are is left undefined, and remains the subject of conjecture and contention. In the Eureka Case, 4 Sawy. 317, Fed. Cas. No. 4,548, the argument tends to support the view that the patent establishes the date of location, and beyond question so, when the date is named in the patent itself.

However, these cases do not settle the question, but, so far as this court is concerned, the circuit court of appeals of this circuit in *Last Chance Min. Co. v. Tyler Min. Co.*, 61 Fed. 557, 9 C. C. A. 613, has determined it. In that case this same question as to the same Last Chance mining claim was involved. The court says: "But it [the patent] does not fix the time the location was made. In order to determine this question, it is necessary to introduce evidence independent of the patent." It is therefore held that the issue of the Last Chance patent does not conclusively fix the date of location. The Stemwinder and Last Chance claims as located had a surface conflict, notwithstanding which the Stemwinder did not protest the application for patent to the Last Chance. Whether this omission was an admission by the Stemwinder of the priority of location of the Last Chance is the question most earnestly discussed by counsel. It is contended, and with much reason, that the proceedings in the land office for a patent are equivalent to a judicial proceeding against all the world. The law requires such particularity of statement of what is claimed by the applicant, and such lengthy notice thereof, both by publication in public print and by the posting of notice on the claim, that it would seem that all may have ample notice of what is claimed; and it also directs that, if objection is not duly made, all parties are thereafter barred from making any objection to the issue of the patent. It is claimed that because of the surface conflict between the two claims the application for patent for the Last Chance was equivalent to an action against the Stemwinder with service of summons, that the failure of the Stemwinder to enter its objection and contest the application is equivalent to a default in an action in court, and that the land office is a court invested with judicial functions for this special kind of action. Certainly it is well settled that "a judgment by default is just as conclusive an adjudication between parties of whatever is essential to support the judgment as one rendered after answer and contest." *Last Chance Min. Co. v. Tyler Min. Co.*, 157 U. S. 691, 15 Sup. Ct. 733, 39 L. Ed. 859. But, even considering the failure of the Stemwinder to object to the Last Chance application for patent as equivalent to a default in an action, the question still remains as to what facts are essential to support the judgment of the land department in issuing the patent. Is the date of location one of those essential facts? I think the authority is that it is not. In the case last cited there are some holdings bearing upon the question of *res adjudicata* that seem to be a guide here. On page 687, 157 U. S., page 735, 15 Sup. Ct., and on page 862, 39 L. Ed., the court says: "The particular matter in controversy in the adverse suit was the triangular piece of ground, which is not the matter in dispute in this action. The judgment in that case is therefore not conclusive in this as to matters which might have been decided, but only as to matters which were in fact decided." Again it says, "The question, then, is, what was in fact decided in that action?" It held and showed by the pleadings that the date of location of the Last Chance was specially put in issue, and was considered and decided. In the proceedings for the Last

Chance patent it cannot be said that such date was more than inferentially included in the pleadings or conclusion, and certainly it was not directly decided. Upon the question of priority, both as to facts and the law, which this court must follow, the conclusion is that the Stemwinder location is prior to the Last Chance.

The question of the underground rights of the Stemwinder remains for consideration. After the location of the Last Chance the Stemwinder location was so amended that its north boundary line in running east bore more to the north than the original north line, but it is made to appear by one of the illustrations, by plaintiff's counsel, that the point of convergence of these two lines is so without the limits of the Last Chance as that it is not affected by the change. While there can be no question of the right of the Stemwinder to amend its notice and location, it cannot do so to the detriment of an intervening locator. But neither the original nor amended north line of the Stemwinder is the line of separation between the rights of the parties in this case. Neither is the south line of the Last Chance the separating plane, for the reason that the Last Chance is the junior claim. It is conceded that defendants own also the Emma claim, which has been adjudicated as prior to the Stemwinder, and therefore owns that part of the apex of the ledge within its boundaries. The south line of the Emma does not continue to the east quite to the east boundary of the Stemwinder, but it does continue in that direction beyond the limits of the ledge. The Stemwinder, then, so far as concerns the Last Chance, owns the apex of the ledge to its north line; but as to the Emma, it owns it only to the Emma south line. If the lines of the Emma were so laid that this south line could be prolonged indefinitely, there can be no question that it would form the dividing line between the Emma and Stemwinder; but the Emma's legal end lines so converge that they meet at the point designated on the above plat by the letter X, beyond which to the westward the Emma cannot follow the ledge. Can the Stemwinder take up the ledge in its downward course where the Emma loses it, and continue to follow it within the limits of its north line? If so, then it would own more along the course of the ledge beneath the surface than it owns on the surface or of the apex. In a few cases, in consequence of the peculiar facts, the law has been so construed that less in length of the ledge is held beneath the surface than is owned of the apex; but in the *Del Monte Case*, 171 U. S. 88-91, 18 Sup. Ct. 895, 43 L. Ed. 72, the supreme court argues to the contrary, and it certainly is the clear design of the law that the lineal ownership of the ledge is the same under as upon the surface. There is nothing in the law granting, under any circumstances, the owner of the discovered ledge more under ground than he owns of the apex. On the contrary, there are provisions to guard against this. As the case of *Walrath v. Mining Co.*, 171 U. S. 293, 18 Sup. Ct. 909, 43 L. Ed. 170, is understood, the court did give a locator more of the ledge under ground than he owned of its apex; but this was not concerning the primary vein, or the one upon which the location was based, but was of a secondary vein, which was unknown when the

location was made, and constituted no function in forming the lines of the claim. The court, on page 308, says: "These propositions we affirm, with the addition that the end lines of the original vein shall be the end lines of all the veins found within the surface boundaries." This, however, has never been held by any court concerning the discovery vein. My conclusion is that the Stemwinder owns only so much of the apex of the ledge measured along its center as lies between its south line as originally located and the south line of the Emma, and that in following the ledge on its downward course it must be between the prolongation of the planes passing through these lines which would end at their point of convergence indicated upon the plat by the letter Y. There is another view which might be taken of the Stemwinder's right; that is, that its south boundary line should be considered established, and that another line parallel to it should be established at the point where its ledge passes into the Emma; as was done by the supreme court in the Del Monte Case, *supra*. This rule cannot be followed here because of the priority of the Emma.

Defendants claim that the planes of the Stemwinder's end lines run more along the course than upon the dip of the ledge, and refer to the fact that this court once instructed a jury that this could not be done. Such instruction was given in the hurry of a jury trial, perhaps without sufficient reflection, and the court may also have been somewhat biased by the still lingering view always entertained by the miner that ledges were to be followed upon their dip; but I think the instruction was not in accord with the rule of the supreme court, which is simply that ledges are to be followed between end-line planes without any limitation prescribed as to dip or course. Following the logic of that rule, I have not examined the evidence bearing upon the relation of the Stemwinder's end lines to the course or dip of the ledge.

The defendant Last Chance Company claims to have held for over five years open, notorious, and adverse possession of the disputed premises, and that under the laws of Idaho it has a perfect title. I do not think the testimony shows such possession as is contemplated by the Idaho statute to confer title.

While other questions have been referred to, those controlling have been above disposed of. The conclusion therefore is that plaintiff have judgment for so much of the premises in dispute as lies within the triangular space bounded by the perpendicular planes prolonged westerly passing through the south line of the Last Chance, the south line of the Emma, and the original south line of the Stemwinder, and indicated approximately upon the above plat by the triangle Z, Y, X.

HOOD v. HAMPTON PLAINS EXPLORATION CO., Limited.

(Circuit Court, D. Nevada. April 1, 1901.)

No. 695.

COSTS—TAXATION—ATTACHED PROPERTY—ALLOWANCE TO KEEPER.

In proceedings on objections by defendant to a taxation of costs, allowing a specified per diem to the keeper of attached property, plaintiff's affidavits in support thereof showed that the rules of court had been substantially complied with in the proceedings therefor, that the allowance was reasonable, and that a similar amount was allowed by defendant, for four years prior to the commencement of the suit, for like services. No counter affidavits were filed, and there was no denial of the facts stated in the supporting affidavits, except a statement by defendant's counsel that, in his opinion, half the sum allowed was ample compensation. *Held*, that there was no error in the ruling of the clerk.

Keeper's Fees.

The property in charge of the keeper is situate in Crum Cañon, remote from habitation, and consists of mines, mining machinery, tramway, mining implements, boarding house and furniture, blacksmith shop and tools, store building and merchandise therein contained, official residence and office and furniture, bunk houses for men, mining supplies, cord wood, quartz mill and machinery, located about 18 miles from the town of Battle Mountain, in Lander county, Nev. This property was attached by the plaintiff in a suit brought against the defendant, and the sheriff placed a keeper in charge thereof, on the 5th day of March, 1900, and the judgment in the suit was rendered on the 26th day of January, 1901. 106 Fed. 408.

James F. Dennis, for plaintiff.

Torreyson & Summerfield, for defendant.

HAWLEY, District Judge (orally). This is an appeal from the clerk's ruling in allowing four dollars per day for keeper's fees. The defendant objects to the item of costs for keeper's fees upon the ground that no sufficient showing is made for the taxation of said fees; that the petition for keeper's fees does not comply with rule 17 of this court; that the petition does not set forth facts sufficient to allow any costs for keeper's fees; that there is no showing that a keeper was employed; that the sum of four dollars per day is unreasonable. The affidavits filed by plaintiff show that the provisions of rules 17-19 of this court have been substantially complied with; that the sum of four dollars per day is reasonable; that this amount was allowed by the defendant for a period of four years prior to the commencement of this suit for like services. No counter affidavit has been filed by the defendant. No denial of the facts stated in the affidavit in behalf of plaintiff, except the statement of defendant's counsel that, in his opinion, two dollars per day would be ample compensation. Taking all these facts into consideration, with the situation and character of the property mentioned in the affidavits, I am of opinion that the clerk did not err in taxing the amount at the rate of four dollars per day. The ruling of the clerk is affirmed.

In re WILSON.

(District Court, W. D. Virginia. May 8, 1901.)

1. BANKRUPTCY—EXEMPTIONS.

Where a bankrupt claimed exemption out of a stock of goods in trade, and the referee found that the goods had been paid for, the bankrupt was entitled to an exemption therein, under Code Va. 1887, § 3630.

2. SAME—CLAIM—SUFFICIENCY.

Code Va. 1887, § 3639, provides for an allowance of an exemption out of a stock of goods on selection by the householder in writing, describing each parcel or article, and affixing to each his cash valuation thereof. *Held*, that a claim by a bankrupt of an exemption out of a stock of goods, claiming such stock in bulk, is an insufficient compliance with the provisions of the Code.

3. SAME—SALE OF GOODS.

Code Va. 1887, § 3630, provides for an exemption to a householder of real and personal estate, including money to the value of not exceeding \$2,000. During the time between a petition in bankruptcy and an adjudication the bankrupt disposed of goods for which he had paid to the amount of \$332.89, and also sold certain goods for which he had not paid, and for the proceeds of which he accounted to the trustee. *Held*, that the proceeds derived from goods sold by the bankrupt were exempt, where, with other property claimed by him, they did not exceed in value \$2,000.

W. D. Vaughan, for bankrupt.

R. L. Jordan, for creditors.

PAUL, District Judge. In this case the referee certifies to the judge of this court certain questions raised by exceptions filed by creditors to the allowance by the trustee of the bankrupt's claim of homestead under the exemption law of Virginia (section 3630, Code 1887). The items in the homestead exemption, as set apart by the trustee, to which exceptions are filed, are the following: Stock of goods in trade, all paid for, \$663.98, cash on hand, in bank, \$332.89.

To sustain the exception to the allowance of the stock of goods in trade, two grounds of objection are alleged: First, that it is a shifting stock of goods, not shown to have been paid for. The referee, on the evidence, found that the goods had been paid for, and the court, on an examination of the testimony, sustains his findings. The burden of showing that goods claimed as exempt under the homestead law have been paid for rests on the party claiming the exemption; this the bankrupt has shown in this case. The position that the property claimed is a shifting stock of goods, and cannot be set apart under the homestead law, is not sustained. The goods have been surrendered in bulk, and the title thereto, by operation of law, vested in the trustee, and by him are to be disposed of as the law directs. In re Tobias, 103 Fed. 68-71, 4 Am. Bankr. R. 555.

The second ground of objection to the allowance of the stock of goods is that it is not claimed as provided by the statute. Section 3639, Code Va. 1887, provides how a homestead may be set apart in personal estate. Section 3639:

"Such personal estate shall be selected by the householder and set apart in a writing signed by him. He shall, in the writing, designate and describe, with reasonable certainty, the estate so selected and set apart, and each parcel or article, affixing to each his cash valuation thereof; and the said writing

shall be admitted to record to be recorded as deeds are recorded, in the county or corporation wherein such householder resides."

The bankrupt has not in his claim of homestead complied with the requirements of the section quoted. He has simply claimed his stock of goods in bulk. He has not designated and described with reasonable certainty the estate so selected, and each parcel or article, and affixed to each his cash valuation thereof. His general claim of his stock of goods in trade is as foreign to the requirements of the statute as if he were a farmer, and claimed as a homestead exemption all of the live stock on his farm, aggregating the value of the whole. The requirement of the statute is a wise and reasonable one. Its purpose is to enable creditors to ascertain, by inspection of the different articles and the prices affixed thereto, whether the debtor is making a fair and honest claim of homestead, or whether he is giving an underestimate of its value, and thereby securing to himself property that should be subjected to the payment of his debts.

The finding of the referee that the bankrupt, in claiming as part of his homestead exemption his stock of goods in trade, and affixing thereto his aggregate value of the same, is designating and describing the goods "with reasonable certainty," will be overruled. The bankrupt will be allowed to amend his claim of homestead so as to comply with the requirements of the statute (section 3639).

The exception to the allowance as part of the homestead exemption of the sum of \$332.89 is thus stated: "Because it is admitted that this amount or sum of money is the proceeds of the sale of goods made between the time of filing the petition for adjudication of bankruptcy and the date the trustee took charge of the stock of goods." The statute (section 3630) exempts to a debtor who is a householder "real and personal estate, * * * including money and debts due him to the value of not exceeding two thousand dollars." Had the bankrupt, at the date of his adjudication in bankruptcy, have had this sum of \$332.89 in his possession, he could have claimed it as part of his homestead exemption. So, if, instead of selling the goods from which the money was realized, he had held them, he could, if they had been paid for, have claimed them as part of his homestead exemption. Converting the goods into money placed the creditors in no worse condition than they would have been had he retained the goods. "During the time between the adjudication and the appointment of the trustee, the bankrupt is a trustee of the property." Coll. Bankr. (3d Ed.) 461.

There is no evidence that the bankrupt, holding the property until a trustee was appointed, in any way abused his trust or managed the property to the detriment of any creditor. The evidence shows that the sum of \$332.89 was realized on the sale of goods for which the bankrupt had paid. It also shows that he kept an account of the sales of goods for which he had not paid; that these sales amounted to \$58.11, which sum has been paid to the trustee. There is no charge of misconduct on the part of the bankrupt in selling these goods, either in the manner of disposing of them or in the prices realized.

The objection to the allowance of the said sum of \$332.89 to the bankrupt as part of his homestead exemption is overruled.

In re CLOTHIER.

(District Court, E. D. Pennsylvania. May 10, 1901.)

No. 901.

BANKRUPTCY—DISCHARGE—FILING OBJECTIONS.

Where specifications of objection to a bankrupt's discharge were filed on the last day permitted by the rule, and thereafter the bankrupt moved to dismiss the objections as insufficient, amended specifications filed without leave of court will be stricken from the files on objection by the bankrupt.

In Bankruptcy.

Leo G. Bernheimer, for bankrupt.

David Mandel, Jr., Henry M. Brownback, Nicholas H. Larzelere, and Louis M. Childs, for creditors.

J. B. McPHERSON, District Judge. The last day for filing specifications of objection to the bankrupt's discharge was April 25th, and before that date four creditors availed themselves of the right to object. On April 29th the bankrupt moved to dismiss the objections as insufficient, whereupon two of the creditors, without having obtained leave of the court, filed with the clerk on May 3d amended specifications; and these I am now asked to make part of the record, with the same effect as if they had been properly filed. No effort was made, however, to account for the delay; and no reason has, therefore, been presented that would justify me in making such an order in the face of the bankrupt's opposition. General order 32 should be strictly complied with, and failure so to do will only be excused when excellent reasons therefor are shown to the court. The amended specifications will therefore be stricken from the files.

With regard to the original objections, they are so general in character that their insufficiency is apparent. Indeed, no attempt was made to support them, and they are accordingly dismissed.

SIMPSON v. VAN ETTEN.

SAME v. DEPUE.

(Circuit Court, E. D. Pennsylvania. May 9, 1901.)

Nos. 27, 36.

BANKRUPTCY—EXECUTION SALES—ACTION TO SET ASIDE.

In a suit by a trustee in bankruptcy to recover from certain judgment creditors of the bankrupt moneys received on the judgments by levy and sales made within four months of the adjudication in bankruptcy, judgment will be entered for defendants, where in the case stated it is not alleged that, at the time the liens under the writs of scire facias were obtained, the execution debtors were insolvent, under Bankr. Act 1898, § 67, cl. "1," providing that levies obtained through "legal proceedings against a person who is insolvent" at any time within four months prior to the filing of petition shall be deemed null and void on an adjudication in bankruptcy.

Edward J. Fox, for plaintiff.
W. S. Kirkpatrick, for defendants.

DALLAS, Circuit Judge. Lester T. Smith and William Dusenberry, co-partners, were on March 21, 1899, upon the petition of certain of their creditors, adjudged to be bankrupts by the district court of the United States for the district of New Jersey. On April 14, 1899, Ora C. Simpson, plaintiff in these cases, was appointed, and he now is, trustee of the said bankrupts. On December 21, 1897, John and James P. Van Etten, the defendants in one of the present suits, filed in the prothonotary's office of a Pennsylvania court a judgment note of Smith & Dusenberry, dated December 20, 1897, for the sum of \$600. No execution, however, was issued upon the judgment which was entered thereon until January 14, 1899, when a fieri facias was levied upon personal property. The sheriff's sale in pursuance of this writ occurred on the 21st and 23d of January, 1899, and, of the amount realized from that sale, \$639 was paid to the said John and James P. Van Etten in satisfaction of their judgment. On January 14, 1899, Mary J. Depue, defendant in the other of these cases, caused a similar judgment to be entered against Smith & Dusenberry on a judgment note dated March 12, 1898, and on the same day upon which that judgment was entered a writ of fieri facias was issued thereon. In his return to this latter writ the sheriff referred to the return in the case of John and James P. Van Etten, and out of the proceeds of the sale of personal property heretofore mentioned the sheriff paid \$543.70 to Mary J. Depue. The plaintiff, as trustee, seeks to recover in the actions now under consideration the sums of money paid as has been stated to the respective defendants, and he bases his claim to do so upon the contention that inasmuch as the sheriff did not make any levy until the 14th of January, 1899, which was within the period of four months prior to the adjudication of bankruptcy, all the proceedings under the levies were null and void, and that consequently the fund realized belongs to the trustee for the creditors of the bankrupts. To support this contention the learned counsel for the plaintiffs has relied exclusively upon section 67, cl. "f," of the bankruptcy act of 1898, and therefore that clause alone need be considered. It is as follows:

"That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: provided, that nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

This paragraph, it will be observed, applies only to cases where liens have been obtained "through legal proceedings against a person who is insolvent," and this limitation is one which cannot be disregarded. As is said by Mr. Collier in his work on Bankruptcy (3d Ed., p. 434):

"Not all liens obtained against one afterwards and within four months adjudged bankrupt are deemed null and void. It must appear that the person whose property is subject to the lien was insolvent at the time of the creation of the lien. It is evident a lien might be obtained against one who is adjudged bankrupt within four months thereafter, but who was not insolvent at the time the lien was obtained. The act of bankruptcy and the insolvency might have occurred at some period subsequent to the creation of the lien. If so, the adjudication of bankruptcy would in no way determine whether or not the party was insolvent at the time the lien was created."

The correctness of this view of the effect of clause "f" is, I think, unquestionable, and it is fatal to the claims here presented. In each of the actions the parties have agreed upon a case stated in the nature of a special verdict, and neither of these statements includes the essential fact that, at the time the liens under the writs of fieri facias were obtained, the execution debtors were insolvent. This point being determinative, the consideration of any other question is unnecessary. It follows from what has been said that judgments should be entered for the respective defendants in each of these cases, and therefore it is so ordered.

In re LESSER et al.

(District Court, S. D. New York. January 15, 1901.)

BANKRUPTCY—DISCHARGE OF LIENS—GARNISHMENTS.

Under Bankr. Act 1898, § 67f, which provides that "all levies, judgments, attachments or other liens obtained through legal proceedings against a person who is insolvent at any time within four months prior to the filing of a petition in bankruptcy against him shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment or other lien shall be deemed wholly discharged and released from the same," a provisional lien acquired by the service of garnishment process more than four months prior to the filing of a voluntary petition in bankruptcy by the defendant, but which, under the state laws, can be made effective only through a judgment, and a levy or demand thereunder, is discharged where judgment is not obtained until within four months prior to the filing of the petition, since such judgment "affects" the property, and cannot be made the basis of proceedings to enforce such lien.

In Bankruptcy. On motion to vacate stay.

Putney, Twombly & Putney, for the motion.

Anderson & Anderson, opposed.

BROWN, District Judge. This is a motion to vacate a stay of proceedings heretofore granted against the further prosecution of two suits in Connecticut against the bankrupts, in which the Brainerd & Armstrong Company, a corporation, was plaintiff, and in which it had by process of foreign attachment garnished certain debts owing

to the bankrupts. The garnishee process was served in one suit in October, 1896, and in the other in June, 1897, by which under the law of Connecticut a lien was created, to continue until 60 days after judgment upon the property attached, to secure the payment of any execution that might be levied under the judgment recovered in the suit. Judgments were recovered in those suits on December 7, 1900. The bankrupts had filed their voluntary petition in bankruptcy in this court on May 12, 1899, and were adjudicated bankrupts on the same day. On June 7, 1899, at a creditors' meeting, Mr. Barker was duly appointed trustee. On December 6, 1900, this court granted an order restraining the Brainerd & Armstrong Company from further prosecuting their proceedings in the suits above stated, which order was served upon them the same day, but after the entry of the above-named judgments. The present motion is to vacate that order.

Upon a previous petition by Metcalf Bros. & Co. in this same bankruptcy proceeding (In re Lesser, 100 Fed. 433), it was held by this court that the provisional or inchoate lien acquired by filing a judgment creditors' bill more than four months prior to the proceedings in bankruptcy, could not be made available by the judgment creditor under section 67f of the bankrupt act, to obtain a preference over other creditors, unless a judgment was obtained in that suit more than four months before the bankruptcy proceedings. That decision has been recently affirmed on appeal in the circuit court of appeals (Dec. 6, 1900) in which, however, the question as to the effect of section 67f on an attachment at law more than four months prior to the petition in bankruptcy was reserved, without any expression of opinion thereon.¹

On considering, however, the language of section 67f, its intention as declared in repeated adjudications in the circuit court of appeals, and the nature of the lien and the means necessary to make it effectual as shown by the statutes of Connecticut, I am unable to find any material distinction between the present case and the former.

Section 922 of the General Statutes of Connecticut provide that

"No estate, which has been attached shall be held to respond to the judgment obtained in the suit, either against the debtor or any other creditor, unless the judgment creditor shall take out an execution and have it levied on the personal estate attached, or demand made on the garnishee in cases of foreign attachment within 60 days after the final judgment." See *Beers v. Place*, 4 N. B. R. 459, Fed. Cas. No. 1,233.

By section 1252 this limitation is again made applicable to garnishments by foreign attachment.

Debts owing to the defendant and attached by garnishee process, it is declared by section 1231, "shall be secured (that is, held fast) in the hands of such garnishee to pay such judgment as the plaintiff may recover."

Section 1253 declares:

"If judgment be rendered in favor of the plaintiff in any action by foreign attachment, all the effects in the hands of the garnishee at the time of the attachment or debts then due from him to the defendant * * * shall be liable for the payment of such judgment; and the plaintiff, on praying out an

¹ Opinion withdrawn, and case certified to supreme court.

execution, may direct the officer serving the same to make demand of such garnishee of the effects of the defendant in his hands and of any debt due to the defendant, and such garnishee shall produce or pay the same, to be taken or applied on said execution."

By the same section if the garnishee has parted with the effects or debt or fails to pay them over as demanded, scire facias may be served on the garnishee to show cause, etc., and if found indebted, judgment on the scire facias may be entered against the garnishee.

From these provisions it is manifest, it seems to me, that although an attachment of chattels belonging to a defendant, or an attachment of a debt owing to him by a garnishee, creates a statutory lien for the payment of the judgment, this lien is only a provisional one; it does not create any property or right of property in the plaintiff in the things attached. It transfers to him no title whatsoever; it creates no *jus in re*, and is nothing more than the taking of the chattels or debt, actually or constructively, into the custody of the court, to be held by the court, for the purpose of subjecting the same to any levy or demand under execution that may be made by the sheriff within 60 days after a judgment recovered in plaintiff's favor as against any other creditor or vendee subsequently claiming the same. The judgment, the execution and the levy by the sheriff in cases of personal chattels attached, or a demand of payment by the sheriff in the case of the garnishment of a debt, which is the same thing as a levy, are indispensable to make the lien of any avail to the plaintiff. In the case of *Davenport v. Tilton*, 10 Metc. (Mass.) 320, Chief Justice Shaw, speaking of attachments under the law of Massachusetts, which are essentially the same as under the law of Connecticut, says:

"An attachment of property on mesne process is a specific charge upon the property for the security of the debt sued for, and the property is set apart and placed in the custody of the law for that purpose, subject only to the condition that the attaching creditor shall obtain judgment in the suit, take out execution and levy upon the property so held within a limited time."

The case of *Beardsley v. Beecher*, 47 Conn. 413, is to the same effect.

Such an attachment is, therefore, only a provisional or conditional lien, which can only be established or made effectual by the subsequent recovery of judgment and a levy of execution thereon. It necessarily follows therefore that unless a valid judgment can be recovered and a valid levy or demand under execution can be made, the attempt to enforce it by these means must be enjoined. Section 67f explicitly provides that

"All levies, judgments," etc., "obtained through legal proceedings * * * at any time within the four months prior," etc., "shall be deemed null and void * * * and the property affected by the levy, judgment, attachment or other lien, shall be deemed wholly discharged and relieved from the same and shall pass to the trustee as part of the estate of the bankrupt."

This applies to voluntary as well as involuntary proceedings. Coll. Bankr. (3d Ed.) 433. As both the judgments are in this case null and void and no levy or demand of payment under execution can lawfully be made under them, the plaintiff in the attachment suits should be enjoined from attempting by such means to obtain an unlawful preference.

In the Case of Lesser above cited, the court of appeals in its opinion by Shipman, C. J., says:

"If the court which rendered the decree had power to create priority the right to priority is perfected, but if the judgment so far forth as it directs priority becomes waste paper the lien is gone. * * * The Metcalfs cannot have the benefit of the decree which directs payment to them of their judgments in the actions at law, because preferences created by the decree were made null by the bankrupt act."

Similarly here, both the judgment and the levy, which are necessary to any application of the property attached to the plaintiff's use are by section 67f rendered null and void.

A further provision of the same section also declares that the "property affected by the levy, judgment," etc., "shall be deemed wholly discharged." Any property attached, it seems to me, is clearly within this provision as being "affected by the judgment and levy" inasmuch as it is only through a judgment and a levy that any application of it for the plaintiff's benefit can be made. The general intention of the bankrupt law by this section to prevent all preferences in favor of one creditor over another from being obtained through any judgment or levy within four months, is strongly stated by the court of appeals in this circuit in the case of *In re Kenney* (Dec. 6, 1900) 105 Fed. 897, where the court speaking by Lacombe, Circuit Judge, says:

"There can be no doubt that it was the intention of congress by this section to prohibit creditors of a bankrupt from obtaining preferences over other creditors as the result of any legal proceedings against him, during the period of four months prior to the filing of the petition. And apt words are used to express that intention."

I do not see how any fair and reasonable effect can be given to the explicit language of section 67f or to its evident intention to prevent preferences, without holding that such attachments can no longer be enforced by means of a judgment or a levy recovered within four months of the bankruptcy proceedings. For some purposes, no doubt, such judgments may remain. Section 67f itself recognizes one most useful purpose, viz. to secure, where necessary, a benefit to the trustee in behalf of all the creditors. Such a judgment may also liquidate the amount due on an unliquidated claim, and be valid for that purpose. But as a means of enforcing a preference, and still more where an execution thereon and levy or demand thereunder are necessary to effectuate a preference, the judgment and execution are declared null and void. The object of section 67f plainly is to prevent any judgment or execution or levy from being so used; and all attempts to make use of a judgment or levy for that purpose when acquired within four months should therefore be enjoined.

The motion is, therefore, denied.

In re LESSER et al.

(District Court, S. D. New York. February 16, 1901.)

1. BANKRUPTCY—DISCHARGE—CONCEALMENT OF ASSETS.

After the appointment of a trustee in bankruptcy proceedings, the concealment of assets which were not turned over to a receiver previously appointed by a state court, and who is entitled to possession of such assets, is equally a concealment from the trustee, and warrants the refusal of a discharge to the bankrupt.

2. SAME—FALSE OATH—SPECIFICATION CONFORMED TO PROOF.

A willfully false statement in the schedule of a bankrupt that all his property has gone into the possession of a state receiver, when in fact he has property which he did not turn over to such receiver nor schedule, constitutes the making of a false oath, which debars him from the right to a discharge. The specification may be conformed to the proof.

In Bankruptcy. On application for discharge.

See 100 Fed. 433.

Blumenstiel & Hirsch, for bankrupts.

Anderson & Anderson, Black, Olcott, Gruber & Bonyng, Epstein Bros., Hays, Greenbaum & Hershfield, and Stickney, Spencer & Ordway, opposed.

BROWN, District Judge. In opposition to the discharge of the bankrupts, the objecting creditors allege concealment of assets and a false oath in regard thereto. Upon the evidence taken by the referee, he finds an undoubted large concealment of assets by the bankrupts, and the evidence seems to justify that finding; but the referee does not sustain the specifications, for the reason that prior to the bankruptcy proceedings, in a suit in the state court between the partners, a receiver was appointed by the state court, who took possession of a large part of the assets; and as that receiver has never been discharged, he holds that it is the receiver who is entitled to whatever the bankrupts concealed, and that consequently there has not been a concealment of assets from the trustee in bankruptcy within the language of section 29b (1).

1. This is a technicality which ought not to shield the bankrupts from the consequences of their fraudulent acts or to defeat the intention of the bankrupt law. After a trustee has been appointed in bankruptcy proceedings a concealment of assets which have not been turned over to a previous receiver, is equally a concealment from creditors, the actual beneficiaries, whether through a receiver or through a trustee, so that the intention of the law is equally thwarted. As respects a discharge, I think the law should be applied according to its spirit and intent, rather than according to the letter alone.

It has already been adjudged, however, by the state court of appeals that the partnership suit in the state court and the appointment of a receiver therein, were fraudulent and void as against creditors. Under this adjudication I do not see how any proceedings could be taken to enforce further payments to the receiver of the assets withheld by the bankrupt, or how the receiver could thereafter be entitled to them; so that since that adjudication, at least,

if not before, the concealment was virtually and in effect a concealment from the trustee in bankruptcy, who from that time was entitled to any assets undisposed of under the receivership.

2. Besides this, moreover, the schedules of the bankrupts, in reciting with some fullness the partnership suit and the appointment of a receiver therein, state explicitly that

"Any and all property of any kind or description whatsoever, and all assets of any nature whatsoever, and all property in which your petitioners had any interest or equity whatsoever then remaining, went into the possession or under the control of the state receiver."

Upon the testimony and the findings of the referee, this statement must be held to be willfully false. The specification although not couched in the precise language to refer to this particular statement, is so nearly akin to it in alleging a false oath in respect to turning over all the petitioners' property, that the discharge should on that ground at least, be refused, and the specification be allowed to be amended in that respect to conform to the proof.

Discharge refused.

In re REKERSDRES.

(District Court, S. D. New York. May 4, 1901.)

BANKRUPTCY—APPOINTMENT OF TRUSTEE.

Where at the first meeting of creditors an attorney appeared, representing the bankrupt and her attorney, and he occupied the same office with such bankrupt's attorney, and produced powers of attorney from creditors to vote for a trustee, and such creditors were in the majority in number and amount of the creditors in attendance, a refusal of the referee to appoint the candidate named by such majority of creditors there represented was proper.

In Bankruptcy.

Edwin Clinton Harvey, for bankrupt.

Harry B. Mintz, for creditors.

BROWN, District Judge. At the first meeting of creditors, Harry B. Mintz appeared before the referee stating that he represented the bankrupt and her attorney Mr. Harvey, who occupied the same office with Mr. Mintz. Mr. Mintz also produced powers of attorney from three creditors to vote for a trustee, and these were a majority in number and amount of the creditors in attendance. Objection was made in behalf of another creditor to the nomination of a trustee by Mintz, and the referee refused to appoint the candidate so named, because his business association with Harvey, the attorney of the bankrupt, raised the presumption that the person nominated for trustee was nominated in fact by the bankrupt or her attorney, and therefore not a suitable person to act in the interest of creditors, since the trustee should be the free and unbiased choice of the creditors and not be influenced by any other interest. *Falter v. Reinhard*, 4 Am. Bankr. R. 782, 104 Fed. 292; *In re McGill* (C. C. A.) 106 Fed. 57.

The referee's ruling is approved. A trustee should be wholly free from all entangling alliances or associations that might in any way

control his complete independence and responsibility. For this reason I disallow the appointment of an attorney's clerk or other employé as trustee or receiver, who would be under the practical control of other interests or of other persons not directly responsible for his conduct.

For substantially similar reasons, proxies presented under circumstances of evident collusion with the bankrupt should be disallowed. It would be intolerable if the bankrupt by such means should be enabled to prevent or embarrass necessary investigation into his conduct or estate.

In re HEYMAN.

(District Court, S. D. New York. May 3, 1901.)

1. BANKRUPTCY—COMPROMISE OF CLAIM—ACCEPTANCE BY CREDITORS—DISAPPROVAL BY COURT.

Bankr. Act, § 27, provides that the trustee "may, with approval of the court," compromise any controversy arising in the proceedings. Section 56a provides that creditors shall pass on all matters submitted to them at their meetings by a majority vote. Section 58 (7) provides for notice to creditors of proposed compromise of any controversy. *Held*, that the action of the creditors on any compromise offered on claims due the estate of the bankrupt is not conclusive, but may, for good cause, be disallowed by the court, under section 27, as the compromise, when determined, must be carried out and executed by the trustee under the "approval of the court."

2. SAME.

Where a trustee recovered judgment for \$10,117 for a preference received, and the case was appealed, acceptance by a majority of the creditors of \$300 in compromise of such claim, against the trustee's objections, will be set aside.

In Bankruptcy.

Einstein & Townsend, for trustee.

Blumenstiel & Hirsch and Myers, Goldsmith & Bronner, for compromise.

BROWN, District Judge. At a creditors' meeting a compromise of two claims of the trustee against Sol Friedman & Co. and against Spiegelberg & Sons was proposed by the debtors and an acceptance voted by the creditors. The trustee opposed the acceptance, and the referee having also disapproved it, the matter has been certified to me.

I am of opinion that section 27 and section 58 (7) and section 56a, Bankr. Act 1897, so far as the latter affect settlements of claims or controversies between the trustee and others, are to be construed together; that any compromise proposed by the trustee under section 27 should be submitted to the creditors in accordance with section 58 (7); and that the action of the creditors thereon under section 56, is not absolutely conclusive, but may for good cause be disallowed by the court under section 27; and that a compromise in like manner proposed to creditors by the debtor is equally subject to the judgment of the court under section 27.

There is no specific provision as to what shall be the consequence of the mere approval by the creditors at a creditors' meeting of a proposed compromise submitted to it by the debtor. The case, as it seems to me, must necessarily come ultimately under section 27, from the fact that no compromise with the debtor, and no release to him, can possibly be effected except through the trustee. Notwithstanding any previous vote by creditors, the compromise must still be carried out and executed by the trustee. It becomes, therefore, a compromise by and through the trustee, and hence falls under section 27 and must therefore have the "approval of the court."

Similarly a composition offered by the bankrupt, though accepted by the requisite number of creditors, must receive the approval of the judge under section 12, who will not confirm it unless he finds "(1) that it is for the best interest of creditors." In other words the majority at a creditors' meeting will not be suffered from outside influences or irrelevant considerations to sacrifice the evident interests of the minority.

The same principle ought to apply to proposed compromises of single claims. For the compromise proposed by the debtor may be approved by a bare majority of the creditors in attendance at a meeting or represented there under powers of attorney, upon considerations quite independent of the best interests of the administration of the estate in bankruptcy. The inference to be drawn from the general regulations prescribed in the bankruptcy act, is that the court or judge should have power to regulate or restrain the action of creditors so far as necessary to secure the best interests of the whole body; and that section 27 in requiring the "approval of the court" is applicable to the compromise of every controversy.

Ordinarily the action of a majority of creditors will be deemed presumptively for the best interests of all. But that is by no means necessarily so, nor is it always so in fact. In the present case the presumptions are very strongly to the contrary. In the claim against Friedman & Co. the trustee recovered a judgment for the sum of \$10,117 for a preference received, and the case is now on appeal, and for that judgment the debtor proposed a payment of \$300 only, which a majority of the creditors voted to accept, against the trustee's objection. The compromise offered by the other debtor was also wholly inadequate and unreasonable. No sufficient considerations appear, as respects the administration of the estate in bankruptcy, which could possibly justify acceptance; and the only rational inference is that the majority vote was induced by wholly different considerations. The referee's construction of the act in this regard is, therefore, approved, as well as his rejection of the compromises proposed.

In re BARD.

(District Court, S. D. New York. May 4, 1901.)

BANKRUPTCY—PROCEDURE—TESTIMONY OF BANKRUPT.

Where depositions or testimony of a bankrupt have been taken at any time during previous proceedings, they may be admitted in subsequent proceedings, where the person who took the notes of the bankrupt's examination testified that they were truly and correctly taken.

In Bankruptcy.**H. L. Reavy, for bankrupt.****G. A. Seixas, opposed.**

BROWN, District Judge. The practice in this district under repeated rulings is, to admit, so far as relevant, any prior depositions or testimony of the bankrupt at any time during the previous proceedings in the cause. It would be a needless expenditure of time and money in proceedings before the referee in support of the specifications against a discharge, to take town afresh the same testimony that the bankrupt had already given in his examination before the court for the purpose of framing specifications, when that testimony was in writing and offered before the referee.

In the present case it appears that the bankrupt's testimony upon his previous examination was not formally signed by him, although numerous adjournments were signed by him on the minutes. When his testimony was offered in support of the specifications, it was rejected, apparently on the ground of incompetency alone, and not because it had not been signed, or because the bankrupt might wish to make corrections in the written statement. The testimony was competent and should be received when properly evidenced. Proper evidence of what his testimony was, would be either his own signature and verification, or in the absence of that, the testimony of the person who took the minutes. The latter in fact is the ordinary mode of proving the testimony of a party given on a previous trial in an independent cause. Subsequently before the referee, the person who took the notes of the bankrupt's examination testified that the notes of the testimony were truly and correctly taken. The testimony was then again offered and again rejected. It should have been received. The signature of the bankrupt was no longer necessary; nor was it necessary that he should be directed either to sign it, or correct it, if he wished. By the testimony of the witness it was duly proved and was competent. Thenceforward the burden was upon the bankrupt to overcome it.

In re FILER.

(District Court, S. D. New York. December 18, 1900.)

1. BANKRUPTCY—JURISDICTION—DOMICILE OF ABSCONDING DEBTOR.

Where the domicile of an alleged bankrupt has been for several years within the district where the petition is filed, and his family continues to reside there, the fact that more than three months before the filing of the petition he absconded to avoid arrest will not defeat the jurisdiction of the court, unless it is shown that he had an intention to change his domicile, and to acquire another elsewhere; and the burden of establishing such fact rests upon those objecting to the jurisdiction.

2. SAME—ACTS OF BANKRUPTCY—ABSCONDING WITH PROPERTY.

The absconding of an insolvent debtor, taking with him money or property not exempt, constitutes a concealment and removal of the property with intent to defraud his creditors, and is an act of bankruptcy, under Bankr. Act 1898, § 3a, cl. 1.

In Bankruptcy. On petition for involuntary adjudication.

Samuel Fleischman, for petitioning creditors.

Nicoll, Lindsay & Anable, for Kohn & Co., opposing creditors.

BROWN, District Judge. Upon an involuntary petition to have an absconding debtor adjudged a bankrupt, other creditors answer the petition and oppose adjudication on the grounds.

(1) That the court has no jurisdiction, because the debtor did not have either residence, domicile, or place of business within the district for more than four months prior to the filing of the petition; and

(2) Because the suffering of an attachment against the debtor several months prior to the petition, no judgment or execution thereon having been entered, was not an act of bankruptcy as charged in the petition; and that the averment of concealing property was not sustained by the proof. Upon consideration of the evidence and of the elaborate briefs presented, I am of the opinion that the objections in this case should not be sustained, and that an adjudication should be ordered. The material facts are as follows:

For several years prior to December 11, 1899, the debtor's residence and domicile was in the city of New York. During 1899 he was employed as cashier by Kohn & Co., bankers and stockbrokers, in Broadway. While thus employed he committed various forgeries, involving Kohn & Co. in considerable loss, and finding that the discovery of these forgeries was immediately impending, on December 11th he absconded to avoid prosecution. On January 19, 1900, he was heard from as being then in Los Angeles, Cal., but otherwise his whereabouts are unknown. On January 10, 1900, Kohn & Co. obtained an attachment on certain bonds and stock in a suit brought against him in the state court, but no judgment or execution has been obtained or issued thereon. On May 9, 1900, one day before the expiration of the four months from the issuing of the attachment, the petition in the present proceeding was filed by three creditors, alleging that the debtor was insolvent, that his residence and domicile had been within this district for the greater part of the six months preceding; that the above attachment, unless it should be vacated and superseded by bankruptcy proceedings, was likely to result in the appropriation of the debtor's property by the attaching creditor alone; that the bankrupt had departed from this state with intent to defraud his creditors and had not been heard from since issuing the said attachment; that he had not vacated or discharged the same, and that within four months he had concealed cash and other personal property of the value at least of \$1,000 with intent to hinder, delay and defraud his creditors.

1. To sustain jurisdiction in this case it is only necessary that it should appear that the bankrupt's domicile continues within this district, notwithstanding his flight to escape prosecution on December 11, 1899. Before that date his domicile here is not questioned. He resided here with his wife and family for several years; they still remain here; and the debtor's domicile is presumed to remain here unless there is sufficient evidence of the debtor's intent to change it and acquire a new domicile elsewhere. The burden of proof in this regard rests upon the defendants. I do not think

that any of the facts in evidence indicate any intention by the bankrupt to change his previous domicile or to acquire any other domicile elsewhere. In *Mitchell v. U. S.*, 21 Wall. 350, 353, 22 L. Ed. 584, 588, Mr. Justice Swayne in delivering the opinion of the supreme court says:

"A domicile once acquired is presumed to continue until it is shown to have been changed. Where a change of domicile is alleged, the burden of proving it rests upon the person making the allegation. To constitute the new domicile two things are indispensable: First, residence in the new locality; and, second, the intention to remain there. The change cannot be made except *facto et animo*. Both are alike necessary. Either without the other is insufficient. Mere absence from a fixed home, however long continued, cannot work the change. There must be the *animus* to change the prior domicile for another. Until the new one is acquired, the old one remains."

These principles have been repeatedly affirmed and followed. *Desmare v. U. S.*, 93 U. S. 605, 609, 23 L. Ed. 959; *Morris v. Gilmer*, 129 U. S. 315, 9 Sup. Ct. 289, 32 L. Ed. 690; *Anderson v. Watt*, 138 U. S. 694, 706, 11 Sup. Ct. 449, 35 L. Ed. 1078; *Chambers v. Prince* (C. C.) 75 Fed. 176, 180; *Marks v. Marks* (C. C.) 75 Fed. 321, 325; *De Meli v. De Meli*, 120 N. Y. 485, 24 N. E. 996.

In *Desmare v. U. S.*, *supra*, the claimant had been domiciled in New Orleans and afterwards entered the Rebel lines and engaged in business in the parish of St. Landry, where he took an oath of allegiance to the Confederate government and became its agent. This was held to be insufficient evidence of a change of domicile. The court again says:

"Before the breaking out of the late Civil War, the appellant was domiciled in the city of New Orleans. He was a member of a commercial partnership there. There is no proof of any change of domicile subsequently. A domicile once existing continues until another is acquired. A person cannot be without a legal domicile somewhere. Where a change of domicile is alleged, the burden of proof rests upon the party making the allegation."

In the present case, as stated above, I do not find any evidence of intention by the debtor to acquire any new domicile elsewhere. He fled from this district to escape prosecution. Whenever that danger ceases to exist, from whatever cause, there is not the least doubt from portions of the evidence submitted, that he would immediately return here to his family. The case is essentially different from that of *Inhabitants of Wilbraham v. Inhabitants of Ludlow*, 99 Mass. 587, and other similar cases.

2. I do not find it necessary to decide whether the debtor's failure to remove an attachment against his property for a period of near four months, where no judgment or execution has been entered or issued, should be deemed substantially an act of bankruptcy within section 3a (3) of the bankrupt act. In the recent case of *In re Lesser* the circuit court of appeals for this district¹ in affirming (Dec. 6, 1900) the judgment of this court (100 Fed. 433, 3 Am. Bankr. R. 815) expressly reserves, as I understand, any expression of opinion as regards the validity of an attachment issued more than four months prior to the commencement of bankruptcy proceedings, where the judgment in the attachment suit is not entered until within the

¹ Opinion withdrawn, and case certified to supreme court.

latter period. If such an attachment remains valid in such cases, it is evident that creditors would be without any remedy to prevent a preference from being acquired by the attaching creditor through a mere delay of his proceedings in entering judgment until the four months had elapsed, unless the bankrupt's creditors should be able to prove some other independent act of bankruptcy, which it might well happen would not be within their power. Without considering this question further, however, the evidence shows without doubt that at the time of the bankrupt's flight, he took with him property to the amount of at least from \$2,000 to \$3,000, which if he had remained here would not have been exempt, but must have been transferred to his trustee in bankruptcy. There being no doubt as to the insolvency of the debtor, such a flight with property, is both concealment and removal of property with intent to defraud creditors within section 3a (1).

Adjudication is ordered.

In re SWIFT et al.

Ex parte LE ROY.

(District Court, D. Massachusetts. April 4, 1901.)

No. 2,745.

BANKRUPTCY—PROCEEDS OF PLEDGE—RECOVERY FROM TRUSTEE OF PLEDGEE.

A pledgee of a certificate of stock indorsed in blank repledged it to a bank, with other securities, to secure a debt of his own. He afterwards made a general assignment, and still later was adjudged bankrupt. The bank sold the securities, and, after its claim was paid, had a sum remaining exceeding the proceeds of such certificate, which it paid over to the assignee, who was advised by the original pledgor of his claim thereto, subject to payment of his own debt, which he had previously tendered to the assignor. The assignee deposited the money in bank, with the other funds of his trust, from which he checked, but the amount to his credit was never less than the proceeds of such certificate; and he afterwards turned over the remainder of the fund to the trustee in bankruptcy. *Held*, that the general property in the certificate or its proceeds remained in the original pledgor, and, conceding that he was estopped by his indorsement as to the bank, such estoppel extended no further than was necessary to protect the bank, and after its claim was paid the proceeds belonged to the pledgor, who could follow and recover the same from the trustee in bankruptcy, subject to payment of his debt to the bankrupt.

In Bankruptcy. Appeal from Decision of Referee James M. Olmstead.

Freedom Hutchinson, trustee, pro se.

Ropes, Gray & Gorham, for Stuyvesant Le Roy, creditor.

LOWELL, District Judge. Le Roy was indebted to Swift, and, as security for the debt, pledged a certificate of stock, indorsing the same in blank. Swift repledged the stock, together with stock of his own, to the Beacon Trust Company, as security for his own indebtedness, which greatly exceeded that of Le Roy to him. On De-

ember 27th Swift assigned to Dickson for the benefit of his creditors. On December 28th or 29th Le Roy offered to pay his debt to Swift, and demanded a return of the certificate. Swift refused to return it, saying that he was unable to do so. Between December 28th and January 2d the Beacon Trust Company sold the securities, including Le Roy's stock, paying itself out of their proceeds. After payment a balance was left in their hands exceeding the amount realized from the sale of Le Roy's stock. On January 2d Le Roy notified Dickson that the certificate was his property, and demanded that it or its proceeds should be kept separate from the general assets of Swift. On January 8th the money was turned over by the trust company to Dickson, who deposited it in the same account with money coming to him from Swift. Against this account he drew checks from time to time on account of his operations as assignee, but the balance to his credit was always in excess of the amount realized from the sale of Le Roy's stock. On April 27th Swift was adjudged bankrupt, and thereafter Dickson transferred all the funds in the account to the trustees in bankruptcy. Le Roy seeks to recover from the trustees the proceeds of the stock, less the debt due from him to Swift.

After the pledge by Le Roy to Swift, the general property in the stock remained in Le Roy, Swift having merely the rights of a pledgee. St. Mass. 1884, c. 229, does not affect the matter, even if applicable to a New Jersey corporation. The delivery of a certificate indorsed in blank to a pledgee transfers to him only the title of a pledgee, not the general property in the stock. This was not the case of a purchase of stock on a margin (see *In re Swift* [D. C.] 106 Fed 65), but an ordinary pledge of property to secure the pledgor's debt. It follows, therefore, that Swift had no right to repledge the stock to the trust company; that his action was wholly unauthorized, and, under the laws of Massachusetts, seems to have been criminal. Pub. St. c. 203, § 72. It is not necessary to determine if Le Roy could have brought an action of trover against Swift without a tender of some sort. Apparently, he could not. See *Talty v. Trust Co.*, 93 U. S. 321, 23 L. Ed. 886; *Cumnock v. Savings Inst.*, 142 Mass. 342, 7 N. E. 342. It seems, however, that the offer by Le Roy to pay Swift was, under the circumstances of Swift's reply, the equivalent of a tender, at least as against Swift. *Cumnock v. Savings Inst.* An action of trover then lay by Le Roy against Swift. Except as the result of estoppel, the trust company took no more title to the stock than did Swift. Save in so far as he was estopped, Le Roy could, immediately after the tender to the trust company of the amount of his debt to Swift, and a demand upon the trust company, have sued that company in trover, or, if the stock had then been sold, could have waived the tort and sued for money had and received to his use. Except for an estoppel, the proceeds of the stock in the hands of the trust company, or at any rate the surplus over Le Roy's debt, belonged to Le Roy. The facts shown in evidence do not establish an estoppel in favor of the trust company as against Le Roy, but this matter was not gone into, and counsel on both sides assumed that the estoppel existed. But the

estoppel protected the trust company only to the extent of the damage that it would sustain from the enforcement of Le Roy's rights. After the payment of Swift's debt, this damage was nothing. If property of A. comes into the possession of B., B. cannot refuse to deliver it up to A. merely because, as the result of A.'s representations that it is the property of C., B. has been led to lend C. money on the pledge of it. To retain the property as against A., B. must show that its delivery to A. would damage himself. After the payment of Swift's debt, had the certificate then been in existence in the hands of the trust company, Le Roy could have recovered it after proper demand, and perhaps after another tender to Swift of his debt. After the sale of the stock by the trust company, its proceeds, or the balance of them over Le Roy's debt to Swift, could have been recovered by Le Roy from the trust company. No one had any claim to the balance but Le Roy; not the trust company, which was bound to pay the money to some one, and so was unprotected by Le Roy's estoppel; and not Swift, who, after tender, had no right to the proceeds of Le Roy's stock, but only to the amount of his debt. The balance of the proceeds of Le Roy's stock was therefore Le Roy's property,—money had and received by the trust company to his use. Before the trust company paid the money to Dickson, Dickson knew the situation. He knew that the proceeds of Le Roy's stock which he was receiving from the trust company belonged to Le Roy. In the ordinary sense, Dickson was not trustee, nor Le Roy cestui que trust, of these proceeds. Dickson's situation was that of a man who, without criminal intent, but without legal right, takes into his possession the proceeds of the property of another. He should have handed the balance over to Le Roy, or, if he desired time for investigation, should have earmarked the proceeds by a separate deposit of them. Instead of this, he mingled them with funds belonging to him as Swift's assignee. Whether he did this as claiming a right to the funds, or merely by way of convenience, does not appear. To deposit in the same bank account funds held in different rights is often done for a short time by men who intend no illegal act. None of the money deposited, so far as appears, belonged to Dickson individually. Whether Dickson's constant retention in the account of an amount of money equal to the proceeds of Le Roy's stock came about by reason of his deliberate intention to have this money always on hand, or merely because the demands upon him as assignee did not exhaust the money which belonged to him as assignee, does not appear. In the absence of evidence, it may fairly be assumed that Dickson intended to do what was right, and to retain the proceeds for their true owner. Even if, however, it could be shown affirmatively that Dickson intended to assert ownership in Le Roy's money, and even if the retention was merely accidental, yet I understand it to be a principle of law that where one deposits in a bank the money of another, together with money of his own, and always retains in the account an amount equal to the money belonging to the other person, then that money so retained can be recovered by its owner from the depositor's estate in bankruptcy. The case is somewhat stronger where, as here,

the depositor mingled, not his own private property and that of another, but the property of another and property belonging to him in a representative capacity. As was said by Lord Justice Thesiger in *Re Hallett's Estate*, 13 Ch. Div. 696, 723:

"Wherever a specific chattel is intrusted by one man to another, either for the purposes of safe custody or for the purpose of being disposed of for the benefit of the person intrusting the chattel, then either the chattel itself, or the proceeds of the chattel, whether the chattel has been rightfully or wrongfully disposed of, may be followed at any time, although either the chattel itself, or the money constituting the proceeds of that chattel, may have been mixed and confounded in a mass of the like material."

See, also, *Birt v. Burt*, 11 Ch. Div. 773, note. See 13 Ch. Div. 721. The cases in this country and in England, decided since *In re Hallett's Estate*, so far from calling in question that decision and the opinions rendered therein, have approved them repeatedly. In England it seems to have been held, indeed, that where, in a case like this, the second pledgee had sold the property of the pledgor, and paid his debt from the proceeds, retaining in specie some property of the original pledgee, yet the pledgor had a lien for the value of his property upon the property of the original pledgee still remaining in the second pledgee's hands. *Ex parte Alliton*, 1 Glyn & J. 160; *Ex parte Salting*, 25 Ch. Div. 148. So, in *Harris v. Truman*, 7 Q. B. Div. 340, the principal was allowed to retain goods purchased, not with the principal's money, but, as was said by Mr. Justice Bowen, "fraudulently substituted by the bankrupt in the place of the barley that should have been so purchased." These cases go further than does the case at bar. In this country, again, a special deposit made in a bank has been followed into the bank's general cash balance, in cases where that balance had never been reduced below the amount of the special deposit. See *Moreland v. Brown*, 30 C. C. A. 23, 86 Fed. 257; *Merchants' Nat. Bank v. School Dist. No. 8*, 36 C. C. A. 432, 94 Fed. 705; *Spokane Co. v. First Nat. Bank*, 16 C. C. A. 81, 68 Fed. 979. It is not necessary to discuss these last-mentioned cases, and others like them. The case of a special deposit mingled in one bank account with funds belonging to the depositor is not precisely the same as that of a special deposit mingled with the general cash balance of a bank. In *Pennell v. Deffell*, 4 De Gex, M. & G. 372, it was decided that checks drawn on a bank account composed of mingled moneys should be first applied to the withdrawal of the money first deposited. How that rule would work in the case at bar does not appear, but it seems to have been definitely overruled in England by *In re Hallett's Estate*, in spite of the dissenting opinion of Lord Justice Thesiger. Apparently, the rule of *Pennell v. Deffell* has not found much favor in this country. It is, indeed, highly artificial, and is applicable only where other tests have failed,—where there is no other reason to apply checks to one class of moneys rather than to another.

Counsel for the trustee urged that *Le Roy* ought not to recover, because, by reason of the use of *Le Roy's* stock Swift was enabled to borrow more money from the trust company, and so his debts were increased. Hence counsel urged that it would be inequitable

to permit the assets in the hands of the trustee to be diminished by paying Le Roy in full. This argument fails for two reasons: In the first place, because the increase in Swift's debts was accompanied by a corresponding increase in his assets. If there is a presumption of law that, by reason of his ability to pledge Le Roy's stock, his indebtedness at the time of his failure was greater than it would otherwise have been, the same presumption of law establishes that at the time of his failure he had greater assets than he would otherwise have had. Either presumption may not correspond precisely with the facts, but one is as reasonable as the other, and they stand or fall together. Second, if the doctrine thus contended for be sound, it would be equally applicable had the trust company returned Le Roy's original certificate to Dickson; yet it is clear beyond a doubt that in such a case Le Roy could have recovered the specific stock. The judgment of the referee is reversed, and judgment is to be entered in accordance with this opinion.

BATTLE & CO. CHEMISTS' CORP. v. UNITED STATES.

(Circuit Court, E. D. Missouri, E. D. April 17, 1901.)

Nos. 4,216, 4,299.

1. CUSTOMS DUTIES—CLASSIFICATION—CHLORAL HYDRATE.

Chloral hydrate is dutiable under paragraph 67 of the tariff act of 1897, as a medicinal preparation in the preparation of which alcohol is used, not specifically provided for, and not under paragraph 3, Schedule A, as a chemical compound not specifically provided for. Being both a chemical compound and a medicinal preparation in the preparation of which alcohol is used, it is classifiable as the latter, because such description is the more specific.

2. SAME—PROTEST—SPECIFICATION OF OBJECTIONS.

An importer must stand on the objections made in his protest, and cannot vary from nor enlarge them on the trial, nor in his petition for review. Where an article was classified as a medicinal preparation in the preparation of which alcohol was used, and the only ground of protest was that, conceding it to be such preparation, it was not dutiable as such, but as a chemical compound, the importer cannot insist, in proceedings to review the action of the board of general appraisers, that the classification was incorrect because it does not appear that alcohol was used in the preparation of the particular article imported, which might have been prepared otherwise.

Petition by importers to review the decision of the board of general appraisers affirming the classification for duty of certain imported merchandise.

Dickson & Smith, for plaintiff.

E. A. Rozier, U. S. Dist. Atty., and Geo. C. Hitchcock, Asst. U. S. Dist. Atty.

ADAMS, District Judge. In 1898, the plaintiff, which is a corporation organized under the laws of the state of Missouri, engaged in the manufacture of drugs and proprietary medicines, imported into this country 3,000 pounds of chloral hydrate, which was classified by

the collector of the port of St. Louis as a "medicinal preparation," within the meaning of paragraph 67 of the tariff act of July 24, 1897, and duty was assessed thereon at 55 cents per pound. On January 7, 1899, the duty so assessed was liquidated by the importer, and in due time a protest was filed, claiming that chloral hydrate should be assessed under paragraph 3, Schedule A, of the tariff act of 1897, as a "chemical compound," for the reason assigned that chloral hydrate is not a "medicinal preparation," within the meaning of the tariff law, but is a "chemical compound," and should be classified as such. The protest was duly considered by the board of general appraisers at New York, and overruled. Plaintiff then filed its petition in this court for a review of the decision of the board of general appraisers, and to recover the difference between the duty paid and that which should have been paid. The evidence before the court consists of the original return of the board of general appraisers made pursuant to the order of this court requiring that the board certify its proceedings here; the testimony, so far as the same is applicable, found in the transcript of record of a former case heard in this court between the same parties; and also the testimony of certain witnesses taken by the board of general appraisers in New York pursuant to an order of this court.

Paragraph 67 of the act of 1897 is as follows:

"Medicinal preparations containing alcohol or in the preparation of which alcohol is used, not specifically provided for in this act, 55 cents per pound, but in no case shall the same be less than 25 per cent. ad valorem."

Paragraph 3, Schedule A, of the act of 1897, is as follows:

"Alkalies, alkaloids, distilled oils, essential oils, rendered oils, and all combinations of the foregoing, and all chemical compounds and salts not specifically provided for in this act, 35 per cent. ad valorem."

The only question for consideration in this case arising on the protest of the plaintiff is whether the collector of the port at St. Louis and the board of general appraisers at New York should have classified the "chloral hydrate" in question as a "chemical compound" or a "medicinal preparation." The court of appeals of the Eighth circuit had a similar question before it in the case of *U. S. v. Battle & Co. Chemists' Corp.*, 4 C. C. A. 249, 54 Fed. 141, arising under the tariff act of 1890, in a suit between these same parties with reference to the same article of merchandise, and that court reached a conclusion, on the record before it, that "chloral hydrate" was, within the meaning of the tariff act of 1890, a "chemical compound," and not a "medicinal preparation," and should be classified as such for the purpose of assessing and liquidating duties thereon. Since the decision of that case, the supreme court of the United States, in the case of *Fink v. U. S.*, 170 U. S. 584, 18 Sup. Ct. 770, 42 L. Ed. 1153, has had occasion to determine the classification of "muriate of cocaine" under the tariff act of 1890. The question presented in that case was whether "muriate of cocaine" should be classified as a "medicinal preparation" of which alcohol is a component part, or in the preparation of which alcohol is used, or whether it should be classified as a "chemical compound" not specially provided for in the act. The tariff act of 1890 is in no essential respect different, so far as the

question now under consideration is concerned, from the act of 1897. All medicinal preparations of which alcohol was a component part, or in the preparation of which alcohol was used, were made dutiable at 50 cents per pound, instead of 55 cents per pound, as provided by the act of 1897; and all chemical compounds and salts not specifically provided for in that act were made dutiable at 25 per cent. ad valorem, instead of 35 per cent. ad valorem, as provided by the act of 1897. The particular article of importation involved in the Fink Case was an alkaloidal salt, and which is very frequently referred to as a chemical salt, and as falling clearly within the generic term "chemical compounds and salts," as found both in the acts of 1890 and 1897. The evidence before the court in this case satisfactorily shows that "hydrate of chloral" is used exclusively as a medicine. The evidence that it is employed in the arts is very slight, and not sufficient to inspire the conviction that such use is of any practical importance. The evidence also satisfactorily shows that chloral hydrate, although, generically speaking, a "chemical compound" of hydrogen, oxygen, and chlorine, is distinctively known in trade and commerce as a "medicinal preparation"; and although it is imported and sold to druggists and pharmacists in crystalline form, it is in that form a preparation for use medicinally, requiring no further chemical reactions for that purpose. It is true it is not commonly administered to the patient in its crystalline form, but is dissolved in water or syrup. This, however, is not for the purpose of chemically changing its substance or quality in any manner, but for the purpose only of providing a vehicle to convey it to the stomach. I do not think the evidence, taken as a whole, establishes the proposition of fact contended for by plaintiff that a "medicinal preparation," as used either in commerce or by the medical profession, is merely and only such a preparation of drugs and chemicals as is fitted and ready by itself for the use of the patient. If such were the case, as one of the witnesses properly remarks, the term would be limited in its application practically to patent medicines. The term, in my opinion, as shown by all the evidence in the case, rather means any preparation used for remedial purposes for the ailments of the human and animal body. But, even if the limited meaning contended for by plaintiff be given to it, I do not believe the use of water merely as a solvent to act as a vehicle for introducing the drug into the stomach is such a further preparation of the drug as changes it from one not prepared for the patient to one so prepared. It is the same thing either way,—a preparation used by druggists and physicians for remedial purposes,—and falls clearly within the term as employed by the acts of 1890 and 1897, a "medicinal preparation." The evidence in this case, as well as the manifest teachings of the Fink Case, shows that muriate of cocaine is a "medicinal preparation" in the same sense, and only in the same sense, as hydrate of chloral is. From all this it appears that the supreme court, when classifying muriate of cocaine in the Fink Case, was dealing with a similar substance to that now under consideration, and under the same provisions of the statutes.

Before stating the conclusions reached in this case, it is proper to say that the classification of chloral hydrate as made by the col-

lector and approved by the board of general appraisers is, "medicinal preparation, in the preparation of which alcohol is used." It was not claimed by them to be a "medicinal preparation" containing alcohol, but only one in which alcohol was employed in the process of its preparation. These are essentially different articles of importation, and recognized as such by the tariff act. There doubtless are many preparations which, when analyzed, disclose the presence of alcohol as a constituent element. There are also other preparations which, when analyzed, disclose no alcohol whatsoever, but in the preparation of which alcohol has been employed. This difference is well illustrated by the preparation now being considered. The usual, if not the only, practical method of producing it is to pass dry chlorine gas into or through absolute alcohol, and this process results in hydrate of chloral, with no remaining alcohol whatsoever in its component parts. So, when alcohol is employed as an instrumentality of making a medicinal preparation, it is dutiable as a distinctly medicinal preparation, even though the finished product may contain no alcohol whatever. So it appears that congress, by making use of the alternative in paragraph 67 of the act of 1897, must be held to have intended to make not only a medicinal preparation which contains alcohol as one of its component parts dutiable, but also any such preparation which, even though it contains no alcohol, has been prepared by the alcoholic process.

The plaintiff has taken some proof tending to show that chloral hydrate may be manufactured by certain processes from starch and sugar, or from acetal, the bye-product of the dry distillation of wood. It is claimed that in neither of these processes of manufacture is alcohol employed, and that neither of them results in a product which contains any alcohol; and plaintiff contends from this evidence that, inasmuch as there is no showing as to which process produced the chloral hydrate in question, it does not appear that it is dutiable at all as a medicinal preparation either containing alcohol or in the preparation of which alcohol is employed; and also contends that because of these several processes which may be employed in the manufacture of chloral hydrate the difficulty of ascertaining whether any particular importation is dutiable or not under the provisions of paragraph 67 of the act of 1897 is so great that congress must have intended to leave such preparations dutiable only as a "chemical compound." A fairly good answer to this contention is found in the provision of law requiring importers to make invoices and declarations containing a correct description of their imported merchandise. It can hardly be supposed—at any rate, the presumption cannot be indulged—that any importer would be so ignorant of the process employed in the manufacture of his merchandise, especially so when the law governing the classification of his importation requires him to know and disclose that fact. And inasmuch as the alcoholic process, according to the evidence in this case, is undoubtedly the almost universal process for manufacturing hydrate of chloral for commercial purposes, it would not be a difficult matter for an importer to ascertain whether any other exceptional and largely experimental process had been employed. But, of whatever little value may be the argu-

ment arising *ex inconvenienti*, it can have no bearing on this case. The plaintiff, in its protest, has admitted that the importation in question was one "in the preparation of which alcohol is used." As already seen, the classification as made by the officers of the government was of that kind, and plaintiffs' protest was not that the officers erred in classifying it as one "in the preparation of which alcohol is used," but, conceding it to be a preparation of that kind, it was urged that it was nevertheless dutiable only as a "chemical compound." An importer must stand on the objections made in his protest, and cannot vary from nor enlarge them in his petition for review, or on the trial. *Arthur v. Morgan*, 112 U. S. 495, 5 Sup. Ct. 241, 28 L. Ed. 825; *Herrman v. Robertson*, 152 U. S. 521, 14 Sup. Ct. 686, 38 L. Ed. 538; *Heinze v. Miller*, 144 U. S. 28, 12 Sup. Ct. 604, 36 L. Ed. 333; *Presson v. Russell*, 152 U. S. 577, 14 Sup. Ct. 728, 38 L. Ed. 559.

Application of the foregoing facts and principles of law leave the following question only for solution: Hydrate of chloral being undoubtedly a "chemical compound" in the generic sense, and being also a "medicinal preparation in the preparation of which alcohol is used," in a specific sense, and the only objection raised by the protest being that the substance should have been classified as a "chemical compound," and not as a "medicinal preparation," as done, has the plaintiff, upon whom the burden rests, made out a case requiring this court to reverse the action of the board of general appraisers at New York, because it did not classify it for duty as a "chemical compound"? The facts disclosed by the proof, in my opinion, bring this case within the principles of the *Fink Case*. It is there held, in substance, that when any article of importation may come within two classifications, one of which is more general and the other more specific, the proper rule requires the application of the more specific classification. The evidence in this case clearly establishes that a "chemical compound" is generic, and includes within it any specific medical preparation, and certainly such a specific medical preparation as either contains alcohol or is prepared by the use of alcohol; and, although chloral hydrate is undoubtedly a "chemical compound," it is more specifically defined as a "medicinal preparation," and, even more specifically than that, defined as a "medicinal preparation in the preparation of which alcohol is used." The evidence in this case, as well as the opinion of the supreme court in the *Fink Case*, shows that chloral hydrate stands in the same relation as muriate of cocaine does to "chemical compounds" and "medicinal preparations in the preparation of which alcohol is used"; hence the same rule of classification should be applied to both. The case before the court of appeals of this circuit, already alluded to, cannot be controlling of the judgment in this case for the following reasons: (1) The evidence relating to whether chloral hydrate is a "medicinal preparation" or not, and whether it is known in commerce or in the medical profession as such or not, is largely different from that before the court in the former case. New and important evidence was taken in this case on these questions, which did not appear in that case. (2) No question was raised in that case to the effect that plain-

tiff was bound by the objections made by it in its protest, and it does not appear that in that case plaintiff conceded that its importation was in fact a "medicinal preparation in the preparation of which alcohol is used." (3) The rule of construction of revenue statutes stated in the Fink Case, and its application to a substance like chloral hydrate, had not been announced by the supreme court before that case was decided.

It follows that the decision of the board of general appraisers at New York is approved, and judgment will be entered accordingly.

WESTINGHOUSE ELECTRIC & MFG. CO. v. SARANAC LAKE ELECTRIC LIGHT CO.

(Circuit Court, N. D. New York. April 27, 1901.)

No. 6,500.

1. PATENTS—ANTICIPATION—BURDEN OF PROOF.

Where anticipation has been clearly shown, if the date of the application be taken as the date of invention, the burden of proof is transferred to the patentee to establish by satisfactory evidence that the invention was made at an earlier date.

2. SAME—PATENTABLE INVENTION.

In contemplation of law, an invention does not exist until the inventor's theories and ideas have been reduced to practical form; it cannot be predicated of mere speculation and conjecture, but must be based on something ascertained, definite, and certain.

3. SAME—ANTICIPATION—ELECTRICAL DISTRIBUTION.

The Kennedy reissue patent, No. 11,031 (original No. 407,294), for an improvement in the method of distributing and regulating alternating electric currents by secondary generators, is void for anticipation.

4. SAME—PRIOR PUBLIC USE—EXPERIMENTAL USE BY INVENTOR.

The inventor of a system of electrical distribution, designed primarily to regulate the current in an electric lighting system, established a temporary lighting plant in a small town at the expense of the company by which he was employed, and for three months furnished a limited number of lights to customers, for some of which a charge was made. The purpose, however, was entirely experimental,—to test the device in actual use, and to enable the inventor to perfect and improve it,—and the portions of the apparatus which embodied the invention were kept locked from public inspection. *Held*, that such use did not constitute a prior public use of the invention, which invalidated a patent thereof granted on an application filed more than two years later, after the device had been perfected.

5. SAME—INFRINGEMENT—ELECTRICAL DISTRIBUTION.

The Stanley patent, No. 469,809, for a system of electrical distribution, was not anticipated nor invalidated by prior public use of the invention, and is valid. Claims 1 and 3 also *held* infringed.

In Equity. Suit for infringement of patents. On final hearing.

Frederick P. Fish and J. Edgar Bull, for complainant.

M. B. Philipp, C. E. Mitchell, and H. B. Brownell, for defendant.

COXE, District Judge. This is an equity suit charging the defendant with infringement of two patents owned by the complainant. The first of these is reissued letters patent No. 11,031, granted September 24, 1889, to Rankin Kennedy, of Glasgow, Scotland, for an

improvement in the method of distributing and regulating alternating electric currents by secondary generators. The second patent is No. 469,809, granted March 1, 1892, to William Stanley, of Great Barrington, Mass., for an improvement in systems of electrical distribution.

The Kennedy Patent.

The view which the court feels compelled to take of this patent renders extended discussion and analysis unnecessary. It can be sufficiently understood from the claim, which is as follows:

"The method of distributing and regulating alternating electric currents by secondary generators, which consists in producing in two or more derived circuits constituting the primaries of two or more secondary generators a counter electro-motive force which, when any secondary is open, is practically equal to the applied electro-motive force in its primary and in controlling said electro-motive force by the current flowing in the corresponding secondary when the secondary is closed in such manner that the current in the primary shall vary with and be approximately inversely proportional to the resistance in the secondary, substantially as described."

The application for the original patent was filed November 13, 1888. The original patent was dated July 16, 1889. The application for the reissue was filed August 28, 1889. It is conceded that the invention is anticipated unless the complainant has succeeded in showing that it was made in June, 1883—over five years prior to the time when Kennedy swore to the application and filed it in the United States patent office.

The patent being anticipated, if the date of the application be taken as the date of invention, the burden rests upon the complainant to satisfy the court that the invention was made at an earlier date. There is no presumption in favor of such a patent. The burden which rested upon the defendant in the first instance has been transferred to the complainant and it must furnish the court with convincing proof that the anticipation has been anticipated.

In *Loom Co. v. Higgins*, 4 Ban. & A. 88, Fed. Cas. No. 17,342, the court says, at page 98:

"The burden of proof rests upon the defendants to show, beyond a fair doubt, the prior knowledge and use set up; but, where they have sustained that burden by showing such knowledge and use prior to the patent, the burden of showing the still prior invention claimed, by at least a fair balance of proof, must rest upon the plaintiff."

Plow Works v. Starling, 140 U. S. 184, 198, 11 Sup. Ct. 803, 35 L. Ed. 404; *Thayer v. Hart* (C. C.) 20 Fed. 695.

The complainant assumes this burden and has attempted to discharge it by the introduction of three articles written by Kennedy and published in the *Electrical Review* of London in June, 1883, in which he describes some "interesting experiments." It is in the last sentence of the first of these articles that the invention of 1888 is said to be found, as follows:

"In parallel arc, however, the secondary generator is a beautiful self-governing system of distribution; but what about the size of conductors for such a system? Prodigious!"

This is the only time secondary generators in parallel arc are mentioned in any of the articles.

It seems to be conceded that the following are essential to the successful working of the method of the patent: First: A constant po-

tential generator. Second: Closed magnetic circuit transformers. Third: Lamps in parallel. Fourth: Plurality of transformers.

It is also conceded that none of these is mentioned in any of the Kennedy articles, but it is said that they are inferred, and that a skilled electrician would be able to construct the full-grown system from the emaciated skeleton thus exhibited. The court is compelled to think otherwise.

The impression produced upon the lay mind, at least, is that Kennedy had no clear conception of a practical system in 1883 and thought the obstacles so prodigious that he did not attempt to surmount them. If he had answered his question with the exclamation "impossible," it is not probable that it would be now asserted that he had solved the problem. And yet though his answer did not go to the extent of saying that the thing could not be done it was one of discouragement and surrender. He offered no solution and intimated that a practical solution could not be found. What he did can hardly be called an abandoned experiment for there was no experiment to abandon; it was only a tentative suggestion, an ingenious theory, a clever idea which is altogether too nebulous a foundation upon which to rest a patent which seeks to levy an immense tribute from the art and which was not thought of until five years afterwards. If the articles had been written by some one else and had been set up as an anticipation by the defendant it is easy to imagine with what contempt their indeterminate, incomplete and infeasible statements would be brushed aside by the complainant. In contemplation of law an invention does not exist until the inventor's theories and ideas have been reduced to practical form. It cannot be predicated of mere speculation and conjecture; it must be based upon something ascertained, something definite and certain. Rob. Pat. §§ 125, 127, 132. "The mere existence of an intellectual notion that a certain thing could be done, and, if done, might be of practical utility, does not furnish a basis for a patent, or estop others from developing practically the same idea." *Standard Cartridge Co. v. Peters Cartridge Co.*, 23 C. C. A. 367, 77 Fed. 630, 645.

But suppose that the articles contain the full statement for which the complainant contends; how then stands the case? In 1883 the inventor published to the world a full description of his invention. This act of itself seems inconsistent with the theory that he intended to secure a patent. If his purpose was to give the public the benefit of his experiments his course was entirely natural, but it was most extraordinary if he intended to secure a monopoly. On the 19th of November, 1886, Kennedy published a letter in the *Electrical Review* in which he takes issue with Zipernowski and Deri that they were the first to make "the simple connection of secondary generators in parallel arc." He maintains that he was the first to do this and says:

"I then thought of and tried parallel arc connection and perfectly succeeded in obtaining self-regulation. There certainly is not much visionary about that; the visions of a monopoly I am afraid are all on the other side, and my experiments and published results are likely to somewhat mar the beauty of monopoly visions. * * * I do not know anything about 'rational methods of connection of transformers,' I know only two methods of connecting to

the mains—series and parallel—both of which methods it is open for anybody to apply to any form of transformer."

Kennedy was not ignorant of the *modus operandi* of securing patents and received several in this country and in Europe prior to the patent in suit and after the letter of November, 1886, in which he expressly abandoned the right to the 1883 method to "anybody" who saw fit to use it. These patents were for transformation and distribution of electric energy, several of which would have supported the claim in issue, but no such claim was made.

The language of Mr. Justice Bradley in *Loom Co. v. Higgins*, 105 U. S. 580, 595, 26 L. Ed. 1177, 1183, seems appropriate:

"If Davis was the inventor of the wire motion applied to these looms, why did he never apply for a patent for it? He was already a patentee for a different and inferior apparatus. He knew all about the method of going about to get a patent. He belonged to a profession which is generally alive to the advantages of a patent right. On the hypothesis of his being the real inventor his conduct is inexplicable."

Between 1883 and 1888 other electricians had reduced the system of the patent to practice and they and the public had acquired rights of great value relying upon Kennedy's inaction and affirmative declaration that he had no monopoly and that what he had described was open and free to all. It is not necessary to hold that each of these acts and omissions considered separately worked an abandonment and dedication to the public; it is enough that taken together they lead to that result. In other words, there seems no escape from the conclusion that Kennedy intended that the public should have whatever he had contributed to the art in the 1883 articles referred to. His words are in harmony with his acts. He told the public that it was free to do all that he had done and knowing that the public had taken him at his word he made no effort to secure a monopoly until years afterwards.

The complainant practically concedes that the 1886 letter was an abandonment, but it argues that Kennedy's letter was addressed to the British public, that the gift was made only to Englishmen, and that the American public had no part or lot in the matter. There are many answers to this proposition, but a sufficient one is that the major premise is incorrect. Kennedy was not addressing the British public, but the skilled electricians of the world. His letter was not printed in a Glasgow paper, but in the *Telegraphic Journal and Electrical Review*, a periodical obviously designed to circulate among electrical specialists in every land and clime. That it was used as the medium through which citizens of other countries than England reached the electricians of every country is abundantly demonstrated in this record. He does not say that his method is open for Englishmen but "for anybody to apply."

The Stanley Patent.

The specification of the Stanley patent says:

"My invention relates to a system of distribution of electricity for industrial and economical uses, with special adaptation to incandescent electric lighting, although it is applicable also to other purposes. For simplicity of illustration

I shall describe in this specification the application of the invention to incandescent lighting only. I employ for this purpose a dynamo-electric machine generating an alternating current and a number of induction coils or converters organized to transform the current which is in the main line, at or near the points of consumption, from one potential to another—namely, a greater or less potential or to the same potential—in a secondary circuit. In this secondary circuit incandescent lamps or other translating devices are included.

* * * In the construction of the coils P and S the following principles are to be observed: The first thing to be determined is the length of the primary wire. This should be of such length that reacting self-inductively upon its own magnetic circuit the average counter potential so produced approximately equals the potential applied to the primary circuit. When so constructed, an ammeter will practically show no current when the secondary circuit is open. To obtain these results in practice I use the following method: I first choose the percentage of efficiency to be obtained. Then having selected a type of magnetic circuit affording as great magnetic conductivity as possible I apply such a length of primary conductor that acting self-inductively upon its core the difference of the counter potential and applied potential multiplied by the current in the converter shall equal the predetermined loss of energy inevitable in conversion and vary the length of primary wire until the desired results are attained. It is obvious that the co-efficients of induction in the dynamo and armature and converter may be made equal by energizing each circuit with the same induction. In the carrying out of my invention it is possible to use the same co-efficients of induction in the armature and the dynamo as are present in the primary circuit of the converters; but this equality is not necessary. Having by these means determined the length of the primary coil, the secondary is adapted to it in such a manner as to secure the desired potential according to the well-known laws affecting the operation of induction coils. I have usually related the potential of the secondary to the primary in the ratio of twenty to one. The size of the wire in the primary and secondary coils is in inverse proportion to their electro-motive forces."

The claims involved are the first and third. They are as follows:

"(1) In a system of electrical distribution, and in combination, an alternating current dynamo and converters electrically connected with the main-line conductors in multiple arc and organized to transform the current in the main conductors into currents of less potential and greater quantity in the secondaries, each converter made with a primary coil containing such length of wire exposed to magneto-electric induction that when operated by the dynamo with which it is to be used with its secondary circuit open the electrical pressure and counter-pressure in its primary circuit shall be equal with incandescent lamps or other translating devices in the secondary circuits, substantially as and for the purposes set forth." "(3) In a system of electrical distribution, and in combination, an alternating current dynamo and converters organized to transform the current generated by the dynamo into currents of less potential and greater quantity at or near the points of consumption electrically connected with the main-line conductors in multiple arc and having their primary circuits constantly closed, each converter adapted to the dynamo operating the system by making its primary coil of such length that when supplied with its full proportionate share of the entire normal electro-motive force of the machine, its secondary circuit being open, the electrical pressure and counter pressure in its primary circuit shall be approximately equal with translating devices in the secondary circuits of the converters to be cut out of the circuit when not in use without the introduction of any resistance in the place of them, substantially as and for the purposes set forth."

The defenses are: First: Anticipation by articles printed in various foreign publications, prior to November 25, 1885,—the date of Stanley's invention—describing the Zipernowski and Deri system at Budapest. Second: Public use more than two years prior to the application. Third: Abandonment. Fourth: Lack of invention. Fifth: Noninfringement.

Stanley's contribution to the art of electric lighting is an improvement upon the method described in the Kennedy patent. It still remained to discover a way to prevent the varying candle power of the lamps, on a given transformer, when a part of the lamps were turned off or on. If, for instance, there were 20 lamps on a transformer, and all were burning, the turning off of 10 would change the candle power of the remaining 10, increasing their luminosity. If they were turned on again the candle power of all would go down. The difficulty was a serious and perplexing one, and electricians generally were searching for a solution but always along the same lines. Stanley found a solution by doing what no one had ever thought of doing before. He discovered that he could remedy existing evils by regulating the length of the wire on the primary coil of the transformer. The patent tells those skilled in the art how to accomplish this result. To the uninitiated Stanley's rule seems indefinite and obscure, but electricians have no difficulty in understanding it. He determines the correct length of the primary coil by winding on wire after the transformer, in circuit, is connected with the dynamo, until the loss of energy represented by the formula C^2R equals the predetermined loss of energy to be suffered in the system. The length of the wire is varied until the desired results are attained. The rule is thus succinctly stated by the inventor himself:

"I apply such a length of primary conductor that, acting self-inductively upon its core, the difference of the counter potential and applied potential, multiplied by the current in the converter, shall equal the predetermined loss of energy."

What Stanley did was an exceedingly valuable addition to the art. He remedied a serious defect; he secured without unnecessary waste of current constancy of secondary pressure as lamps were turned on or off; he struck out into a new path and brought back the prize which, if he had continued upon the old paths, he never would have found. Such a discovery cannot be attributed to the skill of the calling.

The Zipernowski and Deri Article

Is the patent anticipated by the publication of an article in the London Electrical Review of August, 1885, describing the Zipernowski and Deri plant at Budapest? This inquiry must be confined strictly to the article. The question is not what was actually done at Budapest, but what does the article say was done there. The law provides that an inventor shall not be denied a patent because the invention or discovery was known or used in a foreign country. In order to defeat the patent the invention must have been known or used by others in this country or patented or described in a printed publication in this country or a foreign country. Rev. St. §§ 4886, 4923. The burden of proving anticipation rests upon the defendant and he must do this by clear and convincing evidence. Barbed-Wire Patent, 143 U. S. 275, 284, 12 Sup. Ct. 443, 450, 36 L. Ed. 154. The publication relied on must describe the invention in such a complete, clear and precise manner as to enable those skilled

in the art to reproduce it without the aid of the patent. If the differences are only those which the skill of the art will readily supply the publication will not be destroyed as an anticipation, but it will be destroyed if these differences relate to essential features, and independent investigation and experiment are required to explain obscurities and supply omissions. The mere assertion that the desired result has been accomplished without stating how, without describing the means which produced the result, is insufficient. Walk Pat. § 57; *Hanifen v. Godshalk Co.*, 28 C. C. A. 507, 84 Fed. 649.

The article in question imparts no information upon the one subject which is the all essential feature of the Stanley invention, namely, the length of the primary wire and the method of determining the same. Would an electrician reading the article in August, 1885, know how to construct the coils P and S of the Stanley patent? Would a system of distribution constructed upon the information found in the article infringe the claims in question? It is thought not.

After pointing out the advantages of the system, and it is to be noted that the writer can hardly be charged with an overproduction of modesty in this regard, the article proceeds to describe the manner in which these advantages can be secured as follows:

"In order to increase the yield of induction apparatus their inductive action must be increased as much as possible. This can be effected, in the first place, by increasing the rapidity of the current pulsations, that is the changes of the direction of the current; secondly, by bringing the primary and the secondary wire as near to each other as possible; and, thirdly, by increasing the diameter of the iron core inside the coil."

This gives no information which is useful in remedying the defects with which the patent has to deal. It fails to tell electricians how the length of the primary wire can be co-related to the voltage and alternations of the current supplied. In short, it may be said, in the language of complainant's expert, that:

"A person reading these articles would be in the unenviable position of knowing with great exactness and detail the results that it was desired to obtain, without the slightest information as to how they were to be obtained, except that he was to use a type of transformer or induction coil which had first been described by Faraday in 1831, and in its perfected form by Varley as early as 1856."

The truth of this conclusion is still further demonstrated by the fact that although a large number of the foremost electricians of the world read the article and commented upon it none of them found out a way to remedy the defect, and the court is satisfied that no one did remedy it till Stanley showed them how.

The Great Barrington Use.

The statute provides that an inventor who complies with the law in other respects may obtain a patent unless the invention has been introduced into public use in the United States for more than two years prior to the application. Rev. St. §§ 4886, 4887. The leading case upon this subject is *Elizabeth v. Pavement Co.*, 97 U. S. 126, 24 L. Ed. 1000. The court says:

"That the use of the pavement in question was public in one sense cannot be disputed. But can it be said that the invention was in public use? The use of an invention by the inventor himself, or of any other person under his direction, by way of experiment, and in order to bring the invention to perfection, has never been regarded as such a use. * * * When the subject of invention is a machine, it may be tested and tried in a building, either with or without closed doors. * * * It would not be necessary, in such a case, that the machine should be put up and used only in the inventor's own shop or premises. He may have it put up and used in the premises of another, and the use may inure to the benefit of the owner of the establishment. Still, if used under the surveillance of the inventor, and for the purpose of enabling him to test the machine, and ascertain whether it will answer the purpose intended, and make such alterations and improvements as experience demonstrates to be necessary, it will still be a mere experimental use, and not a public use, within the meaning of the statute. While the supposed machine is in such experimental use, the public may be incidentally deriving a benefit from it. If it be a gristmill, or a carding machine, customers from the surrounding country may enjoy the use of it by having their grain made into flour, or their wool into rolls, and still it will not be in public use, within the meaning of the law."

Within this rule the court is of the opinion that the use in question was not public but was experimental. The application for the Stanley patent was filed August 15, 1888. The use at Great Barrington began March 16, 1886, and ended June 16, 1886, being in operation, subject to breakdowns and delays from faulty construction, for a period of three months.

The reasons which induce the court to say that this use is not fatal to the patent may be summarized as follows:

First: Stanley went to Great Barrington under a contract with the Westinghouse Company to perfect his system and make it commercially successful. The Westinghouse Company paid his salary, furnished large sums of money and imported from Europe not only expensive machinery but an expert electrician to assist in the work. All patents obtained for inventions at Great Barrington were to be assigned to the company. Both Stanley and Westinghouse were conversant with the provisions of the patent law and were working to secure for the company the monopoly of the best electric lighting system which human intellect could devise. It seems incredible that such men, dealing with interests of such transcendent magnitude, should abandon their vast schemes of wealth and empire in the electric world in order that they might pocket the paltry revenues from a 60-lamp plant in a country town.

Second: The experiments were of such a character that they had to be performed at a distance from the laboratory and dynamo. Stanley was endeavoring to elaborate a self-regulating system and the only sure way to prove such a system was to test it in actual use. This, of course, involved stringing wires about the town and putting lamps in public and private buildings, but no one save Stanley and his assistants were aware of the new elements which had been introduced into the combination. The engine and generator were hidden from public view in an old rubber mill, temporarily fitted up as a laboratory; the transformers were locked up. Writing, at the time, to Mr. Westinghouse the inventor says: "All the converters are under lock and key so that no one knows anything

about them." Nothing was visible that could give the public any information as to the character of the experiments. The poles, the wires, the lamps were visible and public; the essential features of the system were invisible and private. In short, the invention was not in public use.

Third: All of the persons acquainted with the work at Great Barrington testify unreservedly that it was experimental. Stanley says: "I was experimenting with alternating currents." Belfield, the English electrician, who came to this country at the request of Mr. Westinghouse to assist in the work, says:

"The sole object of the installation at Great Barrington, as I understood it, was entirely of an experimental nature, so that the faults of the system could be discovered and remedied in order that when the apparatus should be installed commercially there would be less chance of failure and the system would be a successful one."

Pantaleoni, who with others visited the plant in the interests of the Westinghouse Company, testifies:

"The whole idea of Stanley in going to Great Barrington was to try an experiment on the public. The laboratory was located quite close to the city. The alternator was a low-voltage machine. But his experiments proved that, as far as the service was concerned, a sufficiently good service could be given with an alternating system to satisfy the public. And this was, of course, one of the points to be ascertained. All the party thoroughly understood that we were looking at a commercial experiment. It was clearly understood that, while we were all extremely pleased at what we had seen, very much more was needed for a commercially successful plant. The plant itself had been paid for out of the experimental fund. The generator was clearly not one that would have been used for an actual plant. The distance was so short that commercially as a business proposition a three-wire system would certainly have been cheaper and better."

Pope, who was intimately acquainted with Stanley's purposes and expectations and who visited Great Barrington in April, 1886, testified in an interference case before the patent office as follows:

"Stanley had established a laboratory in an old factory building in Great Barrington, and was experimenting mainly, as I remember, with converters of various forms and proportions in order to determine which was the most efficient and convenient form. He had an experimental lighting plant in operation, lighting half a dozen stores in the village, half a mile or so from the laboratory, and this I examined with some particularity."

The written evidence is of the same purport. No one can read the contract between Westinghouse and Stanley and reach any other conclusion than that the latter's work at Great Barrington was solely to perfect his invention for the benefit of the Westinghouse Company. One of the provisions of the contract is as follows:

"No extended series of experiments shall be entered upon without first notifying the president or general manager of said company, and receiving his written permission to proceed; it being understood that the company through its general manager, is to direct the general course of experimentation and the nature of the results which it is desired to attain, but that the details of the work are to be carried out by the said Stanley in what he may consider the best manner."

On March 17, 1886, Stanley wrote Westinghouse as follows:

"I am pleased to be able to inform you that the secondary system is being rapidly completed. As I mentioned some time ago, I believe the true way to study it is to give it a commercial test here in town. I have, therefore, run

wires from the laboratory to the village, and have placed a converter in my cousin's store in order to test the commercial necessities. The lamps in the store were running last night. I expect to have three or four lamps in the hotel (the Berkshire House) and in three or four other stores running in a few days more. In short, I expect to have a demonstration of the system ready for inspection within two weeks' time, perhaps sooner. * * * I am striving all I can to finish this system for you at the earliest possible date, but it is expensive work. Possibly you will allow me a longer rest when I have finished my work. I might say a great deal about the system, but, briefly, it is all right. I will send a fuller report in a few days. I am now right in the midst of the work. The working drawings for the converters will be ready very soon."

The testimony both oral and written is absolutely inconsistent with the idea that Stanley was managing the plant as a commercial venture. He had no right to do this and every consideration of honor and self-interest were against it.

Fourth: Even as an experiment the Great Barrington venture was not wholly successful as it broke down before the success of the system was fully demonstrated. Another test had to be made at an expense of \$4,000 to the Westinghouse Company. A plant was installed for this purpose at Lawrenceville, near Pittsburgh. The first commercial plant was installed at Buffalo in the latter part of November, 1886.

Fifth: The fact that a charge was made for the lights is the strongest piece of evidence in support of the defendant's contention, but it is thought that it is insufficient to outweigh all the other evidence in the record which points to a different conclusion. When the subject was fresh in his mind and before his interests were antagonistic to those of the complainant Stanley testified as follows:

"Q. What arrangement did you have with the citizens to whom you furnished the light for payment for it? A. I do not remember now the exact arrangement. I was obliged to ask something for the light in order not to light the whole town. I think I received about \$8 a year from some of the lights. Nothing from others. I did not erect a plant for the purpose of making money out of it."

In other words it was a defensive arrangement on his part in order to limit the number of lamps to those needed for experimental purposes and also to prevent complications with his neighbors. The amount actually received was ridiculously small and there seems to have been no agreement on either side which was not of the most transitory nature. The fact that a few of the lamps were paid for is not inconsistent with the theory that the use was experimental.

In *Manufacturing Co. v. Sprague*, 123 U. S. 249, 8 Sup. Ct. 122, 31 L. Ed. 141, the supreme court says, at page 256, 123 U. S., page 126, 8 Sup. Ct., and page 143, 31 L. Ed.:

"A use by the inventor for the purpose of testing the machine, in order, by experiment, to devise additional means for perfecting the success of its operation, is admissible; and where, as incident to such use, the product of its operation is disposed of by sale such profit from its use does not change its character."

Abandonment.

The court is unable to find sufficient proof that either Stanley or the complainant was guilty of such laches as to warrant the conclusion that the invention was forfeited and abandoned.

Infringement.

The converters used in the defendant's plant were furnished by the Stanley Electric Manufacturing Company. Those converters when operating in a system supplied with a current of constant E. M. F. depend upon variations of their counter E. M. F. caused by variations of their secondary currents for their self-regulating property. It is asserted, and not denied, that the defendant's transformers were actually designed by Stanley himself. In these circumstances the presumption that they infringe is not a particularly violent one. The defendant's plant exhibits all of the elements of the first and third claims which, all agree, are substantially similar. It employs, in combination, in a system of electrical distribution: First: An alternating current dynamo. Second: Converters electrically connected with the main line conductors in multiple arc. Third: The converters are organized to transform the current in the main conductors into currents of less potential and greater quantity in the secondaries. Fourth: Each converter is made with a primary coil containing such length of wire exposed to magneto-electric induction that when operated by the dynamo with which it is to be used, with its secondary circuit open, the electrical pressure and counter pressure in its primary circuit are approximately equal. Fifth: Lamps in the secondary circuit. In these circumstances the order in which the steps, necessary to produce the desired transformer, are taken would seem to be immaterial. Indeed when the testimony of defendant's experts is considered as a whole it hardly amounts to a denial of infringement of the first and third claims. The complainant is entitled to a decree as to these claims, but without costs.

DE HAVEN v. STANDARD METAL STRAP CO.

(Circuit Court, S. D. New York. April 16, 1901.)

PATENTS—INFRINGEMENT—METALLIC BOX—STRAPS.

The Dana patent, No. 374,587, for an improved metallic box strap, constructed, and *held* not infringed.

In Equity. Suit for infringement of patent. On final hearing.
Robert Stewart, for complainant.
W. P. Preble, Jr., for defendant.

COXE, District Judge. The complainant is the owner of letters patent No. 374,587, granted December 13, 1887, to Charles H. Dana for an improvement in metallic box strapping. The action is in the usual form. The specification says:

"The object of my invention is to provide a ready-made metallic strapping for boxes, one in which the shape of the nail hole will not weaken the strength of the material, the driven nail spreading open the walls of said holes and contracting the strap in length, thus tightening the strap about the box in a high degree. * * * A is the strap. It may be made of any suitable soft flexible metal. At proper intervals there are made apertures, aa, for the fastening nail. These holes are shown as diamond shaped, but may be oval. It will be noticed that the metal on either side of the hole is of equal width,

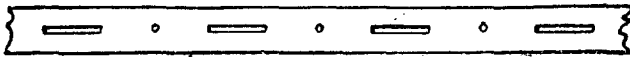
and it is important to so make them, so as not to weaken the strap. This cannot be done by a die which cuts away a substantial portion of the metal, but may be done by making a slight cut through the metal and spreading or wedging it out laterally to form the desired opening, which will have its lateral walls of equal thickness without any of the material being taken away. A punch can easily be designed for performing this operation."

The claim is as follows:

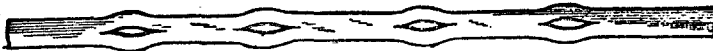
"A solid metallic box strap having at intervals cuts and having the material on each side of the cuts spread laterally, whereby the strap is in no way weakened, as and for the purpose stated."

The defenses are lack of patentable novelty and noninfringement. The entire situation can be clearly understood by placing in juxtaposition diagrams representing the prior art and the patented and alleged infringing strap:

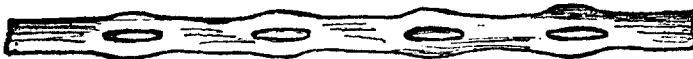
Prior Art



Patent



Defendant.



It is conceded that perforations in a flat or twisted wire strap, before the strap was put to use, were old and that it was also old to enlarge perforations previously made. The only novelty suggested is stated in complainant's brief as follows:

"The perforation of a strap with these holes already spread is new as is also the combination in a box strap of these principles so as to provide a stronger and more efficient strap, presenting a strikingly characteristic appearance and adopted to bring about a better fastening is new, and produces a new and useful result."

As this is not a design patent it would seem that the characteristic appearance, admitting it to exist, is immaterial, and the suggestion that the strap produces a new and useful result seems to be largely imaginative and theoretical. The prior art shows holes of almost every conceivable shape—round, square, oblong, rectangular and oval. The patentee adds diamond shaped holes to the list although he says they "may be oval." He makes these holes by cutting slits in the metal and wedging it out laterally with a punch.

Assuming, in order to stop debate, that this slight and unimportant change involves invention, it is obvious that the claim must be confined to the precise structure shown. So construed the defendant does not infringe. It punches out with a die a strip equal to one-third of the width of the strap. In short, it adopts a method which the patentee was particularly anxious to avoid and which he distinctly says cannot be used to produce his strap. The patented device cannot be made "by a die which cuts away a substantial portion of the metal." The bill is dismissed.

DICKERSON et al. v. MAURER.

(Circuit Court, E. D. Pennsylvania. April 25, 1901.)

No. 33.

PATENTS—VALIDITY AND INFRINGEMENT—PHENACETIN.

The Hinsberg patent, No. 400,086, for the chemical product known commercially as "phenacetin," which is a valuable remedy, largely used by the medical profession since its production by the patentee, held not anticipated, valid, and infringing.

In Equity. Suit for infringement of patent. On final hearing.

Livingston Gifford and Anthony Gref, for complainants.

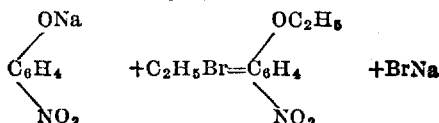
Hector T. Fenton, for respondent.

J. B. McPHERSON, District Judge. The patent in suit, No. 400,086, was granted in March, 1889, and is not for a process, but for the chemical product known commercially as "phenacetin." When the action was begun, the patent was owned by Edward N. Dickerson, one of the complainants, but since February 10, 1899, it has been, and is now, the property of the other complainant, the Farbenfabriken of Elberfeld Company. The specification and claim are as follows:

"Be it known that I, Oskar Hinsberg, a citizen of the empire of Germany, residing at Barmen, in the said empire, have invented a useful improvement in the manufacture of a new pharmaceutical product, of which the following is a specification:

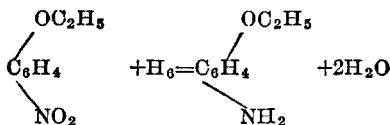
"My invention relates to the production of a new pharmaceutical product, a new antipyretic and antineuralgic, obtained by reducing nitrophenetol, and melting the phenetidin chlorhydrate thus formed with dried sodium acetate and acetic acid.

"In carrying out my process practically, I proceed as follows: Fifty kilos of the potassium salt of paranitrophenol are mixed with three hundred kilos of alcohol, adding forty kilos of bromoethyl. The mixture is heated in an autoclave, at a pressure of three to four atmospheres, during about eight hours. At this time the reaction is finished, whereby paranitrophenetol is obtained according to the following equation:

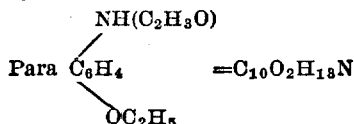


"In order to separate the mononitrophenol, which has not taken any part in the process, from the ether recently formed, the solution is treated with steam. By this operation the ether distills, leaving behind the paramononitrophenol.

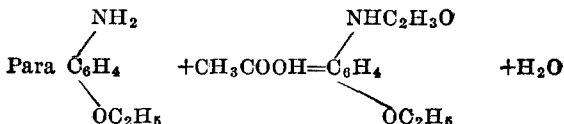
"For the reduction of the paranitrophenetol forty kilos of this ether are mixed with sixty kilos of muriatic acid and sixty kilos of water. To this mixture are gradually added, at a temperature of 70° centigrade, twenty-five kilos of iron filings, the whole being stirred continually. As soon as the ether is entirely reduced, para-amidophenetol is obtained, as explained by the following equation:



"The solution obtained in this manner is saturated with chalk diluted with water, and for the purification of the amido compound treated with steam the distillate is absorbed in water acidulated by muriatic acid. The muriatic salt of the para-amidophenetol crystallizes in white leaves. Fifty kilos of this product are melted with one molecule of melted acetate of sodium and twenty-four kilos of glacial acetic acid. The melted mass is repeatedly boiled with water, and the new monoacetylparamidophenetol obtained from the filtrates after cooling. It has the following chemical formula:



—And is obtained according to the following equation:



"The monoacetylparamidophenetol crystallizes in white leaves, melting at 133° to 136° centigrade. It is tasteless, little soluble in cold water, more so in hot water, but easily in alcohol, chloroform, benzole, etc. It is altogether different from the body described in the Year Book of Pharmacy 1883, page 146, denominated 'phenacetin.' The formula of phenacetin is $\text{C}_{10}\text{H}_{12}\text{O}$; that of phenacetin, $\text{C}_{10}\text{H}_{13}\text{O}_2\text{N}$,—my product containing nitrogen, contrary to phenacetin. The phenacetin represents a coloring matter, an amorphous carmine red powder, the acid solution of which is yellow, the alkaline raspberry red; while my phenacetin is colorless, crystallizing in white leaves, not changing color by addition of acids or alkalies.

"Having thus described my invention, what I claim as new, and desire to secure by letters patent, is:

"The product herein described, which has the following characteristics: It crystallizes in white leaves, melting at 135° centigrade; not coloring on addition of acids or alkalies; is little soluble in cold water, more so in hot water; easily soluble in alcohol, ether, chloroform, or benzole; is without taste, and has the general composition $\text{C}_{10}\text{H}_{13}\text{O}_2\text{N}$."

The defendant infringed the patent during the ownership of each complainant, by selling in this district, without proper license, the identical chemical product described in the claim. There is no other chemical substance than phenacetin that possesses all the characteristics specified in the claim, and these characteristics are possessed by the substance sold by the defendant. Indeed, there is no real

dispute concerning the substance sold by the defendant. The chief controversy has been waged over the validity of the patent, and infringement cannot be seriously denied, if the letters are good.

Several defenses are set up, but, in my opinion, only one defense calls for consideration, namely, whether the invention was anticipated by a published article known in the testimony as the "Hallock Publication." Upon this point the relevant facts are as follows: If the Hallock publication does not anticipate the patent, phenacetin was invented by Oskar Hinsberg, a chemist in the employ of Bayer & Co., at Elberfeld, Germany. It is an acetyl derivative of paramidophenetol, its chemical name being monoacetylparamidophenetol, although it is sometimes called also "Acetphenetidin." Before February 26, 1887 (to use the language of one of the witnesses,—Complainants' Record, p. 43), "Hinsberg was for some time engaged with the chemical investigation of certain amidophenols and their acetyl derivatives. After the production by him of these new bodies, and after the discovery of their nature and properties, he associated with himself Prof. Kast, a physician, who at that time taught at the University of Freiburg. Hinsberg produced and discovered the new body, and suggested its utility in medicine, but as he was a chemist, and not a physician, he was unable to sufficiently test its effects as a medicine by submitting his new drugs to clinical experiments and observations, and therefore associated himself with Prof. Kast for these purposes. Of course, after the discovery of a medicinal body, it is necessary that its action should be tried for a long period to determine the best way of administering it, and in what cases it should and should not be administered, and what are its effects, both ultimate and approximate, before it can safely be placed upon the general market."

On February 26, 1887, the result of these investigations and experiments was given to the world in the *Centralblatt für die Medicinischen Wissenschaften*, a German periodical, in an article published by Hinsberg and Kast "On the Action of Acetphenetidin," this being one chemical name of the patented substance. For present purposes, this date is accepted by both parties as the true date of the Hinsberg invention; and therefore if the Hallock publication, which appeared in 1879 or 1880, properly describes phenacetin, within the rules of law upon this subject, the defense of anticipation is made out. The Hallock article is as follows:

"Phenetol is violently attacked by fuming nitric acid, but is unaffected by concentrated nitric acid, in the cold. Cahours, who first tried the action of fuming nitric acid upon phenetol, obtained, he says, both a solid and liquid product. The former he analyzed, and found to be dinitrophenetol; the latter he supposed to be mononitrophenetol. The writer repeated these experiments with somewhat different results. The dark red viscous liquid obtained by the action of fuming nitric acid upon pure phenetol, or on a solution of phenetol in acetic acid, was distilled in a current of steam. The product consisted of a solid and a liquid, in varying proportions according to the conditions of the nitration. The solid, when purified by repeated recrystallization, both from acid and from alcohol, was proved by an ultimate analysis to be a mononitrophenetol. Its melting point, 58° C., and other physical properties, coincided with that of paramononitrophenetol, prepared by Fritzsche in 1858 by the action of iodide of ethyl upon the silver salt of paranitrophenol. The

writer also obtained the same body by the action of potassium ethylic sulphate and potassic hydrate upon paranitrophenol in sealed tubes at high temperatures. In this operation, however, a considerable quantity of the nitrophenol remained unchanged. Iodide of ethyl and potassic hydrate heated in a sealed tube with paranitrophenol also yielded, as was expected, the same body, but quite impure. The method of direct nitration yields the purest product, but is quite tedious. When the nitration was performed with nitric acid, from which the red fumes had been removed by previously boiling, or by means of hot concentrated acid, the product is mostly liquid, and refused to crystallize, even at low temperature. This liquid was apparently a mixture of ortho-nitrophenetol and unchanged phenetol holding some paranitrophenetol in solution.

"Having obtained a considerable quantity of the paranitrophenetol, an attempt was made to reduce it by means of tin and hydrochloric acid. The resulting salt, after the removal of the tin with sulphydric acid, crystallized from water, in which it was very soluble, in rhombic plates with a pearly lustre.



An ultimate analysis established the composition as $\text{HCL} \cdot \text{C}_6\text{H}_4\text{NH}_2$. With platinum chloride it yielded a very beautiful double salt in bright golden flakes, but easily decomposable, especially when heated.

"These crystals, when treated with potassic hydrate, yield an oily liquid resembling aniline. It boils at 253°C . (uncorrected), and is doubtless para-monamidophenetol. A portion of the salt appears to suffer a further decomposition, so that the amount of oil obtained was very small. This oil combines, like aniline, directly with acetyl chloride to a crystalline solid. In combination with carbon disulphide it also yields a solid body. The writer did not succeed in obtaining this amidophenetol by the action of ammoniac sulphide upon the nitrophenetol at high or low temperature.

"The black mass remaining in the flask, after the mononitrophenetol has been distilled off, contains dinitrophenetol, but is difficult to purify."

This "crystalline solid" is said to have been phenacetin, and upon the sentence containing the phrase just quoted the whole defense of anticipation rests. It is, I think, a slender foundation, not sufficient to sustain so great a weight. It would be profitless to review the technical expert testimony concerning this solid, and to repeat the long chemical terms and elaborate formulas that are found in the record. It is enough to state the conclusion at which I have arrived, after considering all the evidence. In my opinion, Hallock's "crystalline solid"—which might have been any one of nine distinct chemical bodies—was probably a poisonous substance, perhaps containing phenacetin, but differing as a whole from that body, and possessing different characteristics. The complainants are, I think, correct in saying that "it was not either in quantity, quality, or condition suitable for chemical or commercial purposes, or for any use," and that "it was not intended for use, and was not known or described as being, or containing, anything capable of any use." Such a substance, vaguely and insufficiently described, neither intended nor used for any useful purpose,—a mere laboratory product, whose qualities were neither known nor stated,—should not be regarded as an anticipation.

Phenacetin is a valuable antipyretic and antineuralgic remedy, and was so recognized immediately by the medical profession. It does not depress or injure the nervous system, and is therefore used in the treatment of many diseases. It has been extensively sold in the United States and elsewhere, the sales in this country between 1890 and 1900 being more than 3,000,000 ounces; this quantity being

equivalent to 150,000,000 doses, the value being more than \$10,000,000. This very useful and valuable product was deliberately sought for by Hinsberg. It came into existence by the exercise of his inventive faculties, and he is entitled to the fruit of his beneficent labor, unless it clearly appears that he was not the first in the field. As I regard the testimony, his claim to priority has not been successfully attacked, and the complainants are therefore entitled to the usual decree, with costs of suit.

HEAP v. BORCHERS.

(Circuit Court, E. D. Pennsylvania. May 11, 1901.)

No. 27.

ACTION ON PATENT—PLEA—SUFFICIENCY.

In a suit on a patent, a plea alleging that the patent expired 22 days after the bill was filed, and before defendant was required to answer, is sufficient where a preliminary injunction was not moved for, and the bill does not allege prior adjudication, nor acquiescence, nor any fact on which such a motion could have been founded.

See 106 Fed. 558.

Edwin H. Brown, for complainant.

Jos. C. Fraley and Henry N. Paul, Jr., for respondent.

DALLAS, Circuit Judge. The plea which has been filed alleges that the patent upon which the bill is founded expired on December 4, 1900, and the question for decision is: Would that fact, if established, divest the court of jurisdiction to determine this controversy in a suit in equity? The point is not a new one. Upon facts more or less like those now presented, it has on several occasions been considered by the courts; and while, at first glance, it may seem that the conclusions which they have reached are not entirely harmonious, I have, by careful examination made in the light of a very helpful argument, been brought to perceive that they are not conflicting. In some instances, it is true, bills have been retained which had been filed but a very short time prior to the expiration of the patent, while in others they have been dismissed although the patent continued in force for a considerably greater period after the bringing of the suit; but this variance in result does not indicate that the judges who have heretofore been called upon to consider the question have differed concerning the underlying principle upon which, in my opinion, its correct decision actually depends. The important inquiry is, not merely as to the period intervening between the filing of the bill and the expiration of the term of the patent, but is whether the complainant had, prior to its expiration, placed himself in a position entitling him to any equitable relief; and in the present case it seems to be clear that this had not been done. The plea alleges that the patent in suit expired 22 days after the bill was filed, and, therefore, before the defendant was required to answer. A preliminary injunction was not moved for, and the bill does not allege prior adjudication, nor acqui-

escence, nor any fact whatever upon which such a motion could have been founded. Consequently, although the bill does contain the usual prayer for a preliminary injunction, no title to that relief had been either alleged or shown; and as it is not asserted that at the time when the patent is said to have expired any other relief could have been obtained, it follows that, if this plea should be sustained by proof, the bill to which it relates must necessarily be dismissed. Therefore the plea is allowed, but with leave to the complainant to reply thereto within such time as counsel may agree upon, or as, upon notice and motion, the court shall prescribe.

HOLMES, BOOTH & HAYDENS v. MCGILL.

(Circuit Court of Appeals, Second Circuit. April 3, 1901.)

No. 57.

1. PATENTS—CONTRACT FOR MANUFACTURE AND SALE OF PATENTED ARTICLE—CONSTRUCTION.

A contract gave defendant the exclusive right for a term of 20 years to make and sell an article covered by a patent issued to plaintiff, which then had 7 years to run, and such other patents as had been or might be granted to plaintiff for improvements thereon or similar articles. It provided for the payment of a royalty consisting of a percentage of the net profits, which was to be reduced on the expiration of the basic patent on articles which had previously been made thereunder, and should thereafter be made under the later patents. A license was executed by plaintiff at the same time, covering a number of patents specified therein. On the expiration of the original patent the contract was modified, and another license, covering additional patents, was executed. Still later the contract was extended for 30 years, and to cover still other patents. All articles made and sold thereunder purported by their labels to have been made under some one or more of plaintiff's patents. *Held*, that such contracts were not for a division of profits on the business of making and selling the article covered by the original patent, during the life of the contracts, irrespective of the life or validity of the patents, but for the payment of royalties on articles to be made and sold under patents then existing.

2. SAME—LICENSES—LIABILITY FOR ROYALTIES.

So long as a licensee continues to manufacture and sell under a patent presumably valid, without having given notice of its invalidity, and without eviction, he is presumed to manufacture in accordance with his license, and the invalidity of the patent is no defense to a suit against him for royalties.

In Error to the Circuit Court of the United States for the Southern District of New York.

George W. McGill, a citizen of the state of New York and resident of the city of New York, brought four actions at law against Holmes, Booth & Haydens, a Connecticut corporation, before the United States circuit court for the Southern district of New York, to recover royalties under the contracts annexed to the complaints for the succeeding quarters of a year from April 1, 1895, to July 1, 1896. The four suits were, by order of court, consolidated, and were referred by written consent of the parties to Hon. William G. Choate "to hear and determine all the issues herein, a jury having been waived, and judgment may be entered upon his report or decision as such referee with the same force and effect as if the issues had been heard and decided by the court under stipulation for a trial by the court without the intervention of a jury."

Judgment was entered in the consolidated suit in favor of the plaintiff for \$20,315.96 in accordance with the report of the referee. This writ of error was brought to review the judgment. The questions in the case are upon the construction of a contract dated March 23, 1876, and three amendments or additions thereto.

John E. Parsons, for plaintiff in error.

Henry G. Atwater, for defendant in error.

Before WALLACE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge (after stating the facts as above). In 1876, McGill was manufacturing metallic paper fasteners known as "McGill's Fasteners" under patents issued to himself as inventor, the fundamental patent having been issued July 24, 1866; and on March 23, 1876, entered into a written contract with the defendant, a corporation largely engaged in the manufacture of brass and copper articles. The portions of the contract which relate to the present controversy are as follows:

"Whereas, George W. McGill is now the sole owner of letters patent of the United States No. 56,587, issued to him July 24, 1866, for a metallic fastener, and is also sole owner of several letters patent of subsequent date issued to him for elaborations and modifications of said fastener, all of which subsequently dated patents are subordinate to and controlled by said letters patent of July 24th, 1866; and whereas, the firm of Holmes, Booth & Haydens are desirous of making and selling both in the United States and foreign countries all of said fasteners, and other articles made under said patents, and all articles made in the similitude of said fastener which the said McGill has now or may hereafter devise or patent: Now, therefore, it is agreed between the said George W. McGill and said Holmes, Booth & Haydens as follows: First. Said Holmes, Booth & Haydens are to have the sole and exclusive license and right to manufacture all of McGill's fasteners and suspending devices secured and controlled by the before-mentioned patents, or which may be secured by subsequent patents issued to said McGill. Second. The prices which the said Holmes, Booth & Haydens are to render as the cost of said goods shall not exceed twenty-five per cent. over the actual cost of the material and labor used in the manufacture; the price of ordinary brass to be 10 cents per pound above the average price of lake ingot copper. Third. The prices which the said McGill now pays D. M. Somers for the manufacture of said goods, a list of which is hereto attached, marked 'Exhibit A,' shall be considered a proper basis to commence upon; and such prices shall not be altered to pay more than the profit on manufacture above stated based upon brass at the foregoing rate. * * * Seventh. Said Holmes, Booth & Haydens are to have the sole and exclusive sale of these goods both in the United States and in foreign countries. * * * Tenth. Holmes, Booth & Haydens are to make up and constantly keep on hand a stock of said goods in such variety and quantity as will enable them to promptly fill all orders on them for the same, and will use their very best endeavors to extend and push the sales of the same. Eleventh. Holmes, Booth & Haydens are to keep a separate set of books, in which shall be entered all transactions relating to the stock and sales of these goods, and shall render monthly statements to the said McGill of sales of the same, and shall during each month, in preparing said statements, deduct the price paid for manufacturing the goods sold the preceding month from the net amounts for which they were sold, and shall each month place three-fourths of the balance to the credit of the said George W. McGill as his royalty, and subject to his order, except on such of said goods as they may have shipped out of the United States to foreign countries, and upon such shipments or sales his royalty is to be one-half the balance ascertained as aforesaid. The said books shall at all reasonable times be open and subject to the inspection of the said McGill or his agent. Twelfth. The said McGill is to sustain the validity of his patents at his own expense, and is also at his own expense to furnish

sample cards and cuts of his goods, and to pay the expense of advertising. * * * Fourteenth. This agreement shall continue for twenty years from its date, unless sooner dissolved by mutual consent; but at the expiration of ten years said Holmes, Booth & Haydens may terminate the same by surrendering to said McGill, his heirs or assigns, all the interest of Holmes, Booth & Haydens in said business at a valuation made by disinterested parties, which shall only embrace all goods on hand at cost as fixed by the conditions of this agreement; and at the option of Holmes, Booth & Haydens such special tools and machinery, etc., as may be connected with the manufacture of the goods herein referred to, but nothing for the good will of the business. And said Holmes, Booth & Haydens will then desist from the further manufacture and sale of said goods. *And after the expiration of the letters patent of July 24, 1866, or any reissue or extension thereof, the royalty to be paid to said McGill on the goods formerly made under that patent and which may be made under the remaining letters patent referred to in this agreement, and the license upon which it is based, of even date herewith, shall be a sum equal to one-half of the net profits arising from sales of all the goods specified herein, as ascertained under the articles of this agreement.* * * * Fifteenth. It is agreed that the present selling prices and discounts on said goods stand, but may be altered at any time when found necessary, by mutual consent. *And after the expiration of the letters patent of July 24, 1866, said Holmes, Booth & Haydens may regulate prices to meet the exigencies of the market according to their judgment."*

The list of goods in Exhibit A contains six different articles made in different sizes. The entire price list includes 32 numbers. All these articles, except "Miscellaneous Fastener 16," were made or were claimed by McGill before the date of the contract of 1876 to have been made under patents to him. It appears, but not with certainty, that this fastener was represented on McGill's boxes before March, 1876, to have been patented. The point that substantially the entire Somers list consists of articles claimed to have been patented is of some importance because the referee was led to suppose that the fact was otherwise, and to advert to it in the construction of the contracts. At the date of the contract McGill owned the patent of March, 1866, and three other patents of April 20, 1875, for metallic fasteners, two patents for suspending devices, one for buttons, and three patents for clips, punches, and a press. The license mentioned in article 14, and executed by McGill contemporaneously with the contract, granted an exclusive license to the defendant to manufacture and sell goods under these ten patents and three design patents. On July 24, 1883, the date of the expiration of the patent of 1866, the parties amended the contract of 1876 by erasing the parts of the fourteenth and fifteenth clauses which are in italics, and by including in the agreement 12 patents issued to McGill after March 23, 1876. On February 19, 1894, the agreement was extended for the term of 30 years from March 23, 1896, the date of the expiration of the contract of 1876; but on March 23, 1901, either party could terminate the contract upon previous written notice, in which event McGill could have the goods on hand at cost. It was also agreed as follows:

"The agreement thus extended shall include all patents for improvements in paper fasteners and similar devices, and all patents for improvements in tools, machinery, and appliances for use in manufacturing the same which may be obtained or acquired during the extended term by the said George W. McGill, his heirs and personal representatives."

The business of manufacturing these metallic fasteners became exceedingly profitable to both parties. McGill was a director in the

defendant corporation, which made its fastener business a separate department both at the Connecticut factory and at the New York office, where McGill had a desk, and where, as well as the factory, he was potential in directing the business and the manufacture. He was active in developing sales, was prolific in patents, was exacting at the factory, and the fastener business was much within his control and management. He had been also a patent solicitor, and the defendant intrusted him exclusively with the designation, upon the labels and boxes, of the patents under which the articles were claimed to have been made, and the designation was made in accordance with his instructions. The defendant paid no attention to the particulars upon these labels, or to the patents, and supposed that the articles were being made under valid patents, until from some cause differences arose between the parties, which culminated, in 1895, in a suit by the plaintiff against the defendant for alleged fraud in its previous accounting, and an examination was then had by the defendant in regard to the patents upon which, if any, the goods were being manufactured. Upon this question the referee found as follows:

"(3) Prior to April 1, 1895, and thereafter to March 1, 1896, defendant made and sold flat and round head fasteners with loops in their heads as described in plaintiff's alleged patent No. 498,138, dated May 23, 1893; and after March 1, 1896, the defendant made and sold such fasteners without such loops in their heads. (4) Between April 1, 1895, and July 1, 1896, the defendant, in the manufacture of flat and round head fasteners, did not use the combination set forth as the invention described in plaintiff's alleged patent, dated October 2, 1883. The defendant did make said flat and round head fasteners during said period, and for several years prior to April 1, 1895, with one foot longer than the other, but the other features or inventions described in said patent were not used by it during said period between April 1, 1895, and July 1, 1896. The drawing in plaintiff's patent of July 24, 1866, No. 56,587, shows a fastener made with feet of different lengths, and that feature was old, and on that ground unpatentable, on October 2, 1883. (5) The flat and round head fasteners made and sold by the defendant during the period from April 1, 1895, to July 1, 1896, were made by the process described in plaintiff's alleged patent of December 3, 1889, numbered 416,510. (6) Otherwise than as aforesaid, the defendant did not, in fact, use in the manufacture of flat and round head fasteners made and sold during said period from April 1, 1895, to July 1, 1896, any of the inventions described in, or purporting to be described in or secured by, any unexpired patent issued to the plaintiff, but said goods were manufactured in accordance with the invention covered by a patent granted to the plaintiff on the 24th day of July, 1866, for a metallic fastener, which patent had expired prior to the manufacture of any of said goods so sold during said period. (7) There is no invention, and nothing embodying the exercise of the inventive faculty, in the alleged invention set forth or described in patent No. 498,138, dated May 23, 1893. * * * (10) From April 1, 1895, to July 1, 1896, the flat and round head fasteners made and sold by the defendant were packed in metal boxes, and the boxes were packed in wooden packages, and both on the metal boxes and the wooden packages were the words 'McGill's Fasteners' and 'Holmes, Booth and Haydens, Manufacturers,' and patent dates October 2, 1883, and December 3, 1889. Said marks were used with the knowledge and consent of the plaintiff."

The process patent of December 3, 1889, was an invention of Ralph J. Shipley, a foreman in the defendant's factory, was assigned to McGill, and the defendant was licensed to use it. The patent described a machine which had for its object an improved method of making the duplex-pronged metallic fasteners, known as "McGill's Fasteners." The invention was the only one described in any un-

expired patent which was used by the defendant between April 1, 1895, and July 1, 1896, except that before March 1, 1896, the defendant made fasteners as described in a patent of May 23, 1893, which was without validity. The referee was of the opinion that the contract of 1876 and its amendments was an agreement in regard to the division of the profits of the business of the manufacture and sale of McGill's fasteners and the articles connected with them during the life of the contract, irrespective of the life or the validity of the patents, and that McGill's share in the profits, which was called a "royalty," continued as long as the business continued. The contract is inartificially drawn, uses commercial terms—such as "interest in the business"—in a way which blurs, rather than expresses, the intent of the parties, and was also negligently drawn, in that it nowhere expressly states the patents to which it actually related. The preamble mentions only fasteners of 1866 and improvements thereon, which were four in number; but by the first clause the defendant was to have an exclusive license to sell the patented fasteners and suspending devices, which were seven in number, and to use patents subsequently to be issued. The license included three additional patents for clips, a punch, and a press, and two design patents. The contract was for the manufacture and sale of all these articles, called in the contract "goods," under all the patents issued and to be issued; and upon sales in this country McGill was to have three-quarters of the net profit, but after the expiration of the basic patent of 1866 he was to have upon goods formerly made under it and then made under the remaining letters patent a sum equal to one-half the net profits. This clause by itself implies—and, we think, plainly implies—that royalty for the use of the expired patent was to cease, but was to continue upon goods made under the unexpired patents which were formerly made under the expired patent. On the day when the patent of 1866 expired, the parties erased the provision reducing the royalty to one-half of the net profits, and McGill included in his license 12 new patents, but no new intent was manifest to change the principle upon which the first contract was based. Up to this point of time the word "royalty" seems to have had its ordinary meaning,—“a payment reserved by the grantor, and payable proportionately to the use made of such right.” The provision of February, 1894, that the original contract, enlarged as to time, should include patents for improvements in machinery and appliances for use in manufacturing fasteners, meant that the same right to use this class of patents was granted to the defendant that had been granted in the original contract, and that, on the other hand, McGill's compensation for the use of such patents was to be measured upon the principles that had been therein provided. The fasteners bore the general name of McGill's flat and round head fasteners, and the boxes bore labels which designated, either correctly or incorrectly, the date of the patents under which they purported to have been made; but the defendant followed in this regard the directions of McGill, which, in 1894, it requested him to furnish. By another agreement of February 19, 1894, the parties amended the original contract as follows:

"Notwithstanding anything in the said contract, Holmes, Booth & Haydens shall bill flat and round head fasteners at ten per cent. less than the present factory cost prices as now rendered, until the selling prices shall be restored to within seventy-five per cent. of the original selling prices."

This was 11 years after the patent of 1866 had expired, and the plaintiff contends that the amendment is an admission of his right to claim royalties on flat and round head fasteners, and therefore an admission of his right under any patent. It was an admission of the defendant's obligation to pay royalties, but not necessarily an admission of an obligation growing out of the license to use an expired patent. It admitted that under the contract royalties were due, and they were due because they were made under patents nominally in force in 1894. These admissions created no estoppel against the defendant in favor of the plaintiff, for he did not rely and act upon them, nor was he lured by them to his hurt. On the contrary, he was the person who led the defendant to rely upon the validity of the patents. Our conclusion is that the contract was for a royalty upon goods to be made and sold from time to time under existing patents, and not for a share of the profits of a business in the manufacture and sale of goods or articles called "McGill's Fasteners." The patent of 1866 had in 1876 but about seven years of life, and we do not think that the contract shows an intent of the parties that royalties or profits were to be paid for 20 years upon all goods known as "McGill's Fasteners," while it does show that during the contract profits were to be paid upon goods made under licenses to use unexpired patents and upon which the defendant would presumably have a monopoly. The question is whether, inasmuch as the defendant made the goods by process described in the patent of December 3, 1889 (No. 416,510), and a part of the goods as described in the void patent of May 23, 1893, it is liable to the plaintiff for the royalty. The process patent was specifically for the manufacture of the McGill fasteners, was embodied in a described machine, was one of the patents mentioned in the agreement of February, 1894, and the defendant accepted a license for its exclusive use. The terms of the original contract were extended to include this patent, and by those terms the defendant was to pay a specified royalty upon all goods made from time to time under the plaintiff's unexpired patents for which it had an exclusive license. It is true that the royalty of three-fourths of the net profits became an enormous royalty upon a single-process patent, but it was the pecuniary consideration which the contract gave to McGill for its use. The loose agreement which the defendant entered into for 20 years made no distinction in regard to royalties between patents of large value or those for a worthless improvement. The royalty was to be paid upon goods "which may be made under the remaining letters patent referred to in this agreement and the license upon which it is based," and the amendment of 1883 was equally lacking in exactness. Goods were made for three-fourths of the time described in the consolidated suit in the form described in the void patent of May, 1883. The contract was silent in regard to the consequences of the invalidity of patents. It simply provided that McGill was to sustain their validity at his own expense. On August 2 or 3,

1895, the plaintiff had verbal notice that the account of July 1, 1895, did not include royalty on fasteners, and on October 28, 1895, he had written notice of refusal to pay royalties, on the ground of invalidity of the patents. In an action by a licensor against a licensee to recover royalties upon sales made under an exclusive license upon an invalid patent, which was, at the time when the account accrued, apparently valid and in force, and from which there had been no eviction, the invalidity of which had not been declared by an adjudication under legal proceedings, and no notice had been given by the licensee of its refusal to pay on account of its defects, such invalidity is no defense to the suit. As long as the licensee continues to manufacture under a patent presumably valid, without having given notice of its invalidity and without eviction, he is presumed to manufacture in accordance with his license. The cases of *Marston v. Swett*, 66 N. Y. 211, and *Id.*, 82 N. Y. 526, are leading authorities to this effect. The law is stated in *Lawes v. Purser*, 38 Eng. Law & Eq. Rep. 48, by Erle, J., as follows:

"If the plaintiff believed the patent to be valid, and the defendants believed so, too, it seems to me that the defendants must pay for the privilege until they can show that the patent has been rescinded or revoked, or that notice has been given to the plaintiff that the defendants will not pay any more under the contract."

White v. Lee (C. C.) 14 Fed. 789; *Birdsall v. Perego*, 5 Blatchf. 251, Fed. Cas. No. 1,435; *Stott v. Rutherford*, 92 U. S. 107, 23 L. Ed. 486; *Eureka Co. v. Bailey Co.*, 11 Wall. 488, 20 L. Ed. 209. A list of the cases in this country upon this point is contained in 3 Rob. Pat. 696, note 5. It follows that from April 1, 1895, to October 28, 1895, the defendant was liable for royalty under patent of May, 1893, and during the entire period in the consolidated suit under patent No. 416,510. The judgment of the circuit court is affirmed, with costs.

THOMSON-HOUSTON ELECTRIC CO. et al. v. NASSAU ELECTRIC R. CO.
et al.

(Circuit Court, E. D. New York. March 18, 1901.)

PATENTS—VALIDITY—SWITCH FOR ELECTRIC MOTORS.

The Condict patent, No. 393,323, for a switch for electric railway motors, was anticipated, in so far as relates to the combined or mixed use of the rheostat and series-multiple systems of control therein claimed, by the Hunter patents, Nos. 431,720 and 385,180, both granted on applications filed before that of Condict, but is novel and valid as to the unity of switch control provided for in claims 27, 29, and 31, by which the operation of the rheostatic and series-multiple switches is effected by a single lever. Such claims also *held* infringed.

In Equity. Suit for infringement of patent. On final hearing.

Betts, Betts, Sheffield & Betts (Frederick H. Betts and Samuel R. Betts, of counsel), for complainants.

Harding & Harding (George J. Harding and Richard Eyre, of counsel), for defendants.

THOMAS, District Judge. The complainants own letters patent dated November 20, 1888, numbered 393,323, issued to one Condict upon an application filed April 26, 1888, and allege that the defendants use devices infringing certain claims thereof, to wit, 27, 28, 29, and 31 of one group, 20, 21, and 22 of another group, and also claims 2, 7, 10, 23, 24, and 30. The defense is anticipation, lack of patentability, and noninfringement. The alleged infringing apparatus is contained in controllers for electric railway motors used in the cars of the Nassau Electric Railroad Company, and manufactured by the Lorain Steel Company, and which are designated in the record as Nos. 1, 2, 3, and 4. The Condict invention involves, both for the purposes of diminishing or precluding injury to the motor and for regulating speed, the combined or mixed use of external resistances and series-multiple control. The specification distinctly describes these two purposes and advantages, giving, however, chief prominence to the preservation of the machinery by use of these two means of control in suitable adjustment and sequence. Although many claims are involved, for present purposes the main invention claimed is presented with sufficient fullness in claim 31, which is as follows:

"(31) The combination of two motors, a source of electric power, a motor-circuit, a switch for coupling the coils of the motors in series or multiple to vary their internal resistance, a resistance, a switch to insert the resistance when the motor-switch is being shifted, and a connection between said switches to operate both simultaneously."

The term "mixed control" has been employed to describe Condict's invention, and the definition of the term by Mr. Bentley, complainants' expert, may be useful:

"I understand that it relates to a principle of controlling or regulating railway motors, partly on the variation of the internal resistance of the motors by changing their circuits from series to multiple, and partly upon the variation of the circuit resistance external to the motors by a dead resistance."

The present inquiry is aided, and at the same time somewhat constrained, by the decision of Judge Townsend in *Electric Car Co. of America v. Hartford & W. H. R. Co.* (C. C.) 87 Fed. 733, where the Condict patent was sustained and infringement found; and by the order of Judge Lacombe, whereby a temporary injunction was granted in the present suit (*Electric Car Co. v. Nassau Electric R. Co.* [C. C.] 89 Fed. 204), which was affirmed on appeal, Judge Shipman writing the opinion (*Electric Car Co. of America v. Nassau Electric R. Co.*, 33 C. C. A. 420, 91 Fed. 142). Inasmuch as Judge Townsend had decided upon final hearing, Judge Lacombe accepted his construction of the Condict claims, and held that the defendant's devices infringed them; and Judge Shipman considered the question on appeal, not only in the light of the Hartford decision, but also in view of any new evidence contained in the motion papers. The record in the Hartford Case was not before the circuit court of appeals, and the anticipatory patents presented to that court are alleged to be those of Buell, No. 255,249; Thomson & Houston, No. 220,948; Spang, No. 279,036; Edison, No. 273,490; Hunter, No. 385,055; and Paine, No. 321,749. Other evidences of prior use and knowledge

are presented in this record which were not before Judge Townsend or the circuit court of appeals, but they amplify the view of the prior art, and lead to a somewhat different conclusion respecting it. The principal contention herein relates to Nassau controller No. 4, and, if it shall be found to be an infringement of a valid patent, a like conclusion should be reached in regard to the other controllers. It is urged that the resistances used in No. 4 are rheostatic, pure and simple, and that they have no functions and give no advantages not present in rheostatic control. That is, they are used purely for the purpose of regulating speed, and not for the purposes of preventing the injury more specifically pointed out by Condict. It may be said at this time that the evidence does not seem to sustain this claim of the defendants, for it appears from the record, and seems to be conceded on the argument, that the preservative influence upon the motor is always present, although it is claimed that the advantage is incidental and very subsidiary. Indeed, it is difficult to understand how the two advantages may be separated, whatever principal purpose may have influenced the use of the two systems; for, as stated in the defendants' brief, "The same means which prevent too rapid acceleration are always available for regulating speed." No proper appreciation of the prior art may be obtained, save by a thorough understanding of the intimate knowledge that existed concerning both rheostatic and series-multiple control. It is quite safe to say that the use of external resistance was known for the last half of the nineteenth century, and that it was commonly employed to regulate electric motors. All the expert witnesses state that the rheostatic method was common before the Condict invention. Mr. Bentley, for the complainants, says that "prior to the Condict invention the most common method of regulation was to insert an artificial resistance between the motor and its source of current, which could be varied in amount, and check to any desired degree the flow of current to the motor," and that it was the "standard arrangement used by Mr. Van Depoele, the Thomson-Houston Electric Company, the Bentley-Knight Electric Railway Company, the Westinghouse Company, and others."

Dr. Kennelly, for the defendants, says:

"It was the common practice, therefore, in starting any but the smallest motors from rest, to inject a resistance or rheostat into their circuit for the purpose of checking the flow of current until such time as the armature of the motor had been brought to speed, and had been enabled to protect itself against unduly heavy currents by opposing the requisite and automatically adjusted counter electro-motive forces."

Mr. Wightman, for the defendants, states:

"The use of resistances to choke down the flow of current to prevent too sudden acceleration of the motor was as common and well-understood a device in the hands of the electrical engineer as the throttle valve to the steam engineer."

The use of resistance in accelerating a motor gradually from one speed to another was also common in the prior art. While the use of the rheostat was so familiarly known in the prior art as something that could be employed or laid aside at will, it was equally well understood that it was wasteful of energy, because it reduced

the effective voltage by consuming it, and thereby withholding it from use in propelling the motor. As Mr. Bentley stated:

"This resistance acted to absorb to a greater or less degree the impressed electro-motive force delivered from the line wire, and leave only a remainder to be applied to the motor. The amount absorbed represented a dead loss."

So in letters patent No. 271,042, issued to Curtis & Crocker, it is stated that the rheostatic method is objectionable "for the reason that, whenever any resistance external to the motor is introduced into the circuit, electrical energy is absorbed by it, and transformed into heat, without producing any useful electro-dynamic effect in the motor."

There was an effort to avoid this wastefulness which arose from a too prolonged use of the rheostat, and to this end, and to vary the power of the current applied to the motor, the series-parallel system was preferred. Hopkinson's English patent, No. 2,989, of 1881, describes the series-parallel system:

"If desired, two or more dynamo-electric or magneto-electric machines may be employed in conjunction. When so used, they are rendered particularly adapted for the propulsion of tram engines, tram cars, and other vehicles, so as to obtain required variations in the speed by the employment of a switch so arranged as to throw the said machines into parallel circuit or into series, according as it is desired to drive the electro-locomotive or vehicle at full speed or at a less speed. In lieu of two or more complete machines, a single machine having two or more independent circuits may be used. * * * In order to economically vary the speed of a tram car, tram engine, or other vehicle driven by electricity, two dynamo-electric machines may be used on the car, engine, or vehicle; and, when high speed is desired, these are arranged in parallel circuit; when a low speed and greater tractive force is required, they are arranged in series."

In 1884 Reckenzaun secured English patent No. 6,275, wherein he states the wastefulness of idle resistance, and, among other things, says:

"I so arrange the circuits that by means of a switch or commutator the motors may run in 'series,' in 'parallel,' or singly, or partly in 'series' and partly in 'parallel.' I may also arrange the field magnet circuits distinct from the armature circuits, and join their terminals in a variety of ways, known as in 'series' or in 'parallel,' and thereby vary the resistance of the circuit without inserting any 'idle' or artificial resistance."

This illustrates a knowledge of the use of rheostatic and series-multiple control, and a preference for the latter to the exclusion of the former. In the *Telegraphic Journal and Electrical Review* for July 6, 1888, July 13, 1888, and August 3, 1888, Reckenzaun describes the tests made in December, 1887, with his system in this country, whereby he shows the effective working of the system. Sprague used a similar system on his Richmond road in 1887, differing from Reckenzaun in that he provided three sets of field coils in place of two, and made changes by short-circuiting and then throwing in parallel one only of those coils at a time. The evidence tends to show that the system was reasonably successful, and that there was a considerable commercial demand for the controllers. The Julien patents, United States Nos. 384,580, 384,447, and British No. 2,470 of 1886, illustrate the series-parallel system of control. The *Electrical World* of November 20, 1886, described this system, and said:

"The car is started up by turning the lever, without the slightest shock. The movement is, in fact, remarkably smooth and pleasant, and the car can be stopped instantaneously. * * * It is noteworthy that M. Julien depends in no way upon artificial resistances. The rapidity of movement is controlled by the batteries, and full speed, half speed, and reverse motion are all obtained by the merest turn of the lever. To the regulator are brought the connections of all sections of the battery, working alternatively in series and in parallel."

The Julien system employs batteries as a source of supply, and is lacking in economy. The fact that the use of external and internal resistances was well known, and that the series-multiple was preferred, does not show that it was not understood that the two could be used in conjunction. It must have been a matter of familiar knowledge that there could be a combined use, but it is undoubted that the thorough appreciation of the wastefulness of the rheostatic method diverted the mind to the system that would exclude or minimize such use. Reckenzaun stated in 1884, in English patent No. 6,275, where he showed motors in parallel and in series:

"Hitherto engineers have resorted to artificial resistances inserted between the motor and the 'leads' supplying the current; but, though by recourse to such means the amount of current flowing could be regulated, still such artificial or 'idle' resistances are exceedingly wasteful."

He stated that he used the series-parallel system, and thereby varied "the resistance of the circuit without inserting any 'idle' or artificial resistance." Obviously, Reckenzaun knew that the rheostat could be used, but judged it better and more economical not to use it. Condict knew it could be used, and judged that it was better to use it.

But the prior art shows not only full knowledge of the two systems, and of ability to use them in conjunction, but their actual use and adaptation are shown in letters patent No. 431,720, issued to Rudolph M. Hunter July 8, 1890, upon an application filed January 26, 1887,—more than a year before Condict's application. The specification states:

"The motors are connected together by a circuit, and may be coupled in multiple or series connection, and provision is made for varying the resistance of the motor-circuit. * * * R is the motor-circuit, and connects both motors in circuit with the contact-shoes, i, i. The current may be regulated by the resistance-changer, r, which may be operated by a lever or handle, s, on the front of the car-body, as in the case of the brush-shifting devices. As shown in Fig. 2, the motors are in parallel or multiple circuit, but may be put in series connection by switches, T, T, when necessary,—as, for instance, in starting, or when the potential of the current has greatly increased and volume of current decreased from any cause."

The diagram embodies this description, and together with the specification shows a union of the two methods operated by separate switches. Mr. Bentley, complainants' expert, states that Hunter was Condict's attorney in the matter of Condict's patent, but Hunter's description above antedates that relation. The same witness states that, "so far as any regulator is shown, it is a rheostat, and this is only indicated diagrammatically." This second statement seems erroneous, but it is quite necessary that the witness' evidence concerning this patent of Hunter be set out more fully. He says:

"The patent is directed towards an electric truck, and the claims pertain to the arrangement of the motor upon the vehicle. So far as any regulator is shown, it is a rheostat, and this is only indicated diagrammatically. As a distinct matter from the rheostat, two separated and disconnected switches are shown, by which it is said that, while the motors are in parallel or multiple circuit, yet they may be put in series connection when necessary, as at starting, or when the potential of current is greatly increased, and the volume of current decreased, from any cause. This showing is a mere incident. No claim is made to it in the patent, and no organized controller on the mixed principle of Condict shown or suggested. The series-multiple switches are not connected together so as to be operated simultaneously or in any prescribed sequence, nor are the two switches for changing the circuit connected together themselves. Thus, they would have to be operated apart from, and by separate movements from, the rheostat, and each would itself require a movement distinct from the other. Thus, taking the suggestion of Hunter, it amounts simply to the use of the rheostat as the ordinary and fundamental controller, with an occasional operation of the series-multiple switch in an emergency to put the motors in series before operating the usual controller. There is no construction teaching the art to give up the rheostatic method of control, and go to the mixed system of Condict. Much less does it contain an organized structure explaining and illustrating the practical way of building an apparatus on this principle."

Beyond this statement that there is no unity of switch control, the attempted avoidance of the Hunter patent by Mr. Bentley seems to result in the concession that what Hunter says and shows "amounts simply to the use of the rheostat as the ordinary and fundamental controller, with an occasional operation of the series-multiple switch in an emergency to put the motors in series before operating the usual controller." But the statement of Hunter is plain. He directs the use of "the resistance-changer, r," to regulate the current. He states that the motors are shown in parallel, but that they "may be put in series connection by switches, T, T, when necessary,"—as, for instance, in starting, or when the potential of the current has greatly increased, and volume of current decreased, from any cause. This is a description of the conjunction of the two systems, in few but precise words, and to the lay mind the language is fully expressive of the idea of mixed control. Mr. Bentley's sentence, "There is no construction teaching the art to give up the rheostatic method of control, and go to the mixed system of Condict," is not understood. He has just stated that the rheostat is the "fundamental controller," and that there is an "occasional operation of the series-multiple switch in an emergency." Hunter has not limited his use of the series-multiple to an emergency, but has palpably extended it to common operation. Hunter did not claim that it was invention,—indubitably, because he was speaking of devices that were of common knowledge and usual adaptation. The construction of Hunter's device by Mr. Jenks, one of the complainants' experts, is not more fortunate for the complainants. He says:

"From these statements, which, I think, comprise all in the specification which throw any light upon the method of control of the propelling motors, it appears that three plans of regulation were aggregated on one car, and that it was left to the judgment of the motorman which of these three should be used under any given circumstances. A considerable amount of attention is paid to the method by which the brushes are shifted as to their bearing points on the commutators of the motors, and it may properly be inferred that

this method was to be frequently utilized by the motorman, because the apparatus for this shifting was placed directly within his easy reach."

Dr. Kennelly states:

"In a patent to the same grantee, No. 431,720, which was issued in 1890, but which was applied for in January, 1887, series-parallel of two motors is shown and described, in conjunction with rheostatic control. In other words, there is a system of switches both for changing the motors from series to parallel or vice versa, and also for inserting and retaining a variable amount of resistance in the circuit of both. These switches are diagrammatically represented, and are not shown as collocated into a single structure or co-ordinated in their functions. * * * If you mean what references show series-parallel control with the addition of an auxiliary rheostat or rheostatic control, my answer is, * * * U. S. patent No. 431,720, to Hunter."

At a later time, March 15, 1888, and still before Condict's application, Hunter, in letters No. 385,180, states:

"I may vary the resistance exterior to the source of power in many ways, some of which may be enumerated as varying the internal resistance of the motor either by cutting in or out its coils, or by coupling up said coils in various ways, or by varying a resistance in the motor-circuit and exterior of the motor, or both combined."

From the foregoing it appears that the use of the rheostat and series-multiple systems of control, separately or in conjunction, had been understood and described before Condict's invention. The serious inquiry follows whether there was any prior knowledge or use of the unity of switch control shown in Condict's invention. Each of claims 27, 29, and 31 clearly comprises as one of its combined elements a provision for collocating the switches into a single structure and co-ordinating their functions. Judge Shipman says of Condict's invention:

"His controller therefore utilizes each system by the movement of one handle, so that the shock which would be caused by a sudden change of motor connections is prevented by the introduction of dead resistance before or at the time of such change. The switch can also be used for slight changes in the resistances, 'when slight variation in the speed or power of the motors is required.'"

The value of this element of a single switch controller is undoubted, but was Condict privileged to appropriate a combination whereby the several switches in a controller should be operated in co-ordination by the movement of one lever? This question calls for an examination of the state of the art anterior to Condict. Mr. Bentley says:

"The Condict controller has a definite operative connection between the several switches, so that the operation of one involves a subsequent operation of the other, and each complete operation of the controller as a whole involves the operation of both the motor-circuit switch and the resistance switch."

There are several principal movements actuated by the controller: (1) Variations in resistance of the circuit; (2) grouping the motors or field coils, or both; (3) reversal of direction. With one switch Sprague, before Condict's time, controlled variations of resistance and reversal of direction. With the other he effected the grouping of the motors. Condict controls the motors and resistances with one switch, and the reversal of direction with the other. The Paine

patent, No. 321,748, of 1885, relates to an improvement in regulators for electric lights. The specification states:

"The object we have in view is to increase the efficiency of the apparatus so that the variations in the light will be more gradual. This we do by combining in a single progressively-acting switch the principle of throwing the lamps into and out of circuit in groups, with that of varying the candle-power of the lamps of each group, both by throwing the groups into and out of arrangements in series and by the use of external resistances. * * * Our object, further, is to provide means for operating two or more of the switches together or separately, as desired."

Mr. Bentley thinks that he is justified by Judge Shipman's opinion in distinguishing between the control of lamps and the regulation of motors. But Judge Shipman, in distinguishing the Paine patent, was attentive to the main question of the mixed system of control, and not to the mere mechanical devices for effecting their co-action by the use of the single lever. It will be observed that the Weston patent, No. 264,982, of 1882, provides for the use of one lever to control circuit changes and insert resistances. It is true that the circuit changes that Weston desired to make were not the same changes involved in the Condict letters. After a more extended description, which is worthy of consideration, Weston states—

"That the combination of devices just described serves not only as a shifting device, but as a convenient means of effecting the regulation of the speed of the motor by shifting the position of the brushes, and at the same time interposing resistance as the counter electro-motive force is reduced."

So, in letters patent No. 320,630, issued to Daft in 1885, which relate to an improvement in switches, designed to cause motors to operate in either direction, and to regulate their speed, there are evidences of similar knowledge. Concerning this matter, Mr. Bentley states:

"It had long been well known in ordinary rheostatic control that the rheostat could be operated by means of the same handle which worked the reverse-switch; a duplicate set of rheostat contacts being provided, or a similar expedient adopted by which either movement of the reversing-handle could operate the controlling rheostat. It is not obvious what bearing this has upon the Condict invention, since it involves no series-parallel control at all, and is not related in the remotest degree to the problem before Condict, and the structure be devised therefor. It is sufficient to dispose of this patent to point out that it has no series-parallel regulation of the motor, and that Dr. Kennelly himself omits it from the list given in answer to the question propounded to him."

In letters patent No. 279,036, issued to Spang in 1883, the second claim is as follows:

"The combination, with an electro-motor, of a switch or shunting device having a movable lever and contact-pieces with which the terminals of the coils of the field-magnet and resistances, respectively, connect, whereby a movement of said switch will cut out or shunt a portion of the coils of said magnet, and simultaneously introduce into the circuit resistances equivalent to that of the portion of the magnet cut out or shunted."

This inventor with one switch control cuts out or shunts a portion of the coils of the field-magnet, and at the same time he cuts in equivalent resistance. Condict couples the coils of the motor in series or in multiple, by short-circuiting or shunting, cutting in

and out resistances to effect the result. In letters patent No. 346,527, issued to Beattie in 1886, it is said:

"The system including my invention consists of an armature provided with two sets of grooves—the one longitudinal, and the other circular—around the axis of the armature, and with a groove running across each end of the armature; of field-magnets provided with several independent coils upon each leg or arm of the magnets; of a governor geared to the armature-shaft and to a lever which is adapted by its movements to cut out one or more of the field-magnet coils, and to substitute therefor one or more equivalent coils which are not a part of the field-magnets."

This is understood to show a unitary control of the circuit and rheostats. The fact seems to be that before Condict there was no description of a mechanism effecting, by a single lever, an operation of rheostatic and series-multiple switches. Coils had been coupled in series or multiple, and resistances used in conjunction, but each switch had been moved by a separate lever. Although a survey of the prior art lends much support to the claim that Condict simply used a single switch to produce circuit changes in the appropriate introduction and removal of resistances, as had been done before, yet Condict's changes were essentially different. Condict's system of bringing the resistances and motors under the control of a single lever, and separating the reversing switch, is the present adopted method. Why did not Hunter employ this system? It could not have been advantageous for him to use two switches. Modern experiences derived from the extended use of motors for the movement of cars prove this. Hunter was a solicitor of patents. He was himself skilled in the subject-matter here involved. He united external resistances and series-multiple control. He invented but a year before Condict. He knew, presumptively, all that existed. He knew that one switch had been used for the rheostat and reverse switch. That was well known. He must have known that one switch was common for circuit changes and rheostatic resistances. Yet, with all his knowledge as an attorney making a specialty of patents, and an inventor, he did not see that the successful operation of his device required that one hand should control by one lever the external resistances and internal changes. Sprague states that he was called upon to make a choice either of grouping resistances and motor changes, or of grouping one of them with the reversal of direction. He put variation of resistance and reversal together. Events have condemned his selection, and prove his choice so unwise as to indicate lack of conception of the Condict method. Any plan that requires the conjunctive use of mechanism for rheostatic and series-multiple control demands that there should be one lever, whereby the mechanism may be controlled with unity of thought and action. It may be that a skilled mind could use two hands and two levers, making a nice adjustment of these two systems. But the hands that hold the levers on tens of thousands of cars operating under constantly varying conditions and emergencies are not those of electrical engineers. Practice and discipline may aid, but there must be such unitary and automatic action of the machinery that the mind may instinctively direct the hand of the operator to the proper use of the controlling appliance.

It is difficult to understand why Hunter did not grasp this necessity and advantage, but he did not, and Condict did; and the value of it is so great that it is not logical to assert that these known unitary controls of circuit changes and resistances made Condict's device no new thing in mode of operation. This conclusion has not been reached without considerable doubt, but the considerations that support it preponderate.

The final inquiry is, does the defendants' device infringe any of Condict's claims herein held to be valid? The defendants' painstaking and instructive brief is clear, and has been read with great care upon this subject, but in the end the impression obtained upon the argument has grown to suitable conviction that there is infringement. Notwithstanding the long time occupied in the hearing and consideration of this case, the court would pursue the defendants' argument step by step, and point out the process by which its conclusion has been reached, were it not that the case, in the matter of infringement, shows no new fact not before the circuit court of appeals that would justify a departure from its holding respecting infringement. But the nature of the Condict invention is, under the facts in this record, not that stated by Judge Townsend and by the circuit court of appeals. The invention, as regards mixed control, seemed then to be unanticipated and broad. It is now narrowed by the fact that the invention derives its chief novelty from the unitary control. But that control is provided for, apparently, in only claims 27, 29, and 31 of the principal group. If there should be doubt about the precise claims that cover the invention as above construed, counsel will be heard in that regard. The court also desires to hear counsel respecting the group of claims 20, 21, and 22, and also claims 2, 7, 10, 23, 24, and 30, to which slight attention was given on the argument, and concerning some of which the recent decision of the circuit court of appeals in Thomson-Houston Electric Co. v. Lorain Steel Co., 107 Fed. 711, has a bearing. Counsel can be heard on motion day.

GOSS PRINTING-PRESS CO. v. SCOTT.

(Circuit Court of Appeals, Third Circuit. February 20, 1901.)

No. 9.

1. PATENTS—INVENTION—PRINTING MACHINES.

The Firm patent, No. 415,321, for an improvement in rotary printing machines, relates to multi-roll web-perfecting presses, and covers what is known as the "straight-line" press, as distinguished from the "angle-bar" press, formerly in use. In the latter two sets of form and impression cylinders circumferentially headed were placed side by side. One web passed entirely through the machine in the same vertical plane, while the other, after being printed, passed around an angle-bar, by which it was turned completely over, and transferred laterally the distance of its width, where it was brought into register with the first. In the machine of the patent two or more sets of cylinders are banked one above the other, so that the webs are in the same vertical plane during the entire operation, and after being printed are brought together in register to be cut and folded. The straight-line presses have

gone into extensive use, and have the advantage of occupying less floor space, and, by the elimination of the angle-bar, of being much less liable to break the web and cause delay, which is a consideration of the highest importance in newspaper presses. *Held*, that the machine of the patent was not only novel, but useful in a marked degree, and disclosed patentable invention, and not merely mechanical skill, in view of the fact that press construction was mechanically a highly-developed industry, and yet no step had been previously taken towards the form of construction shown. Claim 7 also *held* infringed.

2. SAME—DUPLICATION OF KNOWN MECHANISMS.

A duplication or combination of well-known mechanisms may amount to patentable invention, where they co-act to produce a new and improved result.

3. SAME—UTILITY OF DEVICE—ESTOPPEL OF INFRINGER TO DENY.

The fact that a patent has been infringed is sufficient, as against the infringer, to establish its utility.

4. SAME—SUIT FOR INFRINGEMENT—TITLE OF COMPLAINANT.

A reassignment of a patent by a corporation to the patentee in accordance with the terms of the original assignment, although it may have been voidable under the laws of the state, where it was unchallenged by the corporation, its stockholders or creditors, conveys a title which, in the hands of a subsequent bona fide assignee, will sustain a suit against an infringer.

5. SAME—INVENTION—PRINTING MACHINES.

The Firm patent No. 410,271, for a printing machine, claim #6, which relates to a change in the construction of the cutting and folding mechanism of the machine of the prior patent, No. 415,321, to the same inventor, shows only a mechanical modification, and is devoid of patentable invention.

6. SAME.

The Firm patent No. 529,680, for a printing machine, claims 11, 12, and 13, which cover mechanism for cross-associating the product of two or more independent presses placed side by side, so that the same shall be folded together to constitute parts of the same newspaper, involve merely mechanical changes, and are void for lack of patentable invention.

Appeal from the Circuit Court of the United States for the District of New Jersey.

For former reports, see 89 Fed. 818, 103 Fed. 650.

C. E. Pickard and L. L. Bond, for appellant.

B. F. Lee, for appellee.

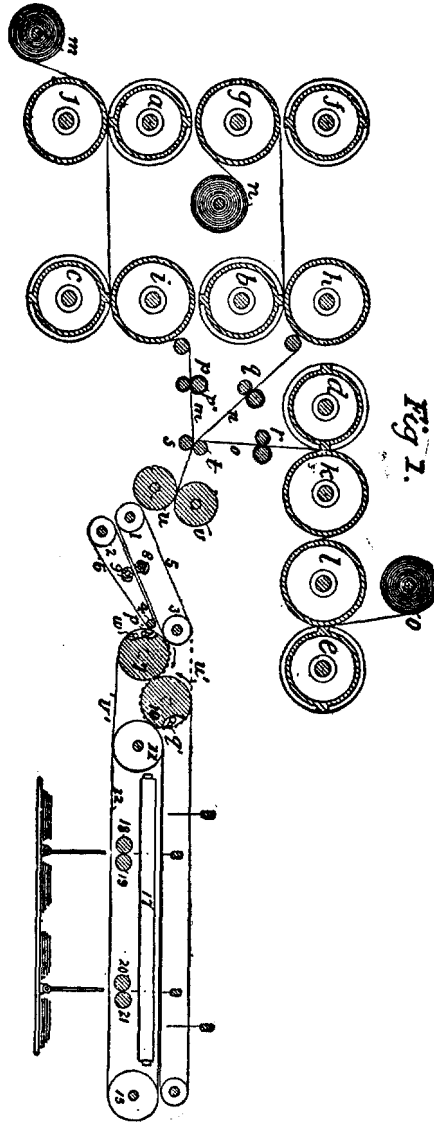
Before DALLAS and GRAY, Circuit Judges, and BUFFINGTON, District Judge.

BUFFINGTON, District Judge. The bill in this case charges infringement of claim 6 of patent No. 410,271, granted to Joseph L. Firm on September 3, 1889, for a rotary printing machine; of claim 7 of No. 415,321, to said Joseph L. Firm on November 19, 1889, for a rotary printing press; and of claims 11, 12, and 13 of patent No. 529,680, to Joseph L. Firm, assignor to the Goss Printing Company, on November 20, 1894, for a printing machine. These patents relate to web-perfecting presses. A web-perfecting press is one which feeds itself with a long, continuous roll of paper, perfects or prints such paper on both sides by passing it between two sets of form and impression cylinders, and, by transverse cuts, severs the web into sheets. In a multi-roll web-perfecting press, two or more such webs are fed into its separate adjoining printing mechanisms, and are simultaneously

perfected. The separate webs are then brought into conjoint register, and thereafter transversely cut into sheets. The registered sheets are properly folded, sometimes after cutting, sometimes once before and once after, and then delivered. Folding and delivery are done by mechanisms separate from the printing, and do not concern the present case, further than as adjuncts to take care of the press output. To fairly appreciate and justly weigh what, if anything, Firm, the inventor, added to this art, it is necessary to give due regard to the peculiar conditions incident to the successful operation of these great presses. Unlike the use of most mechanism, time is of the very essence of the machine. The continuous web darts through the press with lightning speed. It enters a blank, and emerges a folded newspaper. Presswork is held back until the last possible moment, but, when once started, the press must finish its work at a predetermined time. Its operations must be continuous and uninterrupted. A break in its mechanism, or in the web on which it works, increases the possibility of delayed papers, trains and mails missed, and loss to the owner of money and prestige. Unlike the output of other commercial machinery, where the product of one day could, for substantial purposes, as well be made the next, the output of one of these presses is limited not to a question of days, or even hours, but to one of minutes. No one who has noted the feverish anxiety incident to the early morning hours in a newspaper office,—an anxiety which grows more feverish as the time grows shorter, and ends only when the edition is safely launched,—can be oblivious to the fact of how vital and important are the mechanical factors which save or avoid the loss of minutes in a great printing press. Firm's device was meant to minimize the liability to such losses of time. Let us consider what he did. Take, for example, the press of the St. Louis Globe-Democrat, as embodying the most advanced type of the prior art in those features to which the Firm device particularly applied. It printed from two rolls of paper,—one double width, or four plates wide; the other of single width, or two plates wide. Each roll was perfected by its own press. The two presses faced each other, with axes of their form and impression cylinders parallel to each other. In the main press, a four-plate-wide web was printed on both sides, four pages abreast, the column rules running around the cylinders. Consequently the printed columns were parallel with the web sides. The printed matter on these four-abreast pages constituted component parts of a single newspaper, and the press was designed to superimpose two of these printed pages upon the other two in correct register. This was effected by mechanism which we will describe; and, as Firm's device secured the same result without the use of this mechanism, it will be apparent that a study of such mechanism and the objections, if any, thereto, will lead to a just appreciation of what Firm subsequently did. In the Globe press, the double-width web, after being printed, was slit centrally and longitudinally by an ordinary rotary splitter. One of these split sheets, printed, it will be observed, on both sides, and constituting four printed pages of the proposed paper, continued to travel forward in its original vertical plane. The other sheet, likewise printed on both sides, and constituting four

other pages of the paper, passed downward and over a "turner," or an equilateral and right-angled triangle placed apex down, and depending vertically below the web-slitting roller. The effect of passing the sheet downward over one side of the turner, across and upward over the other side, was to reverse the web, turn the lower side up, and also transfer the whole web laterally a distance of its own width, and place it directly beneath the other half of the web, which, as we have seen, had continued to travel forward in its original vertical plane. The path around the turner was so proportioned as to be practically a multiple of the page lengths, and, by mechanism which need not be described, the two sections of the split web were assembled or brought together with their transverse margins in register, led forward to suitable folding and delivering apparatus, and an 8-page paper was produced, folded, delivered, and cut transversely on every margin. This method of securing register by transfer around the turner, commonly known as the "angle-bar system," we note as the highest development of the then art in that regard. Later we will refer to the other part of the Globe press, which was used to produce a 12-page paper, and will show, as evidencing the patentable, inventive character of Firm's improvement, that although this press, in its relation to the principal press, contained some of the mechanical elements of construction embodied in Firm's straight-line presses, even its constant operation in close proximity to the other press suggested to no one the embodiment of its particular functions and relations in the multi-web or principal press. It will be noted that in the first-described press one portion of the web travels forward in its original vertical plane through the entire operation, while the other was deflected from its original vertical plane, turned completely over, transferred across to the vertical plane occupied by its fellow, and there cross-associated with it. But Firm conceived the idea of printing his whole paper by the same, simple, straight-ahead method, so followed by one of the Globe webs, and thus do away with the use of angle-bars, and wholly dispense with the circuitous process of turning the second web completely over, and transferring it across its own width into the vertical plane occupied by its fellow. He did away with all the machinery incident to such process. The means by which he accomplished this were of a relatively simple character, and from the fact that the web, during the printing and registering operation, travels straight ahead, his type of press has come to be styled a "straight-line," as contrasted with an "angle-bar," press. His device is illustrated and described in his patent No. 415,321, for a rotary printing machine adapted for printing a number of copies of a 4, 6, 8, 10, etc., paged paper or pamphlet.

In the drawing from the patent here shown, the webs, m, n, and o, are initially placed in the same vertical plane with each other, and in such plane they continue to move forward until they are printed and in register. The letters, a, b, c, d, e, and f, designate form, and g, h, i, j, k, and l, impression, cylinders. On each of the form-cylinders are arranged places for eight forms, each set of four forms occupying nearly a semi-circumference. The relative arrangement and relation of the forms on the several cylinders need not here be detailed it being sufficient to say that the kind of press here illustrated



is adapted for printing two copies of a 24-page paper or pamphlet; and by allowing certain of the cylinders to remain idle, or altering the form arrangement, newspapers or pamphlets with a less number of pages may be printed. The three webs pass in the initial vertical plane between their respective form and impression cylinders where they are printed. They then pass through the respective sets of cutting rollers, p, q, and r, where, by means of a mediately placed circumferential knife on one roll and a corresponding groove on the

other, the web is longitudinally split on the central margin, leaving two pages abreast on each side. Passing from these sets of rolls, the three webs are guided into position on top of one another, and enter the tension rolls, s, t, in correct register, and on the initial vertical plane. Passing through this set, the assembled and registered webs are carried to the driven rollers, u, v, which exert upon the webs the pull required to draw them from the form and impression cylinders. These rollers also serve as transverse cutters, carrying, as they do, a knife with alternate cutting and perforating teeth, so that the paper will be partly cut and partly perforated across the margin at the page ends. It is not necessary to follow the printed and properly assembled webs through the folding and delivery process, as they have no bearing on the patent. It will be noted that in this device the page forms are all headed circumferentially and in the same direction around the form cylinders; that the webs move in the same vertical plane, along ultimately converging paths. The same vertical plane intersects the central longitudinal margin of all the webs, or any line parallel therewith, from the time the webs leave their respective rolls to the point where they converge, printed and registered. It is this feature that gives such a type of press in the art the name "straight-line" or "straight-run," as distinguished from "angle-bar," or presses where the web is deflected and transferred to a different vertical plane.

We are then brought to the question whether the combination here shown was novel, useful, and patentable. That it was novel, the court below found, and our research in the art leads us to the same conclusion. Was it useful? That it was not alone useful, but useful to a marked degree, the weight of the testimony, and a consideration of the practical results attained, show. Indeed, the contest waged in this case, its extent, expense, and warmth, are in themselves a reasonable measure of the opinion of all parties in that regard. It is improbable that men will render themselves liable to actions for infringement unless infringement be useful. And the fact that a patent has been infringed by a defendant is, as against such infringer, sufficient to establish its utility. *Lehnbeuter v. Holthaus*, 105 U. S. 96, 26 L. Ed. 939; *Vance v. Campbell*, 1 Fish. Pat. Cas. 483, Fed. Cas. No. 16,837. Moreover, we regard the change made by Firm as both novel and useful to a marked degree. The defendant's own proofs show that, in estimating the product of printing presses, about 25 per cent. must be deducted for delays, and that one of the two principal causes of stoppage is web-breaking. When a web-break occurs, the sheet winds around the roller, the press must be stopped, and the web torn off the rolls and rethreaded. The serious results incident to such stoppage will appear when we realize that these presses are speeded to 200 revolutions a minute, and that a delay of five minutes means many thousand less papers, varying according to the press capacity. The marked tendency to print larger papers, to issue greater editions, and to sell the papers for less money, necessitates the use of a cheaper paper, and cheaper paper means greater liability to web-breaks. After a most careful examination and analysis (the details of which need not here be set forth) of the testimony of the witnesses, and with

a due regard to the opportunities different witnesses had for observing presses in regular work, we have reached the opinion that web-breaks are much more frequent on angle-bar than on straight-line presses, and that inferior grades of paper, which could not be safely used on angle-bar presses, can be used on straight-run ones. The data given from actual observation in these respects is not only convincing, but is wholly in accord with our everyday observation, that, if the pull is evenly distributed over an entire sheet of paper, its tensile strength is much greater than when the strain is on one edge. It is, to our mind, clearly proven that Firm, by eliminating angle-bars, made an important improvement in lessening web-breaking. But this was not all. In dispensing with angle-bars, we are satisfied he lessened power requirements,—a fact which is not controverted in the proofs produced,—and made possible a simpler and more desirable type of mechanism; one in which there was less liability to break. A direct, forward, straight-line action from start to finish is mechanically preferable to a deflected, tangent-carried power. In addition to this, the facts proven show that straight-line presses can be built to occupy less floor space than angle-bar machines,—an important feature in mechanism and appliances in city manufactories, on account of the value of city sites generally, and in newspaper plants especially so, from the fact that they are always located in the most prominent parts of a city, and where ground is much more valuable.

Such being the facts, does this device involve invention? In support of its patentability, we have the *prima facies* arising from the grant of the patent. *Lehnbeuter v. Holthaus*, 105 U. S. 94, 26 L. Ed. 939. We have the fact that the device has gone into extensive use,—an element entitled to regard. *Smith v. Vulcanite Co.*, 93 U. S. 486, 23 L. Ed. 952. It is contended the changes made by Firm were merely mechanical, and that in reality he but took the presses which he found standing side by side, and banked them one upon another; that the change involved was mere reconstruction, rearrangement, duplication. It is to be noted, however, that printing-press construction is mechanically a highly-developed industry. The complex and intricate details of these great presses; the calls upon them for speed, strength, and product; the constant demand upon builders for improvement; and the keen rivalry existing among such builders and the users of the presses,—are factors which brought the art to this high mechanical standard. The very fact that, with all these stimulating considerations, insuring the most rapid strides in mechanical advance, no such step as Firm's was taken in duplex presses, shows that Firm's change was not in the line of mechanical progress, but in the original, inventive sphere. Granted the change consisted in banking one press upon another, yet the two, when so combined, and in their new relation, so co-acted as to dispense with angle-bars, with a web-deflected course, and made possible a straight-line duplex press. A single straight-line press in itself was no novelty, so far as the straight-line printing of an individual web is concerned; but, when the product of two such presses were united, it was only through angle-bar agency. Firm's device, by placing the two in new relations, eliminated the angle-bar, did away with the tangent-turning webs, and

thus secured valuable results. The test in such cases is not whether duplication exists, but whether duplication produces, not mere duplication of product or function, but a new unitary, additional result, and not the mere aggregate of prior, separate mechanism. The mere elements of the combination are immaterial. In their individual relations they may be old, may be mere duplicates; but the test is not the character of the combining elements, but the result flowing from their being combined. "Duplication producing a new and a useful result, as it was here produced, may be patentable. It is often the material part of a discovery, because it may be that which renders useful what was previously useless." *Parker v. Hulme*, 1 Fish. Pat. Cas. 44, Fed. Cas. No. 10,740. Consideration of another feature of the Globe-Democrat press referred to above will also show that the change Firm made was more than mechanical. As we have seen, that press was made up of a main duplex press, already described, and a second part used for printing a half-width web. When it was desired to make a 12-page paper, the main press was used to print 8 pages in the manner heretofore described, and the other 4 were printed in the supplemental press. In it but one pair of form and impression cylinders were used. These, however, were of such lengths as to carry four plates abreast on each semi-circumference. The plates at one end contained the matter for the outside, and those at the other for the inside, of the 4-page sheet. A two-plate width web passed between the plates at one end of the cylinder, and was printed on one side. It then, by means of rollers, passed down, over, across, and upward over a turner or angle-bar, which reversed the web and transferred it laterally a distance equal to its own width. The web was then made to pass between the form and impression cylinders at the other end, where its other side was printed. By this means the supplemental web was transferred from its own initial vertical plane, and brought into the vertical plane of the associated halves of the main web; and, by means not necessary to detail, was brought upward and run between these two associated halves, and in register with them. The three then pass together to the folding, cutting, and delivery mechanism. It is curious to note, but, in the light of subsequent development of the art, be it observed, that this machine might have been modified and re-created so as to embody Firm's device. If the supplemental press had been equipped with two sets of form and impression cylinders, it is quite clear the web could have been started on the same initial vertical line occupied by one-half of the web in the other or main press. This would have given straight-line work in both presses, where the supplemental press and one side of the main press alone were used. And, if the other side of the main press were banked above its fellow, all three would have been straight-line presses. But the all-sufficient answer to an imaginary machine such as this being an anticipation is the fact that no one either changed the Globe press, or suggested the possibility of such change. Its resemblance to Firm's device, and its use for several years without any one suggesting such a modification, make it all the more apparent that it required more than mechanical advance to make a straight-line press out of the doubly angled-barred Globe-Democrat press. It is

not nearness to an unsolved problem, but a solution of it, that secures practical results, and benefits the public to the extent of earning the grant of a patent in return. Upon this device the seventh claim, which reads as follows: "In a rotary printing machine in which the several pages of a book or newspaper are printed upon a plurality of webs, in combination, the impression-cylinders, the form-cylinders, page-forms thereon, the rolls whereby the webs after being printed are guided into position on top of another, and cutters by which said webs are severed transversely between the succeeding rows of pages, the page-forms being arranged upon the several form-cylinders with their heads pointing all in the same direction around the cylinder, the forms for these pages to constitute the first half of the book being located upon corresponding zones of the various form-cylinders, and the forms for these pages to constitute the last half of the book being arranged upon other corresponding zones on the various cylinders side by side with the zones in which the forms for the pages of the first half of the book are located, whereby, when the webs are run out over one another, without turning or reversing, the several pages belonging to the first half of the book will arrange themselves above each other, and the several pages belonging to the last half of the book will arrange themselves above each other side by side with those belonging to the first half, substantially as described,"—was granted. It was allowed in the form in which it was originally presented. We are of opinion the charge of infringement is sustained. The proofs show the respondent's infringing machines are three-roll, two-plate-wide machines; that they have form and impression cylinders, and the forms are imposed upon the form-cylinders with reference to the position of the column rules; that the webs, after being perfected in these presses, are guided by means of rolls into position one above the other. It is also shown that the webs are severed transversely by means of cutters between the succeeding rows of pages; that is, upon every transverse margin. The page-forms are so arranged upon the form-cylinders that when the webs are printed the heads of the pages all point in the same direction. The forms for the pages to constitute the first half of the book are located upon corresponding zones of the various form-cylinders, and the forms for these pages to constitute the last half of the book are arranged upon other corresponding zones on the various cylinders side by side with the zones on which the forms for the first half of the book are located. It is also shown that, when the webs are run over one another, it is done without any turning or reversing of the web; and when the several pages belonging to the first half of the book arrange themselves above each other, and the several pages belonging to the last half of the book arrange themselves above each other, side by side with those belonging to the first half, there has been neither turning nor reversing of said pages. It is a wholly straight-line run. The respondent, however, contends that the "turning or reversing" of the latter part of the claim is a limitation upon the operation of that element in the former part of the claim, viz. "cutters by which said webs are severed transversely between the succeeding rows of pages," and that, because in the infringing machine the cutting is done after longitudinal

folding, the cutting is not done without "turning or reversing." Assuming for present purposes that a longitudinal fold is a "turning or reversing," in the sense in which those words are used in this claim, we find no limitation as to the position of said cutters, or the mode of doing, save that the "webs are severed transversely between the succeeding rows of pages." In the absence of such limitation in the claim, it is clear to us that the respondent cannot avoid infringement by making his transverse cut subsequent to the longitudinal fold. His machine embodies all the individual elements of the claim, and they co-operate with each other in the same manner to produce the same result.

The title of the complainant to patent No. 415,321 is questioned. The legal title to this patent is duly vested in the complainant by sundry assignments of record in the patent office, as follows: Assignment of Joseph L. Firm to the Firm Printing-Press Company, dated November 22, 1889; assignment of the Firm's Printing-Press Company to Joseph L. Firm, dated July 24, 1891; and assignment by Joseph L. Firm to the Goss Printing Company, dated January 30, 1892. These several assignments, all in due legal form, were made by the several parties thereto, and stand unchallenged by any of the parties to said several conveyances, their creditors or cestuis que trustent. In view of the fact that the respondent's infringers have no interest in or claim to said patent, and that they do not assert that any legal or equitable title to said patent is asserted by any one else, or is in fact now outstanding in any one else, it might be sufficient to hold that for the purpose of this case, and as against mere infringers, the prima facie record title should suffice to warrant a decree. We will, however, consider at length the facts shown. On June 20, 1888, Joseph L. Firm, by two separate instruments in writing, assigned his interest in certain patents to the Firm Printing-Press Company. Both assignments provide:

"This assignment is made upon the express condition that said Firm Printing-Press Company shall not sell, assign, or transfer the whole or any part of said letters patent to any person, corporation, or association whatever without first giving to me, the said Joseph L. Firm, sixty (60) days' previous notice, in writing, of its intention to sell, assign, and transfer the same, and also giving and granting to me, the said Joseph L. Firm, the first and absolute right and privilege to purchase of said company said letters patent at the same price offered by any other person, corporation, or association."

On the same day an agreement in writing was entered into between Firm and the Firm Printing-Press Company which recited that Firm, as a part consideration for the Firm Company taking said assignments, had agreed to enter into a written agreement—

"To assign to the said party of the second part [the said Firm Printing-Press Company], so long as it exists and continues to do its business for which it was incorporated, all letters patent which may hereafter be issued to him for improvements in printing presses."

The agreement then provided as follows:

"Now, therefore, this indenture witnesseth that the said Joseph L. Firm, for and in consideration of one dollar and other good and valuable considerations, the receipt of which is hereby acknowledged, doth hereby agree to assign to the said Firm Printing-Press Company, so long as it shall exist and

continue to do the business for which it has been incorporated, upon the same terms, conditions, and agreements as the assignments hereinbefore referred to were made, all letters patent which may hereafter be issued to him for improvements in printing presses: provided, the said party of the second part shall advance, pay, and discharge all fees, charges, and expenses which shall or may be incurred in procuring such letters patent. And the said Firm Printing-Press Company, for and in consideration of one dollar and other good and valuable considerations, the receipt of which is hereby acknowledged, doth hereby agree to reassign to the said Joseph L. Firm any and all letters patent which he may hereafter assign to it, if at any time the said Firm Printing-Press Company shall cease to exist or shall cease to do the business for which it has been incorporated."

It will be observed that, as to the patents covered by the two assignments then made, the conditions were that Firm was to have an option to purchase them on 60 days' notice, if the company desired to sell; in the case of assignments of patents to be thereafter granted, not only was the above condition to be inserted, viz. "upon the same terms, conditions, and agreements as the assignments hereinbefore referred to were made," but he was as to thereafter granted patents "to assign to the said Firm Printing-Press Company, so long as it shall exist and continue to do the business for which it has been incorporated." Moreover, it is to be noted that the Firm Company expressly bound itself to reassign all patents thereafter assigned to it by Firm if the company "should cease to exist or shall cease to do business for which it has been incorporated." Thereafter, to wit, on November 22, 1889, Firm conveyed patent No. 415,321 (which was applied for January 17, 1888, and was granted November 19, 1889) to the Firm Printing-Press Company. The assignment contained the condition recited in the two original assignments, dated June 20, 1888, which, as we have seen, was in accordance with the agreement between the parties, dated the same day, to be one of the conditions of the assignment. The other agreed-upon condition, viz. "so long as it [the Firm Company] shall exist and continue to do the business for which it was incorporated," was not inserted. The omission of such clause might cause difficulty, were this all; but this assignment, being of subsequent date to the agreement of June 20, 1888, must be deemed to have been accepted by the Firm Company subject to its agreement to reassign upon certain conditions. The language of the Firm Company's covenant is broad enough to embrace it. The two instruments should therefore be construed together. This patent application was evidently in the mind of the parties when the agreement of June 20, 1888, was made, for it was then pending. The assignment was presumably made in pursuance of that agreement. No additional consideration is shown to have passed to Firm for such assignment. Under all the facts, we are warranted in construing the two instruments together, and in holding the Firm Company were bound to reassign on the condition stated. While, at first view, such a conditional title might seem at variance with the provisions looking to a sale by the company, yet, when we consider that Firm was a large stockholder in the company, it may be possible that circumstances might arise when the company, while still continuing its general business, might deem it advisable to sell these particular patents, and it would be to his interest to have them sold. It will be ob-

served, too, that the company considered itself bound to reassign this patent in case it ceased to do business. By a resolution of its board at a meeting held July 23, 1891, the company admitted that such was its obligation, and authorized its officers to reassign, *inter alia*, the patent in question, and a reconveyance was accordingly made to Firm by the company on July 24, 1891. The company had ceased to do business. It had no means to carry on the object for which it existed. The time had come for it to comply with its covenant to reassign. This duty it performed. Neither the company itself, any of its stockholders, its receiver, nor its judgment creditor have questioned this transfer. The title was held by Firm, thus unchallenged, until January 30, 1892, when he conveyed the patent to the complainant company. Its title has remained unquestioned since that time.

It is alleged the conveyance from the Firm Company to Firm was void by reason of the New York statute which so declares to be certain corporation transfers to its officers for the payment of any debts. We have been cited to no decision of the courts of that state holding that when such transfer has been made, and is unchallenged by the corporation, its receiver, its judgment creditors, or any stockholder, the transfer shall, at the instance of a stranger in interest and title, and against an innocent purchaser from the corporation's grantee, be adjudged absolutely void. In the absence of such construction, we are of the opinion that the title acquired by the complainant was, if, indeed, questionable, not void, but voidable, and, in the absence of any step to avoid it, must, for the purpose of this case, be deemed to vest the legal title to the patent in question in the complainant.

In accordance with these views, the judgment of the court below will be reversed in so far as patent No. 415,321 is concerned, and the record will be remitted, with directions to enter a decree in favor of the complainant, with an injunction and an accounting.

Firm's later patent, No. 410,271, is a modification of the general straight-line device shown in the patent we have discussed. It has substantially the same arrangement of form and impression cylinders, thus constituting a straight-line press. They both operate in the same way in printing, splitting, and assembling the webs in correct register. After these operations are completed, the patent in suit takes one of the printed, split, and assembled web sections, and deflects it from its straight-line course, in order to fold it longitudinally and cut it transversely. This is done by placing the folding rollers and transverse cutting knives at right angles with the printing rollers, as is recited in the sixth claim. To us it is clear that this claim is for a mere mechanical device. Stripped of the straight-line feature, which we have seen was disclosed in Firm's prior device, the combination of this claim shows nothing but mechanical modifications based on that original. Complainants themselves concede that a V-shaped roller, over which the web is drawn by the folder rollers, was well known in the art for that purpose. There was nothing novel in the form of the rolls or the mechanism or arrangement of the cutting knives. The combination of formers and rolls for folding was not new. It required no inventive genius to place these rollers at right angles with an already devised straight-line press, so as to place the two in opera-

tive relation. Clearly, such work was in the sphere of mechanical adaptation. We are therefore of the opinion that the court below committed no error in finding that claim 6 of patent No. 410,271 was void.

Claims 11, 12, and 13 of the third patent in question, No. 529,680, refers to the general type of mechanism of the sixth claim of Firm's patent, No. 410,271, a combination which we have already held void of patentability. The press of that claim was constructed to print complete newspapers, side by side, on independent straight-run presses. The webs of one set of banked presses ran through on its own initial vertical plane and printed a complete paper, and the webs on its adjoining banked duplex did the same thing, printing a separate copy of the same paper. There was no suggestion in the patent of bringing the paper printed on one set of presses over to and associating it with the paper printed on the other, and making a single paper of twice the size. The object of the devices embodied in the claim of patent No. 529,680 was to cross-associate the products of series of banked duplex presses, and make newspapers of double the size of those printed in presses run without such cross-association. Thus the specification states:

"This invention relates to improvements on the letters patent issued to me September 3, 1889, No. 410,271. In said patent is described a printing machine in which a plurality of webs, after being printed upon, are split longitudinally and severed transversely between the pages, and all conducted to one double folding device, located at right angles with the printing machine proper. In my present machine, I employ three double folding devices, and various improvements in the details of construction by which I am able to facilitate the work and to increase the capacity of the machine so far as the range of page combination is concerned."

With that end in view, he placed side by side three duplex presses of the type of No. 410,271, each of which was adapted to print, register, cut, and fold individual papers, as recited in said patent. They were each provided with separate, individual mechanism, and adapted to run wholly independent of all the others. In case it was desired to cross-associate the product of two such adjoining presses, it will be noted that such cross-association does not begin until the separate and individual work of each press had completed the operations of printing, registering, folding longitudinally, and partially severing transversely their respective webs. At this point the web of one side, which otherwise would have continued to pass through the remaining mechanism of its own particular press, is, by a certain roller being thrown into engagement, deflected from following such course, and carried across to and associated with the other longitudinally folded web. From this point forward, the two webs are carried forward by the same mechanism, and subjected to the same process of complete transverse severing into sheets and folding, that the product of that individual press would have been, had no such cross-association taken place. Conceding that this was the first time, in presses of Firm's type, that cross-association was shown, and that the means by which it was there accomplished was novel, still we are of opinion the combination did not involve patentability. The functions of the two presses were not changed. A connection was made between them,

and the product of the one subjected to the operation of the other. The connection by which this was done was a mere mechanical improvement, and which one skilled in that art could solve. This idea of so coupling up two presses so as to print larger paper was but the natural advance incident to new demands upon the art. Reference to the patent shows the exceedingly simple mechanical means by which cross-association is made:

"When it is desired, as in the case of twenty-four page paper, to combine both halves of the web, by having the roller, *q*, mounted upon a pivoted arm *q*¹, pivoted concentric with the roller *q*², the roller, *q*, may be swung up into position shown in dotted lines in Fig. 3, and then that half of the web which would otherwise be treated by the folder, *B*¹, after being perforated transversely, may be conducted across, as shown by the dotted line, Fig. 3, into position on top of the half web passing through the folder, *B*², the parts being so distanced from each other as to cause the pages to properly index. From this point forward, the complete severing and final folding and delivery of the two halves of the web are done together, as already described for one half. By having both rollers, *q*, mounted on pivoted arms, both halves of the split web may be sent either to the folding mechanism, *B*, at the right of Fig. 3, as shown in dotted lines, or to *B*¹, at the left, as will be obvious."

From this it will be seen the transfer is a simple mechanical process, effected by simple, well-known, mechanical agents. Of course, such cross-transfers necessitate relative page rearrangement and combinations, but they are within the knowledge and skill of those familiar with that branch of the art. For the reasons stated, we are of opinion the combinations shown in the three claims in question do not involve patentability, and are, therefore, void, as found by the court below.

The decree of the circuit court is reversed, and the case will be remanded to that court, with direction to enter a decree for the complainant in conformity with this opinion, but without costs to either party, and providing that one-half of the costs payable to the officers of that court shall be paid by each of the parties, respectively. It is further ordered that one-half of the costs of this appeal shall be paid by the appellant, and one-half thereof by the appellee.

NEIDICH v. FOSBENNER et al.

(Circuit Court, S. D. New York. April 11, 1901.)

PATENTS—VALIDITY—DETERMINATION ON DEMURRER.

A patent cannot be held invalid on demurrer unless its validity so clearly appears on its face that no evidence could sustain it.

In Equity. Suit for infringement of patent. On demurrer to bill.

C. V. Edwards and Joseph C. Fraley, for complainant.

James L. Steuart, for defendants.

COXE, District Judge. The bill alleges the infringement of letters patent, No. 640,013, for a new and useful improvement in methods of assimilating printed and typewritten work. The defendants demur on the ground that the patent on its face is void for want of patentable novelty. Unless the court is satisfied that by no pos-

sibility can the complainant succeed the suit should not be dismissed in this summary manner. It is true that, upon the face of the patent, there is plausibility in the argument that the method covered by the claims involves only simple changes in the printer's art within the knowledge of every skilled workman. But it is also true that the complainant may be able to produce testimony which will convince the court that invention is involved. That this may be done is enough. The demurrer must be overruled upon the following authorities: *New York Belting & Packing Co. v. New Jersey Car-Spring & Rubber Co.*, 137 U. S. 445, 11 Sup. Ct. 193, 34 L. Ed. 741; *Ballou v. Edward A. Potter & Co.* (C. C.) 88 Fed. 786; *Electric Vehicle Co. v. Winton Motor-Carriage Co.* (C. C.) 104 Fed. 814; *Industries Co. v. Grace* (C. C.) 52 Fed. 124; *Beer v. Walbridge*, 40 C. C. A. 496, 100 Fed. 465; *American Fibre-Chamois Co. v. Buckskin-Fibre Co.*, 18 C. C. A. 662, 72 Fed. 508; *Bottle Seal Co. v. De La Vergne Bottle & Seal Co.* (C. C.) 47 Fed. 59; *Krick v. Jansen* (C. C.) 52 Fed. 823; *Lalance & Grosjean Mfg. Co. v. Mosheim* (C. C.) 48 Fed. 452; *Lyons v. Drucker* (C. C. A.) 106 Fed. 416. The demurrer is overruled. The defendant may answer within 30 days upon paying the costs of the demurrer.

BRILL et al. v. PECKHAM MOTOR TRUCK & WHEEL CO.¹

(Circuit Court of Appeals, Second Circuit. April 3, 1901.)

No. 139.

PATENTS—CONSTRUCTION OF CLAIMS—SUPPORTS FOR STREET-CAR BODIES.

Claims 1 and 2 of the Brill patent, No. 478,218, for an improvement in car trucks, designed to prevent the oscillation or galloping movement of a street-car body incident to its being supported on a comparatively short wheel base, by the use of both spiral and elliptical springs, are limited by the prior art to the particular construction shown in the specification, in which the two sets of springs are so arranged that the elliptical springs are not brought into action until the spiral springs, which normally support the weight of the car, have begun to compress. As so construed, *held* not infringed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Henry P. Wells, for appellant.

Francis Rawle and Frederick P. Fish, for appellees.

Before WALLACE, Circuit Judge, and WHEELER and THOMAS, District Judges.

WALLACE, Circuit Judge. If the first and second claims of the patent in suit (letters patent to George M. Brill, No. 478,218, dated July 1, 1892) require a construction limiting the combination therein specified to one in which the spiral springs and elliptical springs are so arranged that the latter are not brought into action until after the former have begun to compress, the car trucks of the de-

¹ Rehearing ordered.

fendant do not infringe the claims. In the car trucks of the defendant both sets of springs are brought into action, and begin to compress simultaneously when the weight upon them is greater than the normal weight of the car. In granting the order for a preliminary injunction, which has been appealed from, the court below adopted the construction which had apparently been placed upon these claims in the suit of Brill v. Railroad Co. (C. C.) 103 Fed. 289. In that action the infringement of these claims, as well as that of several other claims in the patent, including Nos. 9, 10, 11, and 14, was alleged by the complainant, and the question of their validity, as well as their infringement, was strenuously contested; and upon final hearing the court adjudicated the validity of all the claims, and held them to be infringed by the defendant. Inasmuch, however, as the infringing car trucks embodied the combinations specified in all the claims, it was not necessary in that case for the court to accurately define claims 1 and 2, in order to determine what, if any, limitations not expressed therein were to be read into them by implication.

The two claims are as follows:

"(1) In a motor truck, the combination, with a stationary frame supported upon the running gear, said frame having sections extending outwardly from the axle, of a movable frame supported upon said truck, spiral springs located between the movable and stationary frames, and elliptical springs located between the extended sections of the said rigid frame and the movable frame, substantially as described.

"(2) In a truck, a spring-supporting frame supported upon the running gear by saddles, and having sections extending outwardly from the axles, a movable frame having like extensions, spiral springs located between the saddles and movable frame, and elliptical springs located between the spring-supporting frame and the movable frame, substantially as described."

In the opinion in Brill v. Railroad Co., the court used this language:

"The gist of the invention consisted in combining, with the frame of the truck and the spiral springs, another class of springs, viz. elliptical springs, between the car body and the extensions of the independent frame. The elliptical springs are slower in their action than the spiral springs, and neutralize the longitudinal oscillation of the car."

The record in that suit is a part of the record now before the court, and upon this record, supplemented by the depositions and documents introduced upon the motion for the preliminary injunction, the appellants insist that a narrower interpretation should be placed upon the claims than seems to have been given them in the former suit and accepted by the court below. They urge that the prior state of the art does not permit a construction of the claims which will include every combination of spiral and elliptical springs with the other elements of either claim, and that the claims must be limited by the language of the description in the patent to a combination in which the springs have a definite mode of operation.

The patent, so far as concerns the employment of the springs, is for an invention which is intended to diminish the end vibration or oscillation of the car body, known as "galloping," when moving over the track, and which in the long cars, having a comparatively short wheel base, is especially obnoxious. Its distinguishing feature is the employment of two kinds of springs,—spirals, for sup-

porting the car body above the axle boxes, and elliptic, for supporting it at the ends. Brill was not a pioneer in the use of springs for this purpose. Among the patents granted before the filing of the application for the patent in suit, the two in the prior art showing the nearest approximation to the invention of Brill are No. 409,993, granted August 27, 1889, to Benjamin F. Manier, and No. 419,876, granted January 21, 1890, to Edgar Peckham. Manier's patent describes the employment of springs for the purpose of obviating the rocking or oscillating movement of the car body. The specification contains this statement:

"Preferably I employ spiral springs, G, as shown in figure 1, for supporting caps, I; but, if desired, the elliptical springs, g, could be employed, as shown in figure 3; or other forms of springs may be used, as found convenient and desirable, the particular form of spring not forming a part of the present invention."

This patent shows every element of the first claim of the patent, in suit broadly considered, except the conjoint use of spiral and elliptical springs; one of the drawings showing spiral springs only, and the other showing elliptical springs only. The patent does not show the combination of the second claim, because the saddles are absent.

The invention in the prior patent to Peckham "consists in a novel construction of a car truck designed to afford spring supports under the end portions of the car body as well as the axles, and thus support said body nearly throughout its length, and also obviate, in a great measure, the vertical oscillation of the same when moving over an undulating track." The specification describes the spiral axle-box springs of the patent in suit, and "suitable springs" for supporting the car body at the ends, "which may be either of the spiral species, as shown at tt, or of the so-called 'semielliptical form,' as shown at t¹, in figures 4 and 5 of the drawings; which latter form of spring is disposed crosswise of the truck, and rests with its ends in suitable shoes." It also shows saddles mounted like those of Brill upon the axle boxes. Of this patent the expert for the complainant makes this statement:

"While the construction shown in this Peckham patent clearly does not embody the combination recited in the several claims of the Brill patent in suit, and while the Peckham patent contains no indication that any advantage would be attained by the use of a semielliptical spring across each end of the car in conjunction with spiral springs supporting the car body over the journal boxes, I am inclined to think that the construction embodying the semielliptical springs would measurably attain the result that is attained by the conjoint use of the spiral and elliptical springs as embodied in the Brill truck, and that a car having the truck structure shown in figures 4 and 5 of this Peckham patent would be less liable to excessive longitudinal oscillation than any of the trucks of the prior art heretofore considered."

It thus appears that it was old in the prior art to employ, for the purpose of obviating the oscillation of the car body, all the parts enumerated in the first and second claims, except the two kinds of springs in the same car truck, and that the only novelty in the inventions of those claims, details of construction being disregarded, consists in the substitution of both spiral and elliptical in the place of either spiral or elliptical springs. Indeed, the inventions are wanting even in this measure of novelty, and reside merely in the sub-

stitution of elliptical for the semielliptical end springs. The claims are not limited to longitudinal end springs, as the specification points out they are only preferably employed, and the circumstance that the semielliptical springs of the Peckham patent extend transversely instead of longitudinally is therefore immaterial. It is manifest that the inventions secured by the claims are of a very narrow character, and that they cannot receive the broad construction which their language would authorize without affirming their invalidity for want of patentable novelty. It would be merely an aggregation of old parts to supplement the spiral springs by the elliptic springs, or the elliptic springs by the spiral springs, and would not involve invention, unless some new mode of operation, due to the conjoint action of the two kinds of springs, should result from doing so. It is asserted that a new result is obtained from the conjoint use of the two kinds of springs, in that it breaks the rhythm of the impulses imparted by each kind, and thereby decreases the amplitude of the oscillation of the car. But when it is shown that the substitution merely consisted in employing elliptic springs in conjunction with the spiral springs, instead of semielliptic springs in conjunction with such springs, and that this substitution produces merely an improved, and not a new, result, the structural changes in form and arrangement which may be discovered in the specification afford the only features of novelty which can support the claims.

A reference to the language of the specification shows that the patentee contemplated special features of construction and arrangement of the springs, and made them a part of his invention as disclosed in the patent. The specification, in describing the springs, uses this language:

"The spiral springs, which are supported by or about the axle boxes, normally take the weight of the car. Between the extended sections of the upper chord and the side beams [that is, near the ends of the truck] I place elliptical springs, which preferably extend longitudinally of the truck, and which are so disposed that they will not be brought into action until the weight of the load on the axle-box springs begins to depress said spring abnormally. Then the elliptical springs begin to act, and assist the spiral springs in resisting the pressure of the load."

Again he says:

"It is therefore clear that more than the ordinary load is intended to be carried on this structure, and for this reason more than ordinary devices for spring-supporting the car body are necessary. To this end I supplement the axle-box springs by placing elliptic springs of slower action between the extended portions or sections of the said beam and upper chord, and so arrange them in respect to each other that the elliptic springs will not come into play until after the axle-box springs have begun to compress, and the action of the spirals in lifting the car body is continued after the elliptic springs have ceased to act."

In the detailed description of the various parts, the specification points out that the elliptic springs are not secured at the top to the upper chord, but are held in place by a cap having downward extending legs:

"The cap is interiorly chambered, so as to permit the elliptic spring, 34¹, to move within it, the legs, 46, acting to keep the said spring perpendicular, while space is left between the inner top portion of the cap and the top of the

spring to permit the upper chords to be depressed some distance before the cap begins to depress the elliptic spring."

Thus, a space is left between the upper chord, upon which the pressure from the car body is exerted, and the top of the spring, which will prevent compression of the elliptic springs until compression of the spiral springs has already taken place.

If the patentee had attempted to do so, it would have been difficult to frame a specification which more industriously sets forth as essential to his invention such a construction and arrangement of the spring devices that the elliptic springs will not be brought into play until the spiral springs have been compressed by the weight of the car body and the added load, "until the weight of the load on the axle-box springs begins to depress said springs abnormally." This characteristic of the invention must be imported into the claims, and would have to be if the qualifying term, "substantially as described," had not been incorporated into them.

We do not overlook the consideration that in other claims of the patent this functional characteristic of the invention is made a limitation in terms. Those claims, however, differ in other respects from the two claims in controversy. There are 28 claims in all, and some of them are merely duplicates of others, varying in phraseology, but not in substance. They were obviously framed to cover any possible theory of the invention which is hinted at in the specification, and which the exigencies of an infringement action may require.

The case is one in which it is apparent that the complainant cannot ultimately prevail, and, following the practice sanctioned by *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U. S. 485, 20 Sup. Ct. 708, 44 L. Ed. 856, one in which the bill should be dismissed.

The order granting the injunction is therefore reversed, with costs, and the cause remitted to the court below, with instructions to vacate the injunction and dismiss the bill, with costs.

CHICAGO INS. CO. v. GRAHAM & MORTON TRANSP. CO.

(Circuit Court of Appeals, Seventh Circuit. April 23, 1901.)

No. 691.

1. ADMIRALTY—PRACTICE ON APPEAL—ASSIGNMENTS OF ERRORS.

In the interest of uniformity in practice, rule 11 of the circuit court of appeals for the Seventh circuit (31 C. C. A. cxlvii., 90 Fed. cxlvii.), which requires an assignment of errors to be filed and returned with the record, will be held to apply to appeals in admiralty. This, however, does not prevent the court from permitting new pleadings or new evidence in proper cases, and, under section 10 of the act creating such courts, the cause will be remanded to the court below for decree as in case of other appeals.

2. MARINE INSURANCE—CONSTRUCTION OF POLICY—EFFECT OF RIDER.

The charterer of a vessel, which it employed in the carrying business, took an open cargo policy for \$5,000, containing the provision, "but no damage to be paid unless amounting to 5 per cent." By a rider it was provided, "Warranted free from particular average under 5 per cent.,

each kind of goods and each bill of lading interest subject to separate average." *Held*, that the effect of such rider was merely to change the liability of the insurer with respect to what should be deemed a partial loss thereunder, by making the 5 per cent. provision applicable to each kind of cargo and each bill of lading interest separately, instead of to the cargo as a whole, so that liability attached in case any one species of cargo or bill of lading interest suffered damage to the extent of 5 per cent., but extending only to such species or interests which sustained damage to that extent; but that, a loss under the policy having been ascertained, the amount to be paid by the insurer must be determined by the usual rules applicable to marine policies, the same as would a loss on an entire cargo, if the rider had been omitted; the insured standing as his own insurer to the extent of the value of the cargo above the amount of the policy, and sharing a proportionate amount of the loss on each part.

In Admiralty. Appeal from the District Court of the United States for the Northern District of Illinois.

The Graham & Morton Transportation Company filed its libel in personam in the court below to recover a sum of money claimed to be due on a policy of marine insurance issued to it by the Chicago Insurance Company. The assured was engaged in the business of transporting and carrying by water, for hire, passengers and freight between different ports and places on the Great Lakes and waters emptying into the seas, and on the 9th of December, 1897, took from the Chicago Insurance Company an open policy for the sum of \$5,000, and a like policy for a like amount in another insurance company, covering property shipped on the steamer City of Duluth, of which the libellant was the charterer. The policy was in the usual form, containing the ordinary "sue and labor" clause, and provided, "but no damage to be paid unless amounting to five per cent." There was attached to the policy a rider as follows: "By this policy of insurance on account of the Graham & Morton Transportation Company, loss, if any, payable to assured. Do make and cause five thousand dollars (\$5,000) to be insured from noon, December 9th, 1897, to noon of April 1st, 1898, on all grain, flour, general merchandise, etc., shipped on board the propeller City of Duluth. * * * Warranted free from particular average under 5%, each kind of goods and each bill of lading interest subject to separate average. Warranted to navigate Lake Michigan, principally between Milwaukee or Chicago and St. Joseph or Benton Harbor, during the life of this policy. * * * It is stipulated and agreed that, if any loss shall occur under the policy, same shall be reduced by the amount of said loss, unless the amount of loss shall at once be reinstated, and premium paid thereon at the pro rata rate of 6½% for the unexpired term of the policy." On January 26, 1898, the steamer City of Duluth departed the port of Chicago, bound for the port of St. Joseph, Mich., laden with a cargo of 29,000 bushels of corn, 2,000 sacks of flour, and general merchandise, consigned to ports on the eastern shore of Lake Michigan. On the evening of that day the vessel, in attempting to enter the port of St. Joseph, without fault of her own, stranded upon a bar at the mouth of the harbor, sprung a leak, filled with water, and became a total loss, damaging a large part of the cargo, much of which, however, was saved in a damaged condition by the assistance of tugs, lighters, and additional aid. Two adjustments of loss were made, each party procuring one. There is an apparent discrepancy in the two adjustments with respect to the value of the corn,—one stating it at \$8,700; the other, at \$7,830. The value of the flour was \$5,142.86; and of the miscellaneous cargo of merchandise, \$4,344.29. The corn was a total loss. The flour was damaged in excess of 5 per cent., and the damage to general merchandise was less than 5 per cent. The adjuster of the libellant made the total claim \$12,219.48, to be paid one-half by each insurance company. The other adjuster made the total claim \$10,467.34, and apportioned \$3,022.25 to each insurance company, and \$4,422.84 to owners uninsured. The different result in the two adjustments arises chiefly from the different theories upon which they are made,—the one, that the insurance was in gross of an entire cargo; the other, that it was

enumerated and distributed insurance on species. At the hearing the district court adopted the latter theory, and pronounced accordingly. A motion is made here to dismiss the appeal for the reason that an assignment of errors was not filed in the court below until the next stated term after the appeal was allowed, and that the order allowing the filing of the assignment of errors nunc pro tunc as of the date of the allowance of the appeal was unauthorized and void.

Charles E. Kremer, for appellant.
Robert Rae, for appellee.

Before WOODS, JENKINS, and GROSSCUP, Circuit Judges.

JENKINS, Circuit Judge, after the foregoing statement of the case, delivered the opinion of the court.

The motion to dismiss presents the question whether in an admiralty cause an assignment of errors is essential for the purpose of an appeal. It may not be denied that, prior to the organization of the circuit courts of appeals, upon appeal in an admiralty cause from the district to the circuit court no assignment of errors was necessary. The cause was there to be tried anew, as if no decree had been rendered; the appeal superseding and vacating the decree from which it was taken. The cause in the circuit court could be heard on new pleadings and further evidence. *Yeaton v. U. S.*, 5 Cranch, 281, 3 L. Ed. 101; *The Lucille*, 19 Wall. 73, 22 L. Ed. 64; *The Hesper*, 122 U. S. 256, 7 Sup. Ct. 1177, 30 L. Ed. 1175. A decree was entered in the circuit court, and enforced by that court without remand of the cause to the district court. *The Louisville*, 154 U. S. 659, 14 Sup. Ct. 1190, 25 L. Ed. 771. Indeed, rule 52 in admiralty expressly provided that "no reason of appeal shall be filed or inserted in the transcript." Under the act creating the circuit courts of appeals, it has seemed to the writer that appeals in admiralty now come to this court, as formerly they went to the circuit court, to be heard here as formerly heard there, and, it may be, upon new pleadings and upon new evidence. Such he understands to be the ruling of this court in *Gilchrist v. Insurance Co. (C. C. A.)* 104 Fed. 566. He is, however, of opinion that, under section 10 of the act creating these appellate courts (31 C. C. A. xxxiii., 90 Fed. xxxiii.), it was not contemplated that an original decree should be entered here, but that the cause should be remanded to the district court for sentence and execution. The question, however, is one of practice only, and it is more desirable that the practice should be settled and uniform than that it should conform to any previous practice; and as my Brethren are of opinion that an assignment of errors is desirable, and to conform the practice to that circuit which has most to do with the admiralty, we hold that rule 11 (31 C. C. A. cxlvi., 90 Fed. cxlvi.) applies to admiralty as to all other cases, and that an assignment of errors is essential, and should be returned with the record, and that paragraph 6 of rule 14 (31 C. C. A. clviii., 90 Fed. clviii.) so far as by reference to rule 52 in admiralty it seems to be in conflict, must be disregarded. This, however, does not prevent the court from permitting new pleadings or new evidence in proper cases. We are also of opinion that no new decree should be entered here, but that, as in other appeals, the cause

should be remanded to the court below. We understand this practice to be in substantial conformity with the rules of the Second circuit, adopted July 1, 1892, as amended October 5, 1892. Rule 10 (1 U. S. App. 717, 40 C. C. A. vi., 100 Fed. vi.). Our rule 11 reserves to the court the right to "notice a plain error not assigned," and in view of the doubt heretofore existing in this circuit with respect to the correct practice, we are not inclined in this case to disregard any substantial error because not assigned, assuming that the assignment of errors here, offered at a new stated term of the court, could not be directed to be filed *nunc pro tunc* as of a day of a prior term at which the appeal was allowed, because there was no omission to enter anything which had actually been done at that term. *The Bayonne*, 159 U. S. 687, 16 Sup. Ct. 185, 40 L. Ed. 305.

Coming then to the merits, we are confronted with the question of the proper construction of this contract of insurance. The rider, of course, controls the interpretation to be placed upon the policy, if there be conflict. It may, perhaps, tend to a better comprehension and solution of the question if we first ascertain the character and extent of the liability under the policy without the rider, and then consider the meaning of the language of the rider and its effect. The policy is the ordinary form of open cargo policy, and contains the clause, "but no damage to be paid unless amounting to 5%." The cargo was in value over \$17,000. The particular insurance here in question was for \$5,000. As the insurance covered only a part of the value insured, "the insured stands as his own insurer as to the remainder. The insurers are therefore liable for only that part or proportion of the loss which the amount they have insured is of the value of the whole property insured and at risk. This is equally true whether the property or interest be valued in the policy or left open." 2 Pars. Mar. Ins. p. 405. The clause, "but no damage to be paid unless amounting to 5%," exempts the insurer from payment of any loss unless that loss should equal 5 per cent. of the value of the cargo. The liability of the insurer under this policy, then, was a liability, in case of partial loss exceeding 5 per cent. of the value of the entire cargo, to pay such proportion of the loss as the amount in the policy bore to the value of the entire cargo. The clause in the rider which is supposed to work a change in the contract as expressed in the policy itself is this: "Warranted free from particular average under 5%, each kind of goods and each bill of lading interest subject to separate average." We agree with counsel for the libellant that, if the expression be ambiguous, it is to be given an interpretation most favorable to the assured; but is it ambiguous, and what is its purpose? The libellant was a common carrier of merchandise, receiving property for carriage from different owners, shipping under different bills of lading and to different consignees. It was sought to protect each bill of lading interest in the same manner that an entire cargo would be protected under a policy of marine insurance when shipped by one owner. The libellant knew that a policy of marine insurance had a radically different construction from that of a policy of fire insurance. We can read here no thought or intention to conform the one to the other. The manifest purpose was this: Under

the general form of policy there could be no loss covered by the insurance unless it equalled 5 per cent. of the entire cargo. It was sought so to change that provision that it should be applicable to each kind of goods and each bill of lading interest. For example, no loss upon the corn should be paid unless it equaled 5 per cent. of its value, no loss upon the flour unless it equaled 5 per cent. of its value, and so on. To ascertain what was to be deemed a loss under the policy, each kind of goods and each bill of lading interest was made subject to separate average. The 5 per cent. was to be computed upon the value of each kind of goods and each bill of lading interest, and not upon the value of the entire cargo. The term "average" is here used in the sense of the per centum of damage necessary to constitute loss under the policy; that is to say, not insured against damage or partial loss unless equal to 5 per cent. of the value of the particular kind of goods or particular bill of lading interest. This appears to us to be the clear purpose and the plain reading of the language employed. Thus, in *Washburn & Moen Mfg. Co. v. Reliance Marine Ins. Co.*, 179 U. S. 1, 8, 21 Sup. Ct. 1, 3, 45 L. Ed. 49, by the memorandum the goods were expressly warranted by the assured "free from average unless general," and by the rider "free from particular average, but liable for absolute total loss of a part if amounting to five per cent." The court, speaking by the chief justice, remarked:

"The memorandum and marginal clauses were in *pari materia*, and to be read together. They were not contradictory, and the rider merely operated to qualify the memorandum by allowing recovery for an actual total loss in part, which could not otherwise be had. In other words, the qualification was manifestly inserted so that, while conceding that under the memorandum clause no liability was undertaken for a constructive total loss, but only a liability for an actual total loss, the insurers might be held for an actual total loss of a part."

The rider in that respect qualified the provision of the policy that, in order to constitute a claim under it, the partial loss must equal 5 per cent. of the entire cargo. This policy covered the entire cargo. It insured "all grain, flour, general merchandise, etc., shipped on board the propeller *City of Duluth*." When, therefore, a loss has occurred on any particular species exceeding 5 per cent. of the value of the species, that is a loss under the policy to be borne according to the terms of the policy. That is to say, a loss being ascertained, the amount to be paid by the insurer is determined in the same manner as in the case of a loss exceeding 5 per cent. upon the entire cargo. Liability under the policy is not enlarged by the rider, except with respect to what shall be deemed a partial loss. The measure of liability for a loss ascertained is that which attaches by law to the policy stated in the rule laid down by Mr. Parsons and other text writers upon the law of marine insurance. That measure of liability is the proportion of the ascertained loss which the amount insured is of the value of the whole property insured and at risk. We perceive nothing in the language of the rider to change the proper construction of the language of the policy. There is nothing to indicate design to change the rule that, if the insurance covers only a part of the value of the property insured, the insured stands as his own insurer as to

the remainder. The insurance, then, was not of \$5,000 on each species, but was to the extent of \$5,000 upon a cargo valued at upwards of \$17,000. The theory of the libellant that, in case of partial loss of all the species equal to the sum of the insurance, the insurer was liable for the full amount of the sum stated in the policy, and that sum should be distributed pro rata among the several species, ignores, without warrant and without contract provision to that end, the fundamental principle of marine insurance, that as to the uninsured value the owner is his own insurer. The case stands, therefore, as though there were \$17,000 of insurance upon \$17,000 of value, and each insurer—the companies, and the owner of the insured value, as an insurer of that value—must bear that proportion of the loss which the sum insured by each bears to the total value. The cases of *Insurance Co. v. Bland*, 9 Dana, 143, and of *Silloway v. Insurance Co.*, 12 Gray, 73, as we read them, in no way impugn our conclusion; the question here involved not arising and being not considered in either of those cases. In the former there was a provision that particularly enumerated articles were warranted free of average unless general, and others free of average under certain specified percentages; and it was held that, to ascertain whether a loss occurred within the policy, the amount of damage is to be compared, not with the total value of the goods insured, nor with the value of the various articles to which the same warranty or rate of average applies, taken together, but with the value of that one of the several articles specified in the warranty to which the damage has occurred. This is in conformity with what we here hold as to the meaning of the rider. In the latter case, under the provision in the memorandum clause of the policy that there should not be liability for partial loss on specified articles unless it amount to 7 per cent. on the whole aggregate value of such articles, and happen by stranding, it was held that the underwriters were liable as for a total loss on any one kind of those articles, which, in consequence of perils insured against, was of no value at the time of arrival at the port of destination, and was thrown away, although other kinds were only partially injured before arrival. The policy insured a certain sum on one-half of the vessel, a certain other sum on one-half of the cargo, and a certain other sum on one-half of the freight. The subjects of the insurance, excepting the vessel, were not valued. The question arose upon the construction of the memorandum clause referred to. Under the Massachusetts practice the trial judge reported a stated case to the supreme court. It was held that the plaintiffs were entitled to recover as for a total loss of the articles which did not arrive in specie at the port of destination, but the question of the extent of liability for the loss thus ascertained did not arise, and was not considered; and, the court ordered that unless the parties could agree on the sum which would be due under the policies upon the principle stated, the case should be sent to an assessor to determine the amount. Neither of these cases reaches the question in hand. We consider that the insurance company is liable for that proportion of the loss which the sum insured bears to the value of the subject insured, and that the ruling of the district court was erroneous. The motion to dismiss is overruled. The cause is

remanded, with directions to the court below to enter a decree for the libelant for such sum as may be proved to be due upon the principles here determined.

CORNELL STEAMBOAT CO. v. 1,883 BAGS OF SUGAR.

(District Court, E. D. New York. April 16, 1901.)

SALVAGE—COMPUTATION OF AWARD—VALUE OF PROPERTY SALVED.

A cargo of sugar in port, on which the duty had been paid, subject to repayment in case of its destruction before landing, was exposed to danger of injury or destruction by fire, and the court made an award to the salvor equal to 10 per cent. of the value of the sugar. *Held*, that such award must be computed on the value of the sugar with the duty unpaid, since that was its actual value and the amount saved to the owner. The remaining sum, which went to make up the market value of the sugar with the tax paid, represented no property interest in the thing salvaged, but merely the tax, which could not properly be the subject of salvage; and its loss, moreover, would have been the loss of the government, which had no interest in or relation to the property, and could not be made a party, or affected by the salvage award.

In Admiralty. Suit to recover for salvage services

Benedict & Benedict (R. D. Benedict, of counsel), for libelant.

Wing, Putnam & Burlingham (C. C. Burlingham, of counsel), for bailee.

Foley & Wray (John F. Foley, of counsel), for carrier.

THOMAS, District Judge. This action is for compensation for salvaging a cargo of sugar awaiting discharge in the Erie Basin, meantime exposed to injury or destruction by fire. The duty had been paid, subject to correction of weights upon landing, and subject to repayment if the sugar were destroyed before landing. Rev. St. U. S. § 2984; Customs Regulations, art. 1236; 4 Treas. Dec., No. 10, p. 5, No. 22,847. Upon the trial the court stated that the salvor should be allowed a sum equal to 10 per centum of the value of the sugar; and the question reserved was whether such value was \$12,245.50, the value with the duties unpaid, or \$18,127.74, the value with the duties paid,—the difference being the amount of duty. It is urged by the libelant that the market value of the sugar was \$18,127.74, as it was worth that sum in the market, and that \$12,245.50 of this value belonged to the claimant, and the remaining \$5,882.24 pertained to the tax levied by the government. The government can lay no tax, save upon an importation into the United States, and the importation is not consummated before discharge. The payment of the duty is an election to land the sugar, and yet the payment is subject to the condition of repayment, if the subject-matter of the tax, in whole or in part, cease to exist before discharge. What, then, was the real relation of the claimant and the United States to the cargo at the time the fire occurred? The claimant held undischarged sugar worth about \$12,000. He could have duplicated it from incoming ships at that price. If it burned, that was the limit of his loss. He owned all the title,—all property interest in it. The United States had no title in it, no property rights, no lien. If the sugar burn, the United

States must return the tax paid in advance. It suffers thereby the diminution of its imports, without any specific loss of property, beyond this: that on a particular lot of sugar the payment of duty had anticipated actual entry into the country, and the amount was returnable by reason of the destruction. But under the fourteenth admiralty rule the United States could not be a party to this suit. It could not be a claimant. It had no relation to the res that enabled it to become either a respondent or a claimant, and is indifferent whether an award be granted or withheld. Had the sugar burned, the government would have lost thereby an opportunity to tax an import. As it was saved, it gained such opportunity. Its tax did not decrease or increase the value of the goods. Such tax was a mere burden of some \$6,000 placed upon the owners. The libelant now urges that the court should add 10 per centum to this burden because the libelant saved the sugar. The position of the persons owning the sugar in such case would be that the libelant saved to them the sum of \$12,245.50. It also preserved to them the right to enter the sugar in the United States, which was no pecuniary benefit to them. For this service the court is unwilling to decree payment by increasing the tax by 10 per centum thereof. The owners, whatever the nature of their interests, should give up something of the thing saved to the salvor, but should not pay some \$600 because the United States was enabled to retain the duty paid. It is difficult to conceive of an interest in the res for which in theory there could be no legal claimant, or of a salvage service to somebody who could not be affected by the salvage award, that would increase a tax on property which would have ceased to exist if the salvage services had not been rendered. In an action against the carrying ship it has been adjudged that the difference between the market value of the cargo upon arrival, and its value had it arrived sound, was the measure of damages available to the consignee, and that the libelant should not be required to give credit for any rebate of the duty paid, which duty was one element making up the market value. *The Eroë*, 9 Ben. 191, Fed. Cas. No. 4,521, affirmed in 17 Blatchf. 16, Fed. Cas. No. 4,522, and followed in *The Lizzie W. Virden*, 19 Blatchf. 345, 8 Fed. 624. Judge Blatchford, in affirming this case, either distinguished or disapproved of *The Carlotta*, 9 Ben. 16, Fed. Cas. No. 2,413, where a different rule was suggested. By the citation of these cases the libelant is understood to suggest that if the sound cargo when landed would be worth \$18,000, including \$6,000 entry duty, and the cargo be destroyed before entry by the culpability of the ship, so that no duty be paid or payable, yet the consignee may recover, in a suit determinable by equitable consideration, the whole sum of \$18,000. It may be that in the actions relating to usual contracts of affreightment a court may not sift out, for the benefit of the culpable carrier, some incidental benefit that is possible to the consignee, should he see fit to obtain a rebate of duties. This would entail an ascertainment, by an impracticable investigation, of the expense and probability of securing the rebate, which might and would place a serious burden on the consignee. The ship comes to port. The consignee pays his duties and takes his goods. If they are found to be damaged, he recovers for the

injury according to the rule laid down in *The Eroë*, and cannot be called upon to obtain a rebate for the benefit of the carrier, against whom there is an action based on tort. But no such case is here present. The owners of the cargo owed no duty to the salvor. They are guilty of no wrong. They have not stipulated to bring to the port a sound cargo. The salvor has paid and is liable to pay no duties. No burden of obtaining a rebate rests upon it. It did an act relating to goods for all practical purposes unentered and undutiable, and, for the service rendered the goods so situated, payment should be made. It is not easy to conceive of an action lying in favor of the consignee under the facts here presented. If there is a breach of duty of carriage, such action lies; but, if the goods be destroyed by fire without legal fault of the carrier, the action would not lie. But if the loss occurred from fire by the ship's fault, and the consignee had not paid the duty, he should not be permitted to recover according to a rule of damages that presupposes payment of such duty. If he has duly paid the duties, it may be that the court would not compel him to take upon himself a recovery of the duties, and credit the wrongdoer with the amount so recovered or recoverable. The consignee does not owe to the offending ship the duty of recovering the duties for the purpose of lessening the damages which the consignee has actually suffered by the ship's default. These views lead to the conclusion that the libelant should have a decree for the sum of \$1,224.55, which is 10 per centum of the value of the goods to the owners at the moment when the salvage service was rendered.

THE HELIOS

(District Court, E. D. New York. April 16, 1901.)

1. SHIPPING—BREACH OF CHARTER—LIABILITY OF VESSEL.

Libelant, a wrecking company, chartered a steamer to be used in salvaging the cargo of a vessel which had been wrecked in the West Indies. The locality and the nature of the work were known to the owner, and the charter gave libelant the use of the vessel for about six weeks. When the salvage had been but partially completed, and before the expiration of the time limited, the master refused to stay longer, alleging the insufficiency of the anchorage, and his fear of storms. The proofs showed that storms were not usual at that season, that the weather had been at all times pleasant, and that the vessel was not in any great or unusual danger by reason of the nature of the anchorage. *Held*, that under such facts the refusal of the master to remain was a breach of the charter, which rendered the vessel liable for the damages sustained by libelant from the forced abandonment of the work.

2. SAME—CONSTRUCTION OF CHARTER—LENGTH OF TERM.

A charter of a steamer for a wrecking expedition limited the term to "about six weeks," which was the time the charterer estimated would be required. *Held*, that such charter could not be construed as one for such time as might be required to complete the enterprise, or to entitle the charterer to retain the vessel for a term longer than eight weeks.

In Admiralty. Suit in rem to recover damages for breach of charter.

Benedict & Benedict (E. G. Benedict, of counsel), for libelant.

Wheeler & Cortis (Everett P. Wheeler, of counsel), for claimant.

THOMAS, District Judge. Hogsty Reef is a coral formation in the West Indies. Its shape is that of a horseshoe, some 4 miles in length from west to east. Its greatest width is $2\frac{1}{2}$ or 3 miles, and the entrance is at the western end, between two sandy keys, from a half mile to a mile apart, rising 10 feet or more above the water, and forming the calks of the shoe. The circle of the reef is in greater part submerged, but over it the water is carried, under the influence of sufficient wind, without immoderate or injurious disturbance of the interior water. The tide rises about $1\frac{1}{2}$ to 2 feet, is deficient in strength, and subordinated to the light counter winds usually prevailing in June and July. The water varies in depth from $5\frac{1}{2}$ to 6 fathoms at the entrance to $3\frac{1}{2}$ fathoms proceeding to the eastward for a distance of 2 or 3 miles. The interior water is clear, and objects on the bottom can be seen usually for a cable's length or more. The bottom is coral, with here and there drifts of shifting sands, sometimes more than 2 feet in depth, with scattered coral projections, rising, relatively to the depth of the water, inconsiderable distances, from which, however, a channel of some 1,500 feet in width is free. The reef is in the trade winds, and at the times of the events herein discussed the prevailing winds were east, or varying to points north and south thereof. About three miles eastward of the entrance, and on the northeast side, and without the reef, the steamer Framnes was wrecked. The libelant made a contract with the underwriters representing the cargo, which consisted of about 1,400 tons of trolley railway iron and fixtures, for salving the same, whereby the libelant obtained rights of property in such cargo. This contract was concluded after the libelant had dispatched Mr. Hagerty, an expert wreckman, to examine the wreck and the cargo, and the opportunities and needed facilities for securing it. Thereupon libelant negotiated with Mr. Hvoslef for the charter of the steamship Helios, to whom was explained the contemplated use of the vessel, the depth of water found through the libelant's investigation, which was stated to be "from five to six fathoms at the entrance of the harbor for a width of about three-quarters of a mile, and that the soundings, continuing up in the harbor for a space of about three miles, were from three and a half to five fathoms." Mr. Hvoslef was also advised of the nature of the cargo, and of the proposed manner of salving it, which accorded with the course subsequently observed. Mr. Hvoslef claimed a general knowledge of the reef, but did not have nor claim a detailed knowledge thereof. He stated that the water, as represented, was sufficient for the Helios. Thereafter Hvoslef brought to libelant a prepared contract for chartering the Helios, and it was executed under the date of May 22, 1900. Upon the submission of the proposed charter to him, Mr. Merritt, libelant's treasurer, called attention to the clause limiting its continuance "for about six weeks, to the West Indies and back." Concerning this Mr. Hvoslef testified that he explained to Mr. Merritt, libelant's representative, that the Helios had to be back by a certain time, and specifically he testified as follows:

"Q. Isn't it the fact that the word 'about' was put in instead of saying 'voyage for six weeks,' 'round trip of six weeks'? You said 'about six weeks'

because it was understood by both you and Mr. Merritt that it was impossible to say just how long it was going to take to get that cargo out of that wreck? A. That is the reason we gave Mr. Merritt the benefit of the doubt,—‘five days more or less.’ We didn’t state it. That is generally the impression. ‘About’ means ‘five or ten days more or less.’ Q. Is that the custom of the trade? A. That is the custom of the trade. * * * Q. The question is whether, under the charter party, with the explanation you gave of the custom of the trade, you gave him six weeks, with an addition of ten days in addition? A. Five or ten days more either way.”

The witness further explained that the time would begin to run from the time of the delivery of the ship. The Helios arrived in New York May 22d, and actually sailed on June 1st, having been delivered May 30th at 12 noon. The Helios was 290 feet in length, 883 tons, carrying 2,300 tons cargo, and was flat-bottomed, and without keel. After the charter was executed, and before delivery of the vessel under it, her master, Capt. Salvesen, called upon Mr. Merritt at the latter’s request, and there also met Mr. Hagerty, the wreckman, and received information similar to that furnished to Hvorslef. The following day, and a day or so before sailing, the master returned, and stated that after considering the matter and nature of the work, and the place of doing it, he could not allow the vessel to go unless the libelant assumed all responsibility for any damage or loss to his property and to the libelant’s accompanying barge. This interview resulted in the libelant’s signing the following letter:

“Bennett, Walsh & Co., Steamship Agents and Ship Brokers,
18 Broadway, New York.

“May 31, 1900.

“Capt. Salvesen and Owners of the S. S. Helios: Referring to charter party dated 22d of May, 1900, between W. D. Munson, chartered owner, and the Merritt & Chapman Derrick & Wrecking Co., in consideration of Capt. Salvesen agreeing to go to Hogsty Reef in order to assist in towing barges in and out of said harbor, and to assist in loading and unloading from such barges cargo from the Norwegian steamer Framnes stranded some time ago on said reef, and otherwise complying with our wishes, we hereby guaranty to hold the owners of this vessel free from any responsibility that may arise from this special work, and we also guaranty to repair all damages to the ship caused by the master complying with our demands to do said work, and, if the ship should be lost, or otherwise damaged, on account of doing this special work (always, of course, excepting the usual risks of navigation ordinarily covered by the owners), we hereby guaranty to cover owners for the vessel’s full value, which is given to us as \$90,000, and small damage as per estimate, if such damage should occur, caused by such work.

“Yours, truly,

Merritt & Chapman D. & W. Co.

“I. J. Merritt, Jr., Treas.”

Thereupon the libelant insured the Helios for \$90,000. After sailing, the Helios took the barge with material and men from Norfolk, and arrived at the reef on June 10th. The work was carried on as follows: The Helios towed the barge to the vicinity of the wreck, and then returned to anchor, usually at a place between the keys. When the barge was sufficiently laden, a signal was displayed by the wreckers, and thereupon the Helios took the barge in tow, and brought her to the anchorage place, and the iron was transshipped. This operation continued until June 22d, at which time the Helios had received four barge loads of iron. Then the master of the Helios notified Hagerty that the reef did not furnish sufficiently safe anchor-

age ground to justify his remaining and incurring the hazard of dangerous weather, and, notwithstanding Hagerty's protest, the *Helios*, Hagerty accompanying, sailed on June 24th to Mole St. Nicholas, where a joint telegram was sent to the Merritt Company, as follows:

"962 rails on board. Will probably get 300 more. Captain considers too risky stay longer; no holding ground. Cable destination.

"Hagerty Salvesen."

To this Hagerty received the following reply:

"Cargo destination Havana. Cable us when expect to arrive. Work must be carried on or abandoned per your judgment. Merritt."

Thereupon the master of the *Helios*, against the expressed decision of Hagerty, declined to continue operations, and returned to the reef, took from the barge the iron secured during his absence, and departed on June 29th, arriving at Havana July 3d, where, after waiting for the underwriters' agent for about 12 days,—a delay occasioned by the unexpected termination of the enterprise,—the iron was discharged, and the steamship returned to New York, arriving on July 25th, after an absence of eight weeks. The cessation of operations and the time lost thereby interrupted the salving of the cargo. Whether all of the iron could have been secured need not be determined, but that some portion was lost by the *Helios*' departure is beyond question. What the amount was and the damage to the libelant therefor is a matter for the commissioner, provided the interruption of the operation was not justified. To this attention will now be given. Did the libelant acquiesce in, and thereby ratify, the cessation of the work? The decision was left to Hagerty, and he decided to stay, and his determination was known to the master of the *Helios*. The master would convey the impression that Hagerty assented to the suspension of the work. Hagerty's statement is easily preferred. The important defenses are: (1) That the libelant did not fulfill the eighth article of the charter, which is as follows: "The cargo or cargoes to be laden or discharged in any dock or at any wharf or place that the charterers or their agents may direct, provided the steamer can always safely lie afloat at any time of tide." (2) The respondents fulfilled the time limited in the charter, to wit, "for a round trip to West Indies of about (6) six weeks. Steamer to be placed at the disposal of the charterers at New York." Certain facts are obvious. From the time of the arrival of the *Helios* at the reef the tide was slight in its influence, the wind was usually gentle, and never immoderate, and in the very midst of temperate conditions of weather the captain of the *Helios* ended the work. Why? Because he said he feared hurricanes, or at least high, and, in view of the anchorage facilities, dangerous, winds. There were no premonitions of a hurricane or dangerous winds, although such winds do come without any considerable notice. They are short in duration, lasting sometimes half an hour, and come with short notice. There is no evidence that one came during the time that the *Helios* should have remained, but the evidence permits the contrary inference. Nor is there evidence of any winds that, in view of the undertaking assumed, should have so excited the apprehensions of a prudent navigator as to effect its

termination. But it is urged that tempests and dangerous winds were expectable in June and July in that region. The evidence shows that such winds were exceptional during those months. But, in any case, the vessel was chartered for those very months, for those very waters, and that very reef. To this the final reply and objection is interposed that the vessel had not good anchorage grounds; that even the light winds that did prevail caused the anchor to drag; and that sudden squalls, even not of the degree of violence of a hurricane or gale, would have caused the anchor to drag, and, according to their direction, have carried the vessel on the reef, or out to sea. One difficulty in solving the controversy lies in the fact that the difficulties of the captain of the *Helios* were entirely subjective, save as they are illustrated by the evidence offered on the part of the claimant that the anchor dragged. The evidence shows that the anchor dragged when it was let go at a point some distance within the reef, where it caught shortly, but the vessel brought up near a black spot, or coral projection, covered by kelp or weeds, so that her bottom was not more than six inches above the same. The captain also claims that his vessel subsequently dragged both before and after Hagerty placed the buoy opposite her to determine whether she dragged, and to test the captain's statement respecting the same. There is no difficulty in reaching the conclusion that the captain is in error in stating that the vessel dragged after such buoy was placed, although the wind was stronger thereafter than at any previous time. There is great doubt whether she dragged at all at the entrance. Even if she did thus drag, there was apparently no serious danger therefrom, and nothing more disastrous than her drifting outside the reef is apparent. Good anchorage was found between the keys with sufficient depth of water, and plenty of room to swing, and at this place she remained during the entire stay, except upon the occasion when she went within the reef and anchored on the single occasion to which reference has been made. Had the winds that excited the prudence of the captain actually come, a catastrophe was possible; but it is difficult for a timid landsman to read the record, and seriously believe that the steamship would have done other than gone to sea if her anchor dragged, provided the persons in charge of her had been as vigilant and prepared as their duty demanded. She might have lost her anchor, but anchors in abundance were offered to the steamer by Hagerty, and were declined. But, if her anchor did drag on two occasions, the remaining time it held. It is not unusual for anchors to drag in a good harbor, but such happening does not condemn the harbor; and while there are undoubtedly better anchorage grounds than this reef, and while the smooth floor was unfavorable to holding, yet no special difficulty arose therefrom while the steamer anchored between the keys. When the owners chartered the vessel they knew that she must anchor, if at all, within the reef. They must have known that the floor of the reef was coral, and that the holding ground would be inferior to sand, mud, or clay. Moreover, for the greater part of the time the vessel was idle, and there was abundant opportunity to increase the means of holding, so that all difficulties could be overcome. Generally, she held. True, the winds were not

violent; but, with some duplication of her anchors, the resistance could have been sufficiently augmented, and in any case the probable results would have been the injury incident from going out to sea. Considering the previous knowledge of his errand, the fortunate conduct of the operation to the time of its interruption, the gentle breezes that prevailed and that were expectable at that season, the general favorable holding of the anchors, the proximity to the sea in case of storm, the general easterly source of the winds as shown by the log and other evidence, the abundance of deep water at and for some distance within the keys, the breadth of the channel at that point, the opportunity to use additional anchors, the conclusion cannot be escaped that the captain was timorous, rather than conservative and duly cautious; that he was too expectant of possible harm to his vessel, chartered for use on or about a coral reef, and too indifferent to the pecuniary sacrifice his departure entailed upon the libellant in the premature dissolution of the enterprise after the great expense of initiating it, and that he shut his eyes too readily and obstinately to all resources suggested to him, or of which he should have been cognizant. It is true that upon the trial objections relating either to loss of time or ineffectiveness were interposed to all suggested measures of which the *Helios* might have availed. It was shown that the *Crosby* went ashore by her anchor dragging, but that would not have happened had she been a steamer; and the divers vessels wrecked without the reef excite or terrify the imagination. Undoubtedly, danger lurks in all things, yet seamen undertaking adventures in tropical regions are not expected to experience the dismay that would come to the inexperienced, but rather to be intrepid, resourceful, and helpful. The captain's consciousness of the possible, but improbable, to a degree ruined the enterprise, and so far compensation should be made.

After hearing and reading the evidence taken in court, and reading all the evidence taken elsewhere, the conclusion is irresistible that the *Helios* has failed to fulfill the charter, and that by her departure against the request expressed by Hagerty a loss occurred for which compensation should be made. The rule for measuring the damages has not been presented, and will be considered in the first instance by the commissioner. While his due action should not be constrained by any present suggestion of the court, it is proper to state that, if the failure to secure more of the iron is involved in ascertaining the damages, as seems probable, it should be considered that during the latter part of the service it required about $1\frac{1}{2}$ days to load the barge, and about the same time to unload it,—some 3 days in all. The captain of the *Helios* so states. Some time was lost—perhaps not more than one day—by the steamer going to Mole St. Nicholas, and 10 or 12 days were lost at Havana. As the case now stands, some 12 or 13 days were lost, and only the iron recoverable during the time lost, whatever it was, may be considered, because under the charter the vessel should have been returned to New York at the time she actually arrived. The charter was for about six weeks, and not for the enterprise. The vessel was under charter for eight weeks, and the respondent accepted payment for that time. Hence

her owner may not now urge that the charter was for a shorter period. The question is whether, by fault of the *Helios*, the charterer was deprived of profitable use of the ship during any part of that time, and, if so, what legal damages accrued therefrom. The libellant's contention that the vessel was obliged to remain until all the iron was aboard is not approved, unless it could have been loaded and delivered, and the ship returned to New York, within the time actually occupied. It is not understood how a charter party for about a fixed time can be extended to cover the completion of an enterprise. The libellant judged that it could be done in six weeks, and for the purpose of covering unexpected delays the word "about" was used. Certainly, the space of two weeks should be the limit of such extension under the facts now presented. It may be that other elements of damage will be urged. It is not intended to fix or to suggest a rule of damage, but only to construe the charter in the matter of its duration.

THE C. F. ROE et al.

(District Court, E. D. New York. April 16, 1901.)

TOWAGE—LIABILITY OF TUG FOR INJURY TO TOW.

A tug held in fault for an injury received by a schooner in tow, by striking against the piling at the side of a railway bridge, the draw of which was not opened in response to the tug's signal, on the ground that it failed to act with sufficient promptness in stopping the tow, as was its custom, being familiar with the locality, and with the fact that the draw might be found closed, when the tug came in full view of it, on account of the near approach of trains.

In Admiralty. Suit to recover damages for injury to tow.

Hyland & Zabriskie, for libellant.

William J. Kelly, for Long Island R. Co.

James J. Macklin, for The C. F. Roe.

THOMAS, District Judge. The railway of the Long Island Railroad Company is carried over Flushing creek by a drawbridge, herein called the "Railway Bridge." Some 480 feet north of it is the highway bridge. The channel between the bridges is practically straight, and the width is about 180 feet. North of the highway bridge the railway bridge can be seen whether the draw of the lower bridge is open or shut, but if the vessel be on the west side it is claimed that the railroad is entirely shut off, and it is probable that it is obscured. The west side is often preferable for heavy draught vessels, for the purpose of avoiding the easterly rocks, which extend for some distance below the bridge, and it was upon the westerly side that on August 16, 1900, the steam tug *C. F. Roe* approached the highway bridge in its undertaking to deliver the schooner *Shepard* and cargo at Jones' Dock, south of the railroad bridge. At a considerable distance north of the highway bridge the tug whistled for the opening of the draw in the highway bridge, and the same signal is practically used, at least it is available, to give notice to the tender of the draw in the railway bridge. When the tug had

passed the highway bridge, her pilot discovered that the upper bridge was closed, and at a time thereafter, which will be noticed, the tug dropped back alongside, on the port hand of the schooner, and made fast; but before the headway could be stopped the schooner struck against piles on the eastern side of the dock, and received the injury which is the subject of this libel. It is urged against the railroad company that the tender did not open the draw, nor give timely notice that it was closed, and against the tug that she entered the space between the two bridges without knowing the condition of the draw, and in not sooner stopping the schooner upon the discovery that the draw was closed. The navigators of the tug were very familiar with the conditions. They knew that while yet north of the highway bridge they were not customarily advised whether the draw was open or shut; hence the present claim that the railroad company should have given a warning suitably north of the bridge was neither expected, and in fact such warning was contrary to the practice of the parties, in which there had been long acquiescence. Moreover, if the signal had been given and observed, it is obvious that the tug would not have stopped north of the highway bridge, because it was the invariable practice of this tug to go beyond the first bridge, and, if the draw was closed, to stop and await its opening. There was ample opportunity to do this in safety. Hence it is immaterial whether the bridge tender used a flag, as he states he did, to give notice that the draw was closed. The tug would not have stopped north of the bridge, and when he entered the bridge he saw that the draw was closed, and the tug was just where it was expected to be in such an event, and where it would have been in any case. Hence, while the tender was undoubtedly on the bridge, the probable absence of the flag is unimportant. Moreover, a train was shortly due, and there was no time to open the draw before it passed, and therefore the draw was properly closed. What, then, caused the accident? It was the failure of the tug to undertake sooner the stoppage of the schooner. The tug had been accustomed to conduct craft more easily managed, and the master made a miscalculation of his ability to arrest the speed of the schooner before she came on the piles at the left of the railway bridge, the contact with which was so moderate that the injury seems to have been due to some peculiarly unfortunate manner of striking. It is urged that the tug could not have stopped earlier, but it is believed that this contention is not sustained. The distance between the bridges permitted the tug to drop back and make fast some time before she did, as the schooner's hull was 115 feet, the hawser 60 feet, and the tug 65 feet, in length. Hence, when the stern of the schooner cleared the bridge, the bow of the tug was 240 feet from the upper bridge, in a place where the tug expected that the upper draw might be closed. At that time the tug should have gone back, and made fast at once, and begun to arrest the headway of the schooner. This maneuver was not undertaken until a considerable portion of this distance had been passed. The time was either slightly too short, or sufficient energy was not used to effect the desired stoppage. The fault of the pilot was that

of miscalculation, but it is sufficient to make the tug liable. There should be a decree dismissing the libel as to the railroad company, and adjudging the tug liable for the damages and costs.

THE ASIATIC PRINCE.

(Circuit Court of Appeals, Second Circuit. April 3, 1901.)

No. 51.

1. SHIPPING—DELIVERY OF CARGO—LOCAL LAW REQUIRING DELIVERY TO CUSTOMS OFFICERS.

Where, by the local law and usage, dutiable goods imported are required to be delivered to the customs authorities, who assume the responsibility of thereafter making delivery to the proper person on payment of the duty, a delivery by the ship to such authorities is a good delivery as between carrier and shipper.

2. PAYMENTS—APPLICATION BY AGREEMENT—RIGHT OF CREDITOR TO CHANGE.

Where a creditor has applied a payment to a particular indebtedness, and notified the debtor, who acquiesces therein, the application becomes a finality, and the creditor cannot thereafter change it without the debtor's consent.

3. SHIPPING—SUIT FOR WRONGFUL DELIVERY OF CARGO—DEFENSES.

Libelant shipped a consignment of goods to a customer at a Brazilian port, taking bills of lading to his own order. He applied a credit in his hands upon the purchase price, and attached the bills to a draft for the balance, and forwarded the same for collection to a bank by the same ship, and also a letter of advice to the purchaser. The latter acquiesced in the payment applied, but, having made further remittances to apply on such consignment in ignorance of the draft, at first objected to its payment, but later deposited its amount with the bank. Before the bills had been delivered to him, however, the bank received from libelant a second draft for the full value of the goods to be substituted for the first, libelant stating that he had changed the partial credit first given. On the refusal of the bank to deliver the bills of lading except on payment of the second draft, the purchaser commenced judicial proceedings, in which, under an order of court, he obtained a deposit of the first draft, and deposited an amount sufficient for its payment, and upon proof of such facts the goods were delivered to him without the production of the bills of lading. His prior remittances, which were specifically stated to be on account of such consignment, and which were received by libelant, together with the amount first credited thereon by libelant, reduced the amount still due thereon far below that deposited. *Held*, that the purchaser was entitled to have such credits all applied upon the price of the goods, and hence was the equitable owner, and that the ship could not be held liable for their wrongful delivery.

Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decree of the district court, Southern district of New York (97 Fed. 343), dismissing a libel to recover damages for the alleged nondelivery of certain merchandise shipped on the Asiatic Prince from New York in December, 1895, and January, 1896, to the port of Santos, in Brazil.

John L. Lewis, for appellant.

J. Parker Kirlin, for appellee.

Before WALLACE and LACOMBE, Circuit Judges, and THOMAS, District Judge.

LACOMBE, Circuit Judge. The merchandise consisted of flour, kerosene, bacon, and lard, of the invoiced price of £6,499.13, which had been ordered by Belmarco & Co., merchants of Santos, who were also agents of the Prince Line—of which the Asiatic Prince was one—at that port. The plaintiff and Belmarco & Co. had had many business transactions prior to the one in question, and as a result of them the latter firm was, as libelant claims, indebted to him to a considerable amount. Bills of lading for this merchandise were issued to the libelant, reciting that the goods were to be delivered at Santos “unto order, or his or their assigns.” A letter of credit on London bankers to the credit of Belmarco & Co. was at the time available, and against that libelant drew for £1,483.9.8, credited and applied that amount to this shipment, and drew a draft on Belmarco & Co. for the balance, £4,965.11.7, with interest and banker’s commission; in all, £4,986.6.2. Libelant attached indorsed copies of the bills of lading to this draft, and forwarded them to a Brazilian bank at Santos, with instructions to deliver to Belmarco & Co. upon payment of the attached draft. These documents went forward in the mail that was carried by the same steamer, together with a letter advising Belmarco of the application of the London credit and of the draft for balance of price of shipment. The steamer reached Santos on February 5th. On February 6th, in the afternoon, the bank at Santos presented the draft to Belmarco. The manager of the bank, libelant’s witness, testified that under the Brazilian Commercial Code and the commercial usage in Santos payment of a sight draft may be delayed for 24 hours if the holder finds it convenient, and that in this case the bank did not expect Belmarco to write any acceptance on the draft, nor to pay it before the expiration of the customary 24 hours. Belmarco, who, as will be seen hereafter, had meantime made remittances on account of this merchandise, at first refused payment, but subsequently, on the same day, reconsidered, and on the next morning, before the bank opened, deposited with one of the officers of the bank a check sufficient to cover the amount. It seems, however, that a few days after the sailing of the Asiatic Prince libelant changed his mind about applying the London credit to this shipment, and drew a second draft, for the full amount of the invoice price, with interest and banker’s commission, £6,494.8.4, which he sent to the bank at Santos to be substituted for the first draft. Although the cable was being constantly used by both parties, libelant, for some reason known only to himself, failed to advise Belmarco & Co. before they received his letter stating application of the draft of £1,483.9.8 to this shipment that he had reconsidered such application, and had chosen to apply it to the old indebtedness. This second draft arrived while discussion was going on between the manager of the bank and the representative of Belmarco & Co. as to the rate of exchange, the question being how much the bank should refund with the bills of lading, the amount of the check being in excess of what either party contended was the proper rate of exchange. The bank thereupon refused to deliver over the bills of lading except on payment of the second draft. Belmarco thereupon commenced judicial proceedings, and under order of the local district court deposited on February 7th with

the Bank of Santos, for libellant's account, the first draft and an amount in Brazilian currency stated in the order to be sufficient to cover it. Entry of the goods was made on the ship's copies bills of lading unsigned and stamped "Nonnegotiable." Proof of all the circumstances above set forth was made to the customs authorities. A bond of indemnity was required from Belmarco, and the goods passed into his hands, notwithstanding the protests of the bank and of Karl Valais & Co., the libellant's agents, to whom, on February 10th, the business was turned over in compliance with instructions by cable. The district judge held that delivery had been made by the vessel according to the provisions of the local law, and that by reason of the application of the £1,483.9.8, and two other remittances of £2,000 and £900, respectively, to cover this shipment, Belmarco had acquired a special property in the goods, and had a right to the completion of the contract under which they were shipped upon payment of the balance of the price on arrival at Santos; and that, as such balance, or more, had actually been tendered, and judicially deposited with the draft as payment after tender, Belmarco & Co. were the true owners, and the ship absolved from all responsibility, because it delivered to the person then rightfully entitled to it. As to the first of these propositions the district judge held:

"The proof is here overwhelmingly in favor of the respondent that by the law and usage of Santos the delivery of all dutiable goods like these must be made by the ship to the customs authorities, as was done in this case, and cannot be made otherwise, and that the allowance of entry and responsibility for a delivery of the goods on payment of duties to the proper person thereafter devolves wholly upon the customs authorities."

Such a system, in which the customs authorities assume the ship's responsibilities as to making true delivery, is contrary to the system prevailing in other ports. Nevertheless it is not incredible that a government may undertake such functions. Whether or not it is the law and usage in Santos is a question of fact, the burden of proving which is on the party asserting its existence. The law of a foreign country and its commercial usages are proved here by calling its lawyers and merchants and interrogating them. That has been done in this case, with a result which certainly warrants the conclusion that the proof is overwhelmingly the one way. It is true that as to the law of Brazil the only witness called by claimant was a young lawyer, but his statements are direct, positive, and reiterated to the effect that the customs authorities require delivery to them, and themselves make delivery to whomever has the right to receive; and there is no reason apparent why his statements should not be accepted, especially when the great weight of mercantile testimony is to the same effect. There was abundant opportunity to take the testimony of some other lawyer in the district court if the statements of claimant's witness were inaccurate, and to make application here to take further proofs; but libellant has contented himself with printing copious excerpts from the statute law of Brazil, which he insists do not sustain the witness' statements. As an example of the argument employed, the witness testified, "The custom-house inspector alone decides any right to entry and delivery," and referred to article 477 of

the Consolidated Custom-House Laws. Appellant prints this article, and says "it makes no reference to delivery." Apparently that is so, but it does provide for making proof to the collector by legitimate documents of a party's right to receive imported merchandise. Such a method of criticizing the testimony of a foreign lawyer as to the law which prevails in his country is unpersuasive. There is much more than the text of a statutory enactment to be considered. Departmental regulations, administrative construction, judicial exposition, are often quite as important. The text of the act of congress of February 26, 1885, might well convey to a jurist in some foreign country a different meaning from that which it conveys to a lawyer here who is familiar with *Holy Trinity Church v. U. S.*, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226. We are of opinion, therefore, that the new proofs contain nothing which should require any modification of the conclusion of the district court as to the ship's delivery of the merchandise to the custom house being sufficient to discharge her obligation.

The decision may be sustained, however, on another ground, more satisfactory, perhaps, because untechnical. We concur with the district judge in the conclusion that by reason of Belmarco's payments on account of this shipment, and the tender and judicial deposit which he made, his firm was rightfully entitled to delivery, and the ship not liable for damages because of such delivery. As has been stated above, libelant drew for £1,483.9.8 against a London credit of Belmarco & Co., and in his letter of January 4th wrote to that firm:

"We have used of the letter of credit No. 9 of Mess. Robertson & Co. by our draft £1,483.9.8 at 90 days' sight, order of London & Hanseatic Bank, Limited, and credited it to you under usual reserve, and applied it to the present shipment. We recommend to you our draft, with documents attached, No. 10,356, £4,986.6.2 [balance invoice price of this shipment], at sight, order Brazilian Bank, to your prompt protection."

The draft for £1,483.9.8 was paid in London, and forwarded by the bankers to Belmarco, who paid its amount to the persons advancing the credit to February 1st. On February 6th he received the letter notifying him of Herbst's application of the proceeds to this shipment, and was presented with draft for the balance, for which, as he testifies, he tendered a sufficient check. Here we have an express application by the creditor, of which application the debtor is informed, and in which he acquiesces, before he receives any notification that the creditor desires to alter the application. Such an application cannot thereafter be changed without the consent of both parties. On January 6th Belmarco sent to libelant drafts on London bank aggregating £2,000, which libelant subsequently received and collected. The next day—January 7th—Belmarco telegraphed libelant (the telegram was duly received): "On account of your shipment per S. S. Asiatic Prince, remittance sent by mail London, &c., Bank yesterday morning £2,000." In the letter to the London, etc., Bank he writes, "Put the above total to the credit of Herbst Bros., of New York, against their shipment of 2,000 kegs lard and 600 barrels bacon on the S. S. Asiatic Prince." Here we have an express application made by the debtor, of which application he promptly notifies the creditor.

It is familiar law that such application must stand. It makes no difference that he is indebted to his creditor on other accounts, nor that his creditor, when he sent forward the goods on account of which the debtor makes the payment, expected that old indebtedness would be first paid, nor that he had good reason to suppose that past differences between them would be arbitrated, nor that the creditor had telegraphed asking for remittance on general account, nor that the creditor objects to the debtor's application, and insists on making a different one. As was said by Redfield, J., in *Boutwell v. Mason*, 12 Vt. 608, this absolute right of application in the debtor "results from one of the most obvious principles of human action,—that a free agent may annex such conditions to an offer as he sees fit, and he who accepts the offer takes it subject to those conditions." It is, therefore, unnecessary to go over the voluminous history of the past transactions, with its disputes as to quality of flour, as to modes of payment, etc., in order to ascertain which of the disputants is nearer right. There is nothing in it all which could in any way deprive Belmarco of his undoubted legal right when he sent his creditor £2,000 on January 6th to designate to which account it was to be applied. On January 7th libellant telegraphed Belmarco, "Remit to W. H. Cole & Co. £900 overdue," to which the latter replied: "Your telegram to hand. We cannot conform to contents." On January 8th libellant again telegraphed, "Remit by telegraph. Remit to W. H. Cole & Co.,"—to which Belmarco replied on the 9th: "New London & Brazilian Bank, Ltd.: Remit p. telegraph £900. W. H. Cole & Co." Belmarco testifies that he applied this payment to the shipment by Asiatic Prince, and says that the word "new" in this telegram is an indication that the remittance is on the new account. This seems to be a reasonable interpretation in view of the circumstance that it appears from the record that there is a London & Brazilian Bank, but does not appear that there is any such concern as a New London & Brazilian Bank. Belmarco's statement is confirmed by his letter of the same day as the telegram to Cole & Co., in which he writes: "We beg to advise you having this day sent you a telegraphic order through the London & Brazilian Bank, Ltd., for the sum of £900, which amount kindly place to the credit of Messrs. Herbst Bros., of New York, for account of their shipment to us per the S. S. Asiatic Prince." We have here another application by the debtor of his payment of £900 to this particular shipment. When the first draft, therefore, arrived at Santos, and was presented to Belmarco, he had paid out money on account of this shipment of £6,449.13 to the amount of £4,383.98. The first draft, therefore, was largely in excess of the amount remaining due. The mail that brought the first draft brought also, as we have seen, the letter of advice from libellant stating that he had applied the £1,483.98 to shipment per Asiatic Prince. Acquiescence in such application by the debtor, Belmarco, would make it a finality. He testifies that he did so acquiesce, and we see no good reason for rejecting this testimony. As to the deposit of check sufficient to meet the draft of £4,986.62 with the Santos Bank early in the morning of February 7th, the only testimony is that of Belmarco and his partner, Lundin. There is in the record a written statement,

signed by the partners in the firm (a depositor in the bank) which furnished the check that was deposited, corroborating this testimony, but it is not sworn, is in no sense evidence, and needlessly incumbers the record. But, if the testimony of Belmarco and Lundin as to an early deposit be rejected, the situation is not changed. The bank officers themselves testify that from the moment of presentation of the first draft Belmarco's contention was that he had made remittances which had reduced the amount he owed on this shipment below the amount of such draft; and that on February 7th, after being informed of the arrival of the second draft, he offered to pay the first draft. Tender of the proper amount was undoubtedly made, and judicial deposit completed on that day. Libelant contends that the original refusal to pay the first draft operated to leave him free to change the application of the £1,483.9.8 to current account, because by so refusing Belmarco failed to acquiesce in the original application. If there had been no other payments, so that the amount of the first draft was still due on this shipment, there might be some force in this contention. But, if it be assumed that Belmarco & Co. had paid £2,900 more on this shipment (and, as we have seen above, there can be no doubt that they made such payment when they applied the £2,000 and £900 drafts thereto), their refusal to pay the whole amount of the first draft as a condition of receiving the bills of lading is no indication that they refused to acquiesce in the first application of the £1,483.9.8. On the contrary, their conduct at the time, insisting as they did that the amount still due on the shipment was very much less than the first draft, fully corroborates Belmarco's testimony that he acquiesced in libelant's original application of the £1,483.9.8 as soon as he heard of it, and never consented to any change. We entirely concur in the conclusions of the district judge, and on all other points arising in the case deem it unnecessary to add anything to his discussion thereof. The decree of the district court is affirmed, with costs.

WHITNEY et al. v. OLSEN.

(Circuit Court of Appeals, Ninth Circuit. February 4, 1901.)

No. 608.

1. ADMIRALTY—REVIEW ON APPEAL—QUESTIONS OF FACT.

In cases on appeal in admiralty, the decision of the district court on questions of fact, depending upon contradictory evidence taken in open court, will not be reversed, unless clearly against the evidence.

2. SEAMEN—INJURY WHILE IN SERVICE—DUTY OF SHIP.

Under the maritime law, a seaman who receives an injury while in the service of the ship is entitled to medical care, nursing, and attendance, and to a cure, so far as cure is possible, at the expense of the ship, and it is the duty of the master, for the performance of which the owners are responsible, to take all reasonable measures to that end.

3. SAME—TAKING INJURED SEAMAN TO NEAREST PORT—WHEN REQUIRED.

Libelant was mate on a schooner which left San Francisco on a cod-fishing cruise in Alaskan waters, all the crew being on a lay. When 500 miles from Port Townsend libelant was struck by the main boom, without fault on the part of any one, and his leg was broken in two places.

There was no surgeon on board, nor any one competent to treat the injury. Libelant asked to be taken back to shore, and the wind was favorable, but the master proceeded to Unalaska, 1,750 miles from the place of injury, which he reached in 16 days, and from that port libelant was sent back to San Francisco. By reason of the delay and the motion of the ship, libelant suffered much additional pain, and his injury was rendered permanent. *Held*, that it was the duty of the master, under the facts shown, to at once proceed to Port Townsend, which was the nearest available port where libelant could have received proper care and treatment, and that his failure to do so rendered the owners liable in damages.

Appeal from the District Court of the United States for the Northern District of California.

Myrick & Deering and Charles W. Slack, for appellants.

H. Digby Johnston, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. The libel in this case was filed to recover damages for alleged negligent, illegal, and wrongful treatment upon the part of the schooner *Uranus*, its owners and master. The court awarded the libelant the sum of \$1,000. The schooner, on the morning of April 5, 1899, sailed from the bay of San Francisco on a cod-fishing voyage in Alaskan waters. Nelse Strangland was the master, and the libelant the third mate, of the schooner. All the members of the ship's crew were on a lay. From the testimony the court found the following facts:

"(1) That the owners of the *Uranus* exercised reasonable care in the matter of overhauling the tackle of the *Uranus*, for the purpose of making her ropes, tackle, and other appliances safe and in proper condition for the voyage referred to in the libel. (2) That upon the 16th day of April, 1899, while pursuing the voyage mentioned in the libel, the main boom lift of the vessel was carried away, and by reason thereof the main boom struck the libelant, causing him to fall and break his leg in two places, one just below the knee and the other just above the ankle, and that said accident was not caused by the negligence of the owners of the *Uranus* or her master. (3) That when said accident occurred the vessel was about five hundred miles distant from Port Townsend, and the wind was at that time fair for her to make that port; that said port could have been made within four or five days, and was the nearest port, and libelant requested to be taken there, but the master refused to do so, and proceeded on his voyage, reaching Unalaska on the 2d day of May following; that the vessel was sufficiently supplied with bandages and splints, but she had no surgeon on board, or any one who knew how to properly set a fractured limb; at Unalaska the libelant was visited by a physician employed by the master for that purpose, and he gave it as his opinion that the broken leg was doing well, and that it would be better for the libelant to be returned to San Francisco, and he was then placed by the master on board the steamer *Del Norte* for that purpose, and reached San Francisco on or about the 14th of May, 1899, and immediately upon his arrival was placed in the Marine Hospital for treatment, where he remained a number of months; that from the time of the accident until his return to San Francisco the libelant received, while on board the *Uranus* and *Del Norte*, all the care and attendance possible to give one on shipboard, in the absence of a surgeon. (4) That the master of the *Uranus* was guilty of negligence in not taking the libelant after the accident to Port Townsend, the nearest port; that by reason of such negligence the libelant was subjected to protracted and unnecessary suffering; that the injuries sustained by the libelant are permanent, by reason of the fact that the fractured bones have failed to make a proper

union, and this result would probably have been avoided if the libelant had received proper surgical treatment within five or six days after the accident, and he had been placed upon shore, where his injured leg could have been kept in a position of rest. (5) That, by reason of the neglect of the master to take the libelant to the nearest port for surgical treatment, the libelant has sustained damages in the sum of \$1,000 and costs."

In the specification of errors relied upon by appellants it is claimed that the court erred (1) in holding that the master of the *Uranus* was guilty of negligence in not taking the libelant to Port Townsend after the accident; (2) that the court erred in giving a decree against the owners of the vessel. It is contended by appellants (1) that the general rule that masters of vessels must in all cases when accidents occur on board ship put into the nearest port to give the injured seaman treatment is not imperative, and that, under the facts of this case, it was not the duty of the master of the *Uranus* to put into Port Townsend; (2) that if the owners used reasonable care in overhauling their vessel, and put her in proper condition before sailing, supplied her with the usual medicines and appliances for the contemplated voyage, and selected a competent master to take charge of her, they cannot be held liable for the acts of the master, within the exercise of his judgment, and that, when a competent master does what he deems best under all the surrounding circumstances, the owner cannot be charged with negligence.

The principal controversy as to the facts arises between the testimony of the master and the appellee concerning the latter's request to be taken to the nearest port. Their testimony is directly conflicting. Appellee testified that shortly after the accident, on the same day it occurred, he asked the master: "Will you be so kind as to put me back [referring to Cape Flattery]?" The master then said: "Wait; I am going to see what I can do." The next morning the master said: "I can't put you back; the nearest place is Unalaska." The master testified that appellee's request to be taken back was not made "until about a week after" the accident, and that he was then nearer Alaska than to Cape Flattery or Port Townsend. His testimony in detail is as follows:

"Q. If any accident occurred on a voyage of that kind, what is the custom,—what do you do? A. If we meet with a serious accident, we have to run into the nearest port that we can, except there is an exception like in this case. The Court: Q. You did not answer fully that question. You say that generally you run into the nearest port, but there was an exception in this case. A. Yes, sir; because I have seen lots of broken legs before. I knew it could not be set any other way, so I thought there was not any great risk to run to go up to Unalaska. * * * Another thing, it was an understanding between me and Mr. Olsen that he was going to go along to Unalaska, and stay there until I got loaded, and I was going there to take him down to San Francisco. Q. * * * You had this talk with Olsen after the accident occurred? A. Yes, sir. Q. It was agreed he should go on with you to Unalaska? A. Yes, sir. Q. And stop there? A. Yes, sir. Q. And then return with you after you got your load? A. Yes, sir. Q. Did he change his mind, and want you to turn back, at any time? A. About a week or so afterwards he wanted me to put back to Port Townsend. Q. You were then past Port Townsend? A. It was a long ways off. Q. Why did you not turn back to Port Townsend? A. Because I was nearer Alaska at the time. Q. When the accident happened, how far were you from Puget Sound? A. About 500 miles. * * * Q. Why did you not run into Puget Sound instead of going

on to Alaska? A. Because it was hard to tell. It may take just as long to run in there. You cannot depend on the wind. It is not like we have got a steamer. We could then tell when we would be there. Q. You thought it advisable to go right on your course? A. Yes, sir. Q. Instead of taking the risk of being becalmed in Puget Sound? A. Yes, sir. * * * Q. To put into Puget Sound, you would have to take the risk of favorable wind to get in there? A. Yes, sir. Q. The wind was favorable in this direction for Unalaska? A. Yes, sir. Q. And you thought it advisable to continue on your course? A. Yes, sir. Q. You thought you could make Unalaska quicker or as quick as you could make Puget Sound? A. Not quicker, but just as quick; and, when Mr. Olsen agreed to it, I did not think it was necessary to return."

What are the probabilities as to the truth of the different statements,—which is the more natural? What other circumstances, if any, tend to corroborate either of the parties? It is true that Olsen admitted that the master said, "The nearest place is Unalaska," and it is claimed that this should be taken as corroborating the testimony of the master, because it could not be true if it was said shortly after the accident occurred. On the other hand, is it reasonable to believe that Olsen, with two unset fractures in his leg,—to use the language of his counsel, "His foot shattered, racked with pain; the broken bones grating against each other and against the torn flesh with every motion of the boat; and knowing there was no one on board to reduce the fractures or give him other relief,"—would have asked to be taken to a place distant about 1,750 miles instead of a place distant about 500 miles?

It must be remembered, in this connection, that, although the master testified in chief differently, the other witnesses, and afterwards the master himself, admitted that the wind was as favorable in one direction as the other. Although in his testimony he said Olsen consented or agreed to be taken to Unalaska, yet in a letter written by him at Unalaska, May 4th, to the owners of the schooner, notifying them of the accident to Olsen, and what had been done by him, he assigned as the reason why "he had to go into Unalaska" that "I was afraid the men was going to leave if I went to the sound." If there had been an agreement with Olsen to be taken to Unalaska, does it not seem reasonable that upon the arrival of the *Uranus* at Unalaska the master would have given that as his reason for going there instead of to the sound? When Olsen was recalled, and his attention drawn to the testimony of the master, he was asked whether he had "ever agreed to go to Unalaska," and answered, "No, sir." After repeating the conversation he had with the master, substantially as we have before stated, he added that at that time the master said to him, "I cannot put you back; the crew is going to run away from me if I go back;" and said that this was the reason he gave for refusing his request to be taken to the sound. It does not appear from anything in the record that there had been any indication of any intention on the part of the crew, or any member of the crew, or that the master had any reason to fear that the crew would desert if he went to the sound. But we are asked to assume that, owing to the Klondike excitement existing at that time, the master had the right to expect there would be danger of the crew deserting.

In addition to all this, the appellee is to some extent corroborated by the testimony of the mate of the schooner. Olsen, in the course

of his testimony, said that he was so angry at the master for refusing his request to be taken to Cape Flattery that he (metaphorically) "chased him" out of the cabin. Matson, the first mate, called by the appellants as a witness, when asked upon cross-examination whether he did not hear Olsen complain that he was not taken to Cape Flattery, answered that he did. "Q. On what day was it that you heard that complaint? A. Well, I don't remember the day. Q. Was it the day after the accident? A. I do not know. Q. Was it about that time? A. Somewhere around there; yes. Q. Olsen seemed to be in great pain, did he not? A. Yes, sir; the way he acted. Q. Did he complain of the motion of the ship hurting his leg and ankles? A. Yes." Does it seem reasonable that Olsen should have complained of not being taken to Cape Flattery if he had agreed to go to Unalaska, as testified to by the master? Furthermore, the answer does not contain any allegation that there was any agreement on the part of Olsen to go to Unalaska, but there is an averment "that after said Olsen was hurt * * * the ship was run into Dutch Harbor, as being the most available port." In the light of all these facts and circumstances, we are of opinion that the weight of the evidence supports the view that appellee requested on the day of the accident to be taken back, and did not consent or agree to go to Unalaska.

Moreover, the testimony in this case was all given in open court. In such cases this court has held that, "in cases on appeal in admiralty, when the questions of fact are dependent upon contradictory evidence, the decision of the district judge, who had the opportunity of seeing the witnesses, and judging their appearance, manner, and credibility, will not be reversed unless it clearly appears that the decision is against the evidence." *The Alijandro*, 6 C. C. A. 54, 56 Fed. 621, 624. The same rule has been followed in other circuits, and in the supreme court. *The City of Naples*, 16 C. C. A. 421, 69 Fed. 794, 796; *The Brandywine*, 31 O. C. A. 187, 87 Fed. 652; *City of Cleveland v. Chisholm*, 33 C. C. A. 157, 90 Fed. 431, 434; *The E. Luckenbach*, 35 C. C. A. 628, 93 Fed. 841, 843; *Compania De Navigacion La Flecha v. Brauer*, 168 U. S. 104, 123, 18 Sup. Ct. 12, 42 L. Ed. 398; *Stuart v. Hayden*, 169 U. S. 1, 14, 18 Sup. Ct. 274, 42 L. Ed. 639; *The Carib Prince*, 170 U. S. 655, 18 Sup. Ct. 753, 42 L. Ed. 1181.

Under this rule, we decline to discuss the other minor points argued by counsel, in relation to the facts found by the court, but content ourselves with the statement that, from a careful examination of the testimony in the record, it does not appear that any of such findings are "against the evidence." On the contrary, the findings in extenso are as favorable to appellants as the testimony would warrant.

Was the master, under the facts as found by the court, guilty of any negligence in refusing to go to the nearest port after the accident occurred? If so, can the *Uranus* or its owners be held responsible for such negligence? What is the duty of the master and the ship in cases where a seaman is injured on board the vessel? There is no law which requires the presence of a physician or surgeon on board a vessel like the *Uranus*. But it was admitted by the master, and is not denied by appellants, that, in case of a serious injury to a sea-

man, it is the general custom for the master to take the ship into the nearest port when there is no surgeon on board. In fact, it was clearly his duty to do so, unless the facts and circumstances relied upon by appellants are of such a character as to justify him in the course he pursued. In discussing these questions, it must be borne in mind that the rules which govern and control them must be determined, not from the municipal law, but by the maritime law. The maritime law furnishes entirely different principles upon many subjects from the common law. Seamen are entitled to different rights from men on land. As was said by Story, Circuit Justice, in *Reed v. Canfield*, 1 Sumn. 195, Fed. Cas. No. 11,641:

"The policy of the maritime law, for great and wise and benevolent purposes, has built up peculiar rights, privileges, duties, and liabilities in the sea service. * * * The law of the ocean may be said in some sort to be a universal law, gathering up and binding together what is deemed most useful for the general intercourse and navigation and trade of all nations. * * * It is impossible, therefore, with any degree of security, to reason from the doctrines of the mere municipal code, in relation to purely home pursuits, to those more enlarged principles which guide and control the administration of the maritime law."

Under the maritime law it is well settled that a seaman who receives an injury while in the service of the ship is entitled to medical care, nursing, and attendance, and to a cure, so far as cure is possible, at the expense of the ship. *Reed v. Canfield*, supra; *The Ben Flint*, 1 Biss. 562, Fed. Cas. No. 1,299; *Brown v. Overton*, 1 Spr. 462, Fed. Cas. No. 2,024; *Harden v. Gordon*, 2 Mason, 541, Fed. Cas. No. 6,047; *Peterson v. The Chandos* (D. C.) 4 Fed. 651, 654; *The City of Alexandria* (D. C.) 17 Fed. 390, 393; *The W. L. White* (D. C.) 25 Fed. 503, 504; *The Vigilant* (D. C.) 30 Fed. 288; *The Lizzie Frank* (D. C.) 31 Fed. 477, 481; *The Carlisle* (D. C.) 39 Fed. 807, 5 L. R. A. 52; *The A. Heaton* (C. C.) 43 Fed. 592, 595.

In *The City of Alexandria*, the court, after citing article 6 of the laws of Oleron, article 18 of the laws of Wisbuy, article 39 of the laws of Hanse Towns, and numerous other authorities, said:

"Misconduct or neglect by the officers in the treatment of the seaman, after he has been wounded in the service of the ship, becomes a different and additional cause of action against the ship, because a legal obligation to him then arises to afford suitable care and nursing, and if this be neglected the ship may be held to consequential damages."

In *Brown v. Overton*, where, on a voyage from Calcutta to Boston, and 25 days before passing within sight of St. Helena, a seaman fell from aloft, and broke both legs, it was expressly held that it was the duty of the master to have put into St. Helena for the cure and relief of the seaman. In the course of the opinion the court said:

"A seaman disabled in the service of the ship is to be cured at the expense of the ship. To this his right is as perfect as to food or wages. It is incumbent upon the master to furnish means of cure, and to use all reasonable exertions for that purpose. Scarcely a case can be presented where this obligation applies with greater force than the present. This seaman, at the command of his officer, had exposed his life and his limbs for the preservation of the ship. He was thrown from the yardarm, and both legs were badly fractured. There was no surgical skill on board, and the unceasing motion of the ship, and the accidents and discomforts to which he was necessarily exposed, were unfavorable to his cure. The master intended to go within

sight of St. Helena, and, if he had shaped his course to go into port, he might, with only a few hours' detention, have consulted the American consul, obtained surgical aid and advice, and ascertained how far it was necessary, or would be useful, for the libellant to be left on shore. The reason assigned by the master, since his return, for not having left this seaman at St. Helena, is that it would have occasioned expense. This presents not the least extenuation. It is merely saying that, if he had performed his duty, the owners would have been subjected to a burden which the law imposes. The master ought to have gone into St. Helena, to have given to the seaman the means of cure, which that place afforded, and for this neglect the libellant is entitled to recover such damages as he sustained."

In *Peterson v. The Chandos*, which we will have occasion again to refer to, this duty of the master was specially recognized. The court said:

"If it had been shown that the vessel could, under the circumstances, make about ten miles an hour, and thereby have made Valparaiso in a little more than five or six days, it might have been proper for the master to have gone in there; indeed, I think it would have been his duty to do so."

For the purpose of this opinion, it will be admitted that the rule requiring the master of vessels to go into the nearest port, in order to give the injured seaman treatment, is not an imperative one; that, in the nature of things, there must be some limit to the obligation of the ship to seek aid outside of the vessel. It depends upon the facts and surrounding circumstances of each particular case. If Olsen had agreed with the master to go to Unalaska, he could not have complained of the master's failure to go to Port Townsend. In the *Chandos Case* it was held that it could not be assumed from the evidence that the port of Valparaiso could have been made in less than two weeks, and the court was of opinion that the vessel was not under obligation to make that sacrifice of time and risk of cargo for the libellant. Here it would only have taken four or five days to reach Port Townsend. There was no cargo on board; no danger of loss or damage on that account. The wind was fair and favorable. There was no peril to the ship. But it is argued that the master was justified in pursuing the course he did, and was not guilty of any negligence, because the vessel was on a cod-fishing cruise, and the men were sailing on a lay, and the master had no right to make the men work the schooner into the sound and out again for nothing, subjecting the vessel to possible actions for damages for the extra labor. This contention, in the light of all the testimony disclosed by the record, cannot be sustained. It does not appear that any of the men were consulted upon the subject of the deviation. It is not shown that any of them objected to going to the sound. There is no testimony on this subject. The master gave no such reason for refusing the libellant's request.

How could the vessel, its owners, or master be held responsible in damages in performing their duty under the law? There might have been additional expense incurred, but this presents no excuse,—“not the least extenuation.” If the master had performed his duty, and taken the injured seaman to Port Townsend for treatment, the vessel and its owners would simply “have been subjected to a burden which the law imposes.” No member of the crew could complain, or hold the ship responsible in damages, for loss of time necessarily incurred

in the discharge of its duty. Necessity and humanity, as well as the principles of the admiralty law, would have amply protected the owners of the ship from such loss. Even if the additional expense then incurred could be considered, it is questionable, to say the least, if there would not have been, in this particular case, a saving instead of a loss ultimately incurred.

The cases of *Peterson v. Swan*, 53 N. Y. Super. Ct. 151, and *The Wensleydale* (D. C.) 41 Fed. 602, relied upon by appellants to sustain their contention that the *Uranus* cannot be held responsible for any error of judgment on the part of the master, relate solely to actions where damages were sought to be recovered for the negligence of the master in treating injuries of seamen in the absence of a surgeon on board the ship. They have no application to the facts of this case. The *Uranus* was not held liable for any negligence in that respect. The only damage allowed to appellee was for the negligence of the master in not taking him to the nearest port, where proper surgical skill could have been procured. With reference to this point, it cannot be said that the master exercised his own best judgment, or, in fact, any judgment at all. He relied upon the consent and agreement of Olsen to be taken to Dutch Harbor, and that he did not request to be taken to the sound until a week after the accident, when the vessel was as near Unalaska as Port Townsend. The appellants, however, failed to establish these points. The master testified that he did not "think it was necessary to return" to the sound "when Mr. Olsen agreed" to go to Unalaska. There is a suggestion made that the libelant did not request to be taken to Port Townsend, but to Cape Flattery. There is no merit in this suggestion. Cape Flattery is on the coast. Port Townsend is on Puget Sound. These places are not far distant from each other. There is a marine hospital at Port Townsend, and that is where the libelant could have received proper medical treatment, and where the master should have taken him. The ship's obligation to the libelant did not depend on his precise geographical location of the nearest port. This case was evidently well tried in the district court, and was ably argued in this court. The whole case has been examined by us with great care. We find no error that would justify a reversal. The decree of the district court is affirmed, with costs.

THE BELVEDERE.

(Circuit Court of Appeals, Ninth Circuit. February 4, 1901.)

No. 607.

SEAMEN—DETENTION BEYOND TERM OF SERVICE—NATURE OF ACTION FOR DAMAGES.

An action by seamen who shipped for a whaling voyage, which, as stated in the shipping articles, was "not to exceed 12 months," for which they were to receive as compensation for their services a share of the proceeds of the voyage, to recover damages for their alleged wrongful detention by the master beyond the year, is one for breach of contract, and not for a tort.

Appeal from the District Court of the United States for the Northern District of California.

H. W. Hutton, for appellants.

D. T. Sullivan, for appellees.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. The principles involved in this case do not require any extended discussion. It is enough to say that we have examined the entire record as to the facts, and all the legal points raised by appellants, and our conclusions are that the district court did not err in treating the libel as an action to recover damages for breach of a contract, instead of for a tort, as contended for by appellants. And although the learned judge did not state in detail how he arrived at the conclusion that the libelants were entitled to the sum of \$70 each, yet we are satisfied that in the light of all the circumstances testified to by the respective witnesses the amount was fair and reasonable, and was fully justified under the law and facts. We therefore adopt the opinion of the district court, as reported in *The Belvedere*, 100 Fed. 498, and, upon the reasons therein given, the decree of the district court is affirmed.

THE KENNEBEC.

(Circuit Court of Appeals, Second Circuit. April 3, 1901.)

No. 104.

1. COLLISION—MOORED VESSELS—PRECAUTIONS REQUIRED IN FOG.

The fact that there is no rule requiring vessels to display lights or give signals during a fog, while moored to a wharf, does not relieve them from the duty of taking such precautions where the circumstances are such that ordinary prudence requires it.

2. SAME—OBSTRUCTION OF CHANNEL—FAILURE TO DISPLAY LIGHTS.

Eight vessels were moored abreast at a coal dock on a dark and foggy night, extending 185 feet out into a channel which was not more than 500 feet wide. No watch was maintained on the vessels, no fog signals given, and no lights displayed, except ordinary lanterns, most of which were placed on the decks, and which could be seen only a very short distance, owing to the fog. During the night a steamer came in on her regular trip, and was compelled to pass up the channel to her own dock, above. She was in charge of a competent pilot, and on a course which took her 100 feet outside the coal dock. She had proper lookouts, and was under only sufficient speed to give her steerageway, and could be stopped in a distance of 125 feet. Her lookouts did not see the lights on the moored vessels until she was within 50 feet, when she at once reversed, but came in collision with libellant's barge, which was the sixth vessel from the dock, and sunk her. *Held*, that the steamer was not chargeable with any fault, but that the collision was due solely to the want of ordinary care and prudence on the part of those having charge of the moored vessels, in permitting them to obstruct the channel under such circumstances without taking any measures to give notice of their presence to other vessels.

Appeal from the District Court of the United States for the Eastern District of New York.

This cause comes here upon appeal from a decree of the district court, Eastern district of New York, dismissing a libel for damages sustained by libellant's barge No. 11 in consequence of a collision with the steamer Kennebec.

Chas. M. Hough, for appellant.

Wm. J. Kelly, for appellee.

Before WALLACE and LACOMBE, Circuit Judges.

LACOMBE, Circuit Judge. The opinion of the district judge (103 Fed. 681) is most exhaustive. It not only sets forth the facts found by him, but contains a careful epitome of the evidence bearing on such questions of fact as are in controversy. We shall not undertake to restate the case in like detail. His opinion may be consulted for facts not here recited.

The Kennebec, a large passenger and freight steamboat, was bound from Providence into New Haven. Her dock lay far up the harbor, at the mouth of Quinnipiac river. Next below her dock lie two others, known, respectively, as the "Water Dock" and the "Coal Dock,"—the latter distant about 350 feet from the steamboat dock. From the face of this coal dock across to shoal water on the other side the total fairway is not over 500 feet wide. The hour was about 1:30 a. m. October 27, 1899, and there was a heavy fog. From a point in the harbor off the Long wharf, five-eighths of a mile below the coal dock, on which wharf the steamboat company had stationed a man with a horn and maintained a red light to aid the navigation of the steamer in the fog, her pilot laid a compass course which, if no obstruction were found in the fairway, would clear the coal dock by 100 feet, and bring him safely to the steamboat dock. To that course he held, and when he reached the line of the coal dock he was 100 feet outside of its face, in the fairway of the channel. There and then he encountered libellant's barge; her presence not being disclosed to those on the steamer till they were almost on top of her,—barely 50 feet off. Of all the many instances of carelessness which have come before this court since it was constituted, it may well be doubted whether there has ever been disclosed any more gross than this, which left the barge tied up in a narrow fairway just short of the terminus of a steamboat route, 100 feet out from the face of a dock, with no effort on the part of any one to advise navigating vessels of her whereabouts. The way it came about is as follows: Moored to the face of the dock, which the chart shows to be a long one, was a barge. Outside of that was fastened another barge, and outside of that, again, a schooner. These were there at nightfall of the 26th. About 8:30 p. m. a tug brought five other boats to the same place, where they were berthed one against the other outwardly from the dock; the whole eight abreast, bows upstream; the inner one fast to the pier; each of the others moored to the boat next inshore, as if such boat was a part of the pier. By adding up their respective widths, it appears that they thereby practically thrust the face of the dock, itself a lawful obstruction to the extent of its own superficies and

its proper use, 187 feet out into the fairway. In itself, this would seem to manifest a wanton and reckless disregard of the rights of others. It was aggravated by an equal lack of ordinary common sense in caring for the lives and property thus exposed. As was stated before, it was a foggy night; had thickened considerably after midnight. There had been some feeble efforts to show lights (they will be referred to later), which the fog rendered abortive. All of the men in charge of the respective boats were in bed; some asleep; others listening to the various sounds which told them other vessels were navigating. The representative of the owner of the coal dock, a watchman, was there. He allowed the vessels to tie up in the manner described. Indeed, vessels had often done so before; the owner of the dock apparently finding it more profitable to accommodate boats seeking berth by appropriating the public thoroughfare to its individual use, than by building another dock. Complaints of this abuse had been made frequently before, and on this very night, long before the Kennebec arrived, complaint was again made—to the watchman—of the manner in which these eight boats were berthed. Neither the watchman nor any other employé of the owner of the coal dock made any attempt whatever to give warning through the fog to vessels coming up the fairway that such owner was appropriating a large part of the channel to its private use that evening, and was so operating its dock as to maintain what might fairly be called a purpresture in the highway of commerce. As to the presence of any lights on the berthed boats the testimony is conflicting and not persuasive. Even accepting the testimony offered by libellant at its full value, the most it shows is that there were small lanterns on the decks of the sixth and seventh boats (counting from the dock), and a like lantern on the flagstaff of the outside boat. The fog, however, was so dense that these lights were practically useless as a warning. Libellant's boat was the sixth from the shore. The Kennebec struck her on the starboard quarter.

As to the conduct of those in charge of the coal dock and the outlying vessels it is contended by appellant that the vessels did more than their duty, by maintaining the lights they claim to have displayed; citing *The Martin Dallman*, 17 C. C. A. 419, 70 Fed. 797; *The Granite State*, 3 Wall. 310, 18 L. Ed. 179; and *L'Hommedieu v. The Mischief* (D. C.) 39 Fed. 510. The rules concerning lights and sound signals during fogs which were in force at the time prescribed lights for a vessel at anchor, and the ringing of a bell when at anchor in a fog, but are silent as to vessels moored to a pier. The cases cited hold that vessels so moored need show no light, but the situation was vastly different in each case from what it was in the case at bar. The schooner with which the *Martin Dallman's* tow collided was properly moored, "her stern west of the west end of the wharf, and her bows at the east end, around which the *Dallman* attempted to turn in order to enter the * * * canal. The testimony is clear that the schooner was moored out of the way of vessels going into * * * the canal." The barge with which the *Granite State* collided lay across the end of pier 23, East river. "She was well secured in her place, but had on board no watch

or light; the laws of the port of New York, as was proved, not making it obligatory on vessels of this sort moored at wharves to have either." The tug with which the *Mischief* was in collision was lying alongside her boats in tow,—how many does not appear,—which were fast to the shore of Newton creek. That case is to some extent similar to the one at bar. It was held that "not being in motion, but moored alongside other vessels attached to the shore," she was not guilty of the only fault charged against her,—failure to have a light. In *The Express* (D. C.) 48 Fed. 323, the vessel struck was held excused for failure to give fog signals, but she "tied up at her usual mooring place, along the southerly side of a dock, with her head towards the shore, and her stern a few feet inside of the outer end of the pier." The rules provide fog signals for vessels "under way," and define those words as meaning "when she is not at anchor, or made fast to the shore, or aground." They also provide that "a vessel when at anchor shall, at intervals of not more than one minute, ring the bell rapidly for about five seconds." There is no provision for a vessel moored to a wharf. Presumably, it may be assumed that it was not expected that when so situated she should do anything. But a situation such as the one at bar seems to be a *casus omissus*. It might not unfairly be argued that a boat tied up as was libellant's was not moored to the wharf at all. The district judge states the case tersely:

"If a vessel may not anchor in the channel 100 or 175 feet from the pier without taking due measures in the midst of a fog to give notice of her presence, by what right may she tie up outside other boats, in the whole occupying nearly half the channel? Her position is the same. In the one case she is held by her anchor; in the other, by her connection with the other boats."

We concur in his conclusion:

"It is objected that the statute does not require lights or signals. Even so, common prudence demands that ships appropriating a quarter or a third of a channel should use care to employ adequate means to make their presence known."

As the question is presented here, it is not so much whether this particular barge, No. 11, failed to comply with some rule, or omitted to do something which she, aside from any rule, ought to have done, thus depriving herself of a right to recover, or requiring a division of the damages. It is from the standpoint of the *Kennebec* that it is to be considered. She is the one charged with improper navigation, and her navigation is to be judged by a consideration of what her pilot had the right to expect. If he was entitled to assume that, rule or no rule, no one would be so devoid of common sense as to make a barge fast in a traveled fairway, and leave her there, exposing life and property to constant peril, during a dense fog, without sounding any note of warning, it makes no difference what particular person should have given such warning. No. 11 was the sixth boat from the dock, and the third from the outside. Signals warning of the presence of the other vessels would have protected her. She did not come there herself. Her tug left her, and the barge may fairly have assumed that the tug would look after her safety if

the place was perilous, or became so by weather changes. Indeed, it might have been expected that the enterprising coal-dock owner who devised this plan for turning a highway of commerce into a private anchorage would take some action to prevent risk to the lives and property which he placed there, exposed to grave peril whenever a fog shut in. Whoever was in fault for the failure to give a warning of No. 11's presence appropriate to the situation is immaterial. Somebody ought to have done so, and the pilot of the Kennebec was entitled to assume that somebody would.

The faults of navigation charged against the Kennebec in the libel are: (1) Navigating the harbor of New Haven in a fog; (2) navigating at too high a rate of speed in a fog; (3) keeping no lookout, or no sufficient lookout; (4) not stopping and backing in time to prevent the collision; (5) not taking any proper or seasonable precautions to prevent the collision. It is sufficient to refer to the opinion of the district judge for the findings on which is based his conclusion that "the Kennebec approached the coal dock, well piloted, at proper speed, with sufficient men on lookout, and capable of being stopped within one hundred and twenty-five feet." With the assistance of the man sounding a horn on the Long wharf, and a like guiding signal at her own dock, the Kennebec, with a careful and competent pilot, might very properly, so long as she exercised due caution, feel her way along to her berth. Her speed was reduced barely to steerageway, and she could stop within the space found by the district judge. Any efficient signal, warning that the coal-dock owner was obstructing the fairway, would have been heard at a much greater distance. She had two, if not three, careful and competent lookouts, who saw the boats as soon as the fog would permit. She stopped and backed at once. Indeed, none of these faults are dwelt upon on this appeal. The contention now is that it was improper navigation to proceed on a compass course, which would take the steamer 100 feet out into the fairway, when the fog was so dense that lights could not be seen soon enough to insure stopping, relying on being warned by sound that there was a boat lying motionless in the water there. But, as we have held, the pilot had a right to rely on receiving just such a warning, and is not to be charged with the knowledge that he was to find the fairway thus obstructed that night because boats had been moored at the coal dock in the same way before. There is no evidence that such a state of affairs ever existed before when there was fog, and the pilot was entitled to assume that, when the fog shut in, there would be some proper warning given, if the obstruction was there then. The decree of the district court is affirmed, with costs.

WINKLER v. CHICAGO & E. I. R. CO.

(Circuit Court, D. Indiana. May 6, 1901.)

No. 9,978.

1. REMOVAL OF CAUSES—TIME FOR FILING PETITION.

Although the statutes of Indiana do not prescribe the time for filing pleadings, and there are no rules of court fixing such time, the same being fixed in each case by order, yet, under 1 Burns' Rev. St. 1894, § 403, requiring the courts to direct the making up of issues without unreasonable delay, and Id. § 348, which provides that "the judgment on overruling the demurrer shall be that the party shall plead over," where a demurrer to the complaint was overruled on the third day of the second term after that to which the summons was returnable a petition for removal filed on the fourth day of the succeeding term is presumptively too late to come within the provisions for removals in the judiciary act of 1887-88, and the federal court will not take jurisdiction unless it affirmatively appears from the record that the state court extended the time to answer to that date.

2. SAME—TRIAL OF ISSUE OF LAW IN STATE COURT.

Under the removal provisions of the judiciary act of 1887-88, a defendant cannot remove a cause after the trial in the state court of an issue of law on demurrer to the complaint for want of facts.

3. SAME—SUFFICIENCY OF PETITION—CITIZENSHIP OF CORPORATION.

An averment in a petition for removal filed by a corporation defendant that it "was at the time of the commencement of the suit, and still is, a citizen and resident" of another state named, is insufficient to show jurisdiction in a federal court, where it is not shown by the record that it was created by the law of such state.

At Law.

John W. Kern and Coffey & McGregor, for plaintiff.

W. H. Lyford, Geo. A. Knight, and Elliott, Elliott & Littleton, for defendant.

BAKER, District Judge. This action was commenced by the plaintiff against the defendant on the 9th day of July, 1900, in the circuit court of Clay county, Ind., to recover damages for personal injuries. On the same day a summons was duly issued and served on the defendant, requiring it to appear in said court on the 9th day of October, 1900 (being the second day of the October term of that court), to answer the complaint. On the return day the defendant filed its demurrer to the complaint. No action appears to have been taken on this demurrer. On the 8th day of January, 1901 (being the second judicial day of the January term of said court), the defendant filed another demurrer to the complaint, alleging that it did not state facts sufficient to constitute a cause of action. On the next day the court overruled the demurrer, and the defendant saved an exception. Two days later the defendant filed its answer in four paragraphs; the first being in general denial, and the remaining paragraphs of answer setting up affirmative matters of defense. On January 21st the plaintiff filed his reply, in four paragraphs, to the second, third, and fourth paragraphs of the defendant's answer. Two days thereafter the defendant filed its separate demurrer to the third and fourth paragraphs of the plaintiff's reply. Without any action having been taken on the demurrer to these paragraphs of

reply, the cause was continued to the March term of the court. On March 21, 1901 (being the fourth judicial day of said term), the defendant filed its verified petition, accompanied by a bond, for the removal of the cause from the state court into this court. The application for removal was sustained, and the cause removed. The plaintiff now moves the court to remand the cause to the circuit court of Clay county, Ind. The sole ground presented in the motion to remand and in the argument of counsel is that the application for removal came too late. The defendant, however, insists that the application was seasonably filed, because the statute of this state does not fix the time for filing an answer or plea, and there is no rule fixing such time, and that the defendant, by demurring and filing its answer before any rule had been entered by the court therefor, was not debarred from removing the cause, under the terms of the statute of the United States. In the opinion of the court, the contention that the petition was filed in time is unsound. The statute (1 Burns' Rev. St. 1894, § 348) enacts that "the judgment upon overruling the demurrer shall be that the party shall plead over; * * * if a party fail to plead after the demurrer is overruled, judgment shall be rendered against him as upon a default." This provision of the statute, regardless of the fact that the application for removal was not made until the third term after the party might have been required to answer or plead, seems to me to be decisive against the right of removal. The defendant filed a demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. There was a trial of this issue in the state court, and a judgment was rendered against the defendant. The statute required the court, in overruling the demurrer, to enter judgment that the defendant should plead over. The presumption, nothing to the contrary appearing in the record, is that the court entered an order requiring the defendant to plead to the complaint. The petition and record are silent as to the time within which the court ruled the defendant to answer. In the absence of any showing to the contrary, the court cannot indulge the presumption that the state court extended the time to answer from the third day of the January term to the fourth day of the March term. Indeed, the presumption should be that the answer filed two days after judgment on the demurrer was then filed in pursuance of a rule of the court made in conformity with the statute. At any rate, if the fact were otherwise, the burden was on the defendant to make it clear. The burden is on the defendant to affirmatively show that the state court did not enter a rule to answer before the petition for removal was filed, because the statute made that the duty of the court. The presumption that the court entered a rule fixing the time for answer is fortified by section 403, 1 Burns' Rev. St. 1894, which provides:

"On the second and each succeeding day of the term the court shall call as many of the causes which stand for trial at such term for issues as the business of the court will permit; the court shall call the causes in the order they stand on the docket, and shall compel the parties to file their respective pleadings and answers to interrogatories at such time as the court shall deem just, in no case allowing unreasonable delay; the pleadings shall be completed at an early day of the term."

This provision of the statute expressly limited the time within which the defendant was required to answer or plead to an early day of the October term. If it failed to do so, unless the court enlarged the time it would have been in default for want of an answer or plea. The court cannot, in view of these statutory provisions, indulge the presumption that the defendant was not required to answer or plead earlier than the fourth day of the March term.

Nor could the defendant remove the cause after there had been a trial of an issue of law upon the demurrer alleging that the complaint did not state facts sufficient to constitute a cause of action filed at the commencement of the second term after the filing of the complaint. Under the twelfth section of the judiciary act of 1789 (1 Stat. 73, c. 20), the defendant was required to file his petition for removal at the time of entering his appearance. By the act of 1866 (14 Stat. 306, c. 288), the removal might be had "at any time before the trial or final hearing of the cause." Under the act of 1875 (18 Stat. 471, § 3, c. 137), the petition was required to be filed "before or at the time at which said cause could be first tried and before the trial thereof." The right of removal has never been extended beyond the limits prescribed in the two last above cited statutes. It has been uniformly held in construing these statutes that a trial upon an issue of law in the state court barred the right of removal. *Alley v. Nott*, 111 U. S. 472, 4 Sup. Ct. 495, 28 L. Ed. 491; *Scharff v. Levy*, 112 U. S. 711, 5 Sup. Ct. 360, 28 L. Ed. 825; *Gregory v. Hartley*, 113 U. S. 742, 5 Sup. Ct. 743, 28 L. Ed. 1150; *Laidly v. Huntington*, 121 U. S. 179, 7 Sup. Ct. 855, 30 L. Ed. 883. And it has also been uniformly held that the act of March 3, 1887, as re-enacted and re-enrolled in the act of August 13, 1888, contracted the then existing jurisdiction of the courts of the United States in respect of their jurisdiction over original as well as removed causes of action. To hold that the present application was presented in time would be to enlarge the right of removal beyond that which was given under the acts of 1866 and 1875. The supreme court, in the case of *Martin's Adm'r v. Railroad Co.*, 151 U. S. 673, 685, 687, 14 Sup. Ct. 533, 38 L. Ed. 311, having the acts of 1887-88 under consideration, said:

"Construing the provision now in question, having regard to the natural meaning of its language and the history of the legislation upon this subject, the only reasonable inference is that congress contemplated that the petition for removal should be filed in the state court as soon as the defendant was required to make any defense whatever in that court, so that, if the case should be removed, the validity of any and all of the defenses should be tried and determined in the circuit court of the United States."

See, also, *Goldey v. Morning News*, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517.

This declared purpose of the statute can only be accomplished by holding that the petition for removal must be filed in the state court before the trial of an issue of law upon a demurrer to the complaint for want of facts.

This cause, however, must be remanded on another ground, not suggested by counsel. The complaint alleges as follows:

"Frank Winkler, plaintiff, complains of the Chicago & Eastern Illinois Railroad Company, defendant, and says that on the 5th day of March, 1900, the said defendant then was, and for a long time prior thereto had been, and still is a duly-organized corporation, organized for railroad purposes, and then was, and for a long time prior thereto had been, and still is the owner and is operating a line of railroad in Clay county, Indiana, and is a common carrier of passengers and freight."

It is not stated in the complaint under the laws of what state the corporation was created. The petition for removal, so far as material to the determination of the question, is as follows:

"That the controversy in said suit is between citizens of different states, and that your petitioner, the defendant in the above-entitled suit, was at the time of the commencement of this suit, and still is, a resident and citizen of the state of Illinois, with its principal office in the city of Chicago, in the county of Cook, in said state of Illinois, and that the plaintiff was then, and still is, a citizen of the state of Indiana."

It is shown by the complaint that the defendant was and is a corporation, but it is not shown that it was created by or organized under the laws of the state of Illinois or of any other state. The sole statement contained in the petition is that it was at the time of the commencement of the suit, and still is, a resident and citizen of the state of Illinois, with its principal office in that state. This is not sufficient. A corporation is not a citizen of the United States or of any state, within the meaning of the word "citizen" as used in the constitution of the United States. The word has no sensible meaning when so used. In *Insurance Co. v. French*, 18 How. 404, 405, 15 L. Ed. 451, which was an action brought by citizens of Ohio in the circuit court of the United States for the district of Indiana, the declaration described the defendant as "the Lafayette Insurance Company, a citizen of the state of Indiana." The supreme court said:

"This averment is not sufficient to show jurisdiction. It does not appear from it that the Lafayette Insurance Company is a corporation, or, if it be such, by the law of what state it was created. The averment that the company is a citizen of the state of Indiana can have no sensible meaning attached to it."

See, also, *Hotel Co. v. Jones*, 177 U. S. 449, 20 Sup. Ct. 690, 44 L. Ed. 482, and cases there cited.

The jurisdiction of the circuit courts of the United States over suits between citizens of one state and a corporation of another state was at first maintained upon the theory that the persons composing the corporation were suing or being sued in its name, and upon the presumption of fact that all those persons were citizens of the state by which the corporation was created, but that the presumption might be rebutted by plea and proof, and the jurisdiction thereby defeated. This was decided on March 15, 1809, in the case of *Bank v. De Veaux*, 5 Cranch, 61, 3 L. Ed. 38, which was followed by many cases in the supreme and circuit courts of the United States. The law as there declared remained the rule of decision until the case of *Railroad Co. v. Letson*, 2 How. 497, 11 L. Ed. 353, which was decided at the January term, 1844, in which the earlier cases were overruled. In that case it was held that a

corporation created by the law of a state, and transacting business therein, was to be deemed an inhabitant of the state, capable of being treated as a citizen for all purposes of suing and being sued, and the averment of the facts of its creation and the place of its doing business was sufficient to give the circuit courts jurisdiction. It has never been held, however, that it was sufficient merely to allege that the corporation defendant is a citizen of a particular state. As was said in *Muller v. Dows*, 94 U. S. 444, 24 L. Ed. 207:

"A corporation itself can be a citizen of no state, in the sense in which the word 'citizen' is used in the constitution of the United States. A suit may be brought in the federal courts by or against a corporation, but in such a case it is regarded as a suit brought by or against the stockholders of the corporation, and for the purposes of jurisdiction it is conclusively presumed that all the stockholders are citizens of the state which by its laws created the corporation. It is therefore necessary that it be made to appear that the artificial being was brought into existence by the law of some state other than that of which the adverse party is a citizen."

The removal act of March 3, 1887, as re-enacted and re-enrolled by the act of August 13, 1888, authorizes any action of a civil nature brought in any court of a state between citizens of different States, and in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000, to be removed into the circuit court of the United States "by the defendant or defendants therein, being non-residents of that state." In order to be a "non-resident of that state," within the meaning of the statute, the defendant must be a citizen and resident of another state, or a corporation created by the laws of another state. *Martin v. Railroad Co.*, supra. The defendant is shown by the complaint to be a railroad corporation, but it does not appear either in the petition for removal or elsewhere in the record that the corporation was created by or organized under the laws of any particular state. Failing to show that the corporation was created by the laws of a state other than the state of Indiana, the petition fails to show that the action is one of which this court can entertain jurisdiction. The motion to remand is sustained.

SWAFFORD v. TEMPLETON et al.

(Circuit Court, E. D. Tennessee, S. D. April 30, 1901.)

JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION.

Where the declaration in an action for illegally denying to plaintiff the right to vote at a national election shows that the sole ground of defendants' action was the refusal of plaintiff to comply with a state law, which is admittedly valid, and applies alike to all voters within the districts where it is in force, but which was extended to the district in which plaintiff resided by an act which he claims is in conflict with the state constitution and void, it affirmatively appears from such declaration that the case involves no federal question which can give a court of the United States jurisdiction.¹

¹ Jurisdiction in cases involving federal questions, see *Bailey v. Mosher*, 11 C. C. A. 309; *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co.*, 35 C. C. A. 7.

Action at Law. On demurrer to declaration.

Burkett, Miller & Mansfield, for plaintiff.

Templeton & Carlock and A. P. Haggard, for defendants.

CLARK, District Judge. The demurrer in this case does not raise what it seems to me is the most serious objection to the suit, namely, the question of jurisdiction. The demurrer may possibly be construed as presenting that issue, but it is doubtful. The plaintiff does not content himself with the averment that he was wrongfully and maliciously or illegally deprived of the right to vote in a national election, accompanied with the further averment that he was qualified to vote under the constitution and laws of the United States and of the state of Tennessee, so as to bring the case within the ruling in *Wiley v. Sinkler*, 179 U. S. 61, 21 Sup. Ct. 17, 45 L. Ed. 84. On the contrary, the declaration goes further than this, and avers specifically, and throughout impliedly shows, that the plaintiff was denied no right secured to him under the constitution and laws of the United States, but, on the contrary, avers that his right to vote was fully acknowledged, provided he would comply with the statute of the state called the "Dortch Law," which regulates the exercise of the elective franchise in this state. It is distinctly averred, and is plainly evident, that plaintiff was denied the right to vote because he expressly refused to comply with this statute of the state called the "Dortch Law," upon the ground that an act of the general assembly (chapter 163, Act 1899), extending the Dortch law to the district of plaintiff's residence, is unconstitutional as applied to the district in, and the precinct at, which the plaintiff was attempting to vote. The action in no wise depends upon the theory or proposition that the Dortch law in its general application is unconstitutional. On the contrary, the constitutionality of the act has been declared by the supreme court of the state (*Cook v. State*, 90 Tenn. 408, 16 S. W. 471), and such a conclusion is accepted by the courts of the United States (*Mason v. Missouri*, 179 U. S. 328, 21 Sup. Ct. 125, 45 L. Ed. 214).

The plaintiff's suit proceeds distinctly upon the grounds: First, that he was denied the right to vote because of a failure to comply with the Dortch law; and, second, that the special act of the legislature (chapter 163, Act 1899), extending the Dortch law to the district of which the plaintiff is a citizen, is unconstitutional. The alleged invalidity of the act is based upon its supposed conflict with the constitution of the state, and not with the federal constitution. The special statute extending the Dortch law to the district of which plaintiff is a citizen is not only not alleged to infringe any provision of the constitution of the United States, but it is perfectly obvious that the statute is valid so far as any provision of the federal constitution is concerned. The statute of the state makes no discrimination against the plaintiff on account of the attempt to exercise any federal right whatever, nor did the registration commissioners discriminate against the plaintiff, or undertake, directly or indirectly, to deny or invade any federal right or immunity. In regard to the exercise of the elective franchise, the plaintiff stood exactly on an equal footing with

every other citizen of his district, and, if plaintiff's action can be successfully prosecuted, it is not because of any rights secured to him by the constitution of the United States, but on account of rights secured to him by the constitution of the state, namely, protection against special or class legislation.

As the declaration sets out specifically and fully the issue, and the only issue, involved in the case, and on which the action proceeds, it clearly appears that there is no federal question, and that this court is without jurisdiction. The action must be one which really and substantially involves a federal question before the court may entertain jurisdiction of a case which must turn on a question which is clearly nonfederal in its nature. The suit is accordingly dismissed, with costs. The demurrer, construed as raising this issue, is well taken; but it is so doubtful whether it presents the question on which the suit is dismissed that I desire the entry to show that the suit is dismissed upon the demurrer as well as by the court of its own motion. From this ruling the writ of error must be prosecuted direct to the supreme court of the United States, as the dismissal is on the sole ground that there is no federal question involved, and the court is therefore without jurisdiction.

CHICAGO, ST. P., M. & O. RY. CO. et al. v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. April 9, 1901.)

No. 693.

PUBLIC LANDS—ATTACHMENT OF RAILROAD GRANT—PRIOR PRE-EMPTION.

In order that a pre-emption settlement made under the act of 1841 on offered public lands should prevent the attachment of a subsequent railroad grant of the same land, it must have been followed by proof and payment by the settler within 12 months, as required by section 15; and where such proof and payment were not made, and after the expiration of the time therefor the railroad company filed its map of definite location, which brought the land within the limits of the grant, it passed to the company thereunder as if no pre-emption had ever attached.

Appeal from the Circuit Court of the United States for the Western District of Wisconsin.

Thomas Wilson, for appellants.

David F. Jones, for the United States.

Before WOODS, JENKINS, and GROSSCUP, Circuit Judges.

GROSSCUP, Circuit Judge. The action is brought under the Act of March 3, 1887, as amended by the Act of March 3, 1891, and the Act of March 2, 1896, making it the duty of the Attorney General to prosecute the necessary proceedings to cancel all patents, certification, and other evidences of title, theretofore issued for lands contained in railroad land grants, where such lands had been, for any cause, erroneously certified and patented by the United States to, and for the use, of the company claiming by, or under, the grant; provided that no patent to any lands held by bona fide purchasers

should be vacated or annulled. The decree of the Circuit Court appealed from found for the appellee, and ordered the cancellation of the patents of the land in dispute from the United States to the State of Wisconsin.

The land in question—the North West quarter of Section Seven (7), in Township Twenty-four (24) North, of Range Four (4) West, in the State of Wisconsin—was a part of an alternate section included within the description of the grant of the United States to the State of Wisconsin by Act of Congress June 3, 1856, substantially re-enacted May 5, 1864, in aid of the West Wisconsin Railway Company—as also within the description of the map of definite location filed June 9, 1865—and was subsequently certified and patented to the State of Wisconsin for the purpose named; having come, by mesne conveyance, from the State of Wisconsin to the appellant, the Chicago, St. Paul, Minneapolis and Omaha Railway Company.

The granting act, in each case, provided that in case it should appear that the United States had, when the lines and routes of the said roads were definitely fixed, sold any sections or parts thereof, or that right of pre-emption had attached to any section or part thereof, it should be lawful for any agent or agents, to be appointed by the Governor of the State, to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tier of sections above specified, as much land in alternate sections, or parts of sections, as should be equal to such lands as the United States had sold or otherwise appropriated, or to which the right of preemption had attached.

The contention of the appellee is that, by virtue of this provision, the quarter section involved in this suit was, in effect, lifted out of the grant. This contention is based upon the following facts:

November 27, 1855,—the quarter section in question being then offered lands—one Jacob Flick, a citizen of the United States entitled to preemption, entered upon the land, and filed with the register of the proper district a written statement describing the land settled upon, and declaring his intention to claim the same under the preemption provisions; but, though in the following spring the preemptor settled upon the land and improved it, no proof, affidavit, or payment was thereafter made, or attempted, within twelve months, as provided for in Section 15, Act Sept. 4, 1841.

The distinction between lands offered and lands unoffered, under the Act of 1841 and the Act of 1843 (the Acts applicable to the land in question) is summed up by the Supreme Court as follows: "Taking these two acts of 1841 and 1843 and reading them together, it is seen that there was a difference between unoffered and offered lands by reason of the fact that on unoffered lands the right or privilege to secure land by a preemption filing continued up to the commencement of the public sale whenever that might be, and if that right or privilege had not been exercised and the land was offered at public sale and not sold, it then became subject to private entry by the first applicant, while on offered lands the right or privilege to secure them by a preemption filing continued for twelve

months after the date of settlement, and if the preemptor failed to file the declaratory statement or make the proper affidavit within the twelve months, "the tract of land so settled and improved shall be subject to the entry of any other purchaser"; and it was held that a railroad company, coming in under a grant, in all substantial respects like the grant under consideration, after the expiration of such preemption, takes title under the grant and the filing of the map of location, as if no preemption had ever attached. *Railroad Co. v. De Lacey*, 174 U. S. 622, 19 Sup. Ct. 791, 43 L. Ed. 1111. This decision settles the title of the north half of the quarter section in favor of the appellants. We need not inquire if Bever—a grantee of the railway company, having made valuable improvements—is a bona fide purchaser within the meaning of the Act.

The appellants ask no action respecting the decree in the Circuit Court, so far as it relates to the south half of the section. Indeed, the railway company offers to quit claim to the Flicks. We do not, for that reason, consider any questions that might be raised respecting this portion of the land.

The cause is reversed, with instructions to the Circuit Court to dismiss the bill, as to the north half of the quarter section; or to dismiss the bill altogether upon the execution and delivery, to the satisfaction of the court, of proper quit claim deeds by the Railway Company to the Flicks of the south half of the quarter section.

MALOTT v. COLLINSVILLE, C. & E. ST. L. ELECTRIC R. CO.

(Circuit Court of Appeals, Seventh Circuit. April 9, 1901.)

No. 733.

1. RAILROADS—CROSSINGS—ILLINOIS STATUTE.

Rev. St. Ill. c. 114, § 209 (Act May 27, 1889), which provides that, in case there is objection by a railroad company to the place or mode of crossing its tracks desired by another road, either party may apply to the state board of railroad and warehouse commissioners, who shall view the ground, and, after full investigation, and with due regard to the safety of life and property, prescribe the place and manner of such crossing, must be construed as in *pari materia* with sections 18 and 20 of the same chapter (Act March 1, 1872, §§ 17, 19), which provide generally for the exercise of the power of eminent domain by railroad companies, and as making a valid provision for the modification of the procedure under such prior statute so far as relates to the place and manner of constructing railroad crossings, in the interest of greater safety; and a court, in a proceeding by one company to condemn right of way for a crossing over another road, or even in an equitable proceeding to require a receiver to consent to such crossing, cannot properly refuse to give effect to such provisions by ignoring proceedings instituted by the defendant company thereunder before the commission to have the place and manner of the crossing determined.

2. SAME—ELECTRIC RAILROAD COMPANIES.

A corporation organized in Illinois for the purpose of building and operating an electric railroad, and incorporated under the provisions of the general railroad act (Rev. St. Ill. c. 114), is a railroad company, for all purposes relating to the exercise of the power of eminent domain, and subject to all statutory provisions affecting the right of such companies to make crossings over the tracks of other railroads.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

In November 1896, upon the bill of Mark T. Cox, James A. Blair and James W. Paul Jr., in the Circuit Court for the Southern District of Illinois, against the Terre Haute & Indianapolis Railroad Company, seeking certain equitable relief growing out of its relations with the Terre Haute & Peoria Railroad Company, the appellant was appointed receiver of the first mentioned road, and as such took possession of, and operated the railroad up to and including the time when the transactions constituting the subject-matter of this appeal occurred.

March 8, 1900, an intervening petition was filed by the appellee, a corporation, organized under the act of March 1, 1872, providing for the incorporation of railroad corporations in Illinois (Rev. St. Ill. c. 114), to construct and operate an electric railroad for the carriage of passengers, etc., from Collinsville in Madison County to the City of East St. Louis in that state. The intervening petition sets forth that the bulk of the construction of this road had been completed, but that, in order to finally complete and operate the same, it was necessary to cross the Terre Haute & Indianapolis Railroad near Caseyville in St. Clair County; that the appellee had been unable, after due efforts, to make an agreement with appellant for such crossing; and praying an order authorizing the appellee to construct and operate its electric railway across the railroad at the place mentioned upon such just and reasonable terms as should be fixed by the judge. Later an amendment, immaterial to the case under consideration, was filed.

August 2, 1900, an amended petition was filed, in substance the same as the original, except that it is shown that the Terre Haute and Indianapolis Railroad runs, controls, and operates, the road as lessee of the St. Louis, Vandalia & Terre Haute Railroad, under a lease running for nine hundred and ninety-nine years, and that the proposed crossing is located at a definite point—one hundred and fifty feet west of the end of a switch or sidetrack—and is said to require about ten feet, in width, where the same crosses the railroad tracks, and the right to construct a fill on each side of the track of forty feet at the bottom. It is also averred that the right of way asked is for a public purpose, and the prayer is for an order, authorizing the appellee to construct and operate an electric railway over the railroad, at the place mentioned, "after the payment of compensation that may be fixed herein."

To the amended petition appellant demurred, for the reason (a) that it did not present a case cognizable in equity; (b) that it did not present a case sufficient to entitle the petitioner to the relief demanded or any relief; and (c) that there was a defect of parties, in that the St. Louis, Vandalia & Terre Haute Railroad Company, lessor of the Terre Haute & Indianapolis Railroad Company, was not made a party; but the demurrer was overruled.

Thereupon appellant asked leave to answer, the proposed answer containing, among other things, the following: "He admits that the petitioner has been unable to make agreement with him for crossing the St. Louis, Vandalia & Terre Haute Railroad for the reason among others that said crossing would be dangerous to passengers carried over either railroad unless said crossing were properly protected by safety appliances such as are in general use in the State of Illinois pursuant to the experience of railroad companies and the laws of said state, or were made an overhead or an underground crossing and the petitioner refused to make anything except a grade crossing and refused to protect the same in the manner above stated; and thereupon said receiver says that he together with the St. Louis, Vandalia & Terre Haute Railroad Company instituted proceedings before the Board of Railroad and Warehouse Commissioners of the State of Illinois, for the purpose of having the place and mode of said crossing determined by said Board pursuant to the statute of Illinois in such cases made and provided; and the petitioner herein appeared to said proceedings, and the same are now pending before said Board and still undetermined," to which objection was made by appellee upon the ground that under the practice of the Supreme Court of Illinois it is not allowable to file an answer to a petition in eminent domain proceedings;

which objection, upon the grounds stated, was sustained, and leave to file an answer refused.

A motion to refer the case to a master was, for a like reason, overruled.

This was followed by proceedings described in the record as follows: "And a part of the evidence having been submitted to the Court and the same having been duly considered it is now ordered, adjudged and decreed by the court that said the Collinsville, Caseyville & E. St. Louis Electric Railroad Company is entitled to a crossing of the said St. Louis, Vandalia & Terre Haute Railroad at grade at the point named in the last amended intervening petition herein as in said petition prayed.

"It is now further ordered by the court that the determination of the amount of compensation to be allowed for such crossing be submitted to a jury and that the twelve persons named in the special venire and selected pursuant to the order of this Court this day made and entered, be called to the jury box. * * *

The jury, thus summoned and sworn, as provided in section 8, c. 47, Rev. St. Ill. (the oath prescribed for jurors in eminent domain proceedings), having heard the evidence, returned a verdict finding the compensation to be paid to appellant the sum of forty dollars; upon which verdict a judgment was entered, that, upon the payment of this amount to the county treasurer of St. Clair County for the use of appellant, the appellee might enter upon the right of way and track of the St. Louis, Vandalia & Terre Haute Railroad Company, at the proposed crossing, for a width of ten feet over the tracks, and a width of forty feet across the right of way; said crossing to be put in and maintained by appellee at its own expense.

Exceptions were duly made and noted, and from this judgment the appeal is prosecuted.

The testimony, other than that relating to the value of the right of way taken, in substance showed, that the electric road, starting at Edgemont, about five miles from East St. Louis (where it connected with a suburban road to East St. Louis), proceeded to Caseyville, distant about four miles, and then to Collinsville, about three miles further; that at the time of the hearing the road was already in operation on both sides of the railroad track at Caseyville, a car from each side running every hour and a half from seven a. m. until twelve at night; that the proposed crossing was within the corporate limits of Caseyville, but was not upon any street actually opened (though one had been authorized by ordinance of July 19, 1900), the land on both sides being farmed in corn; and that, by ordinance passed November 6, 1899—ten months previously—a franchise had been granted to lay and operate said electric road upon Long street, as it then existed, not including the crossing.

No evidence was offered relating to the character or suitability of the crossing other than the foregoing; or to any safety appliances; or to the practicability of an overhead or an underhead crossing at either this point or near by. At this point in the proceedings the record contains the following: "Petitioner now desires to state that we stipulate the Collinsville, Caseyville & St. Louis Electric Railroad Company will put the crossing in at a time not to interfere with the operation of the St. Louis, Vandalia & Terre Haute Railroad and pay the expense of putting it in and maintaining it in first class condition.

"If the Court finds that we have proved our petition in eminent domain we will ask the jury to come and fix the compensation.

"The Court: 'The court finds the petition proven and that the petitioner has a right to make its crossing and condemn the same for said purpose.'" And this colloquy was followed by evidence relating to value.

The further facts are stated in the opinion of the court.

Among other errors assigned are the following:

(1) The court below erred in entertaining and assuming jurisdiction of a proceeding in eminent domain; (2) in overruling the demurrer of appellant to the amended intervening petition; (3) in holding that the matters set forth in the amended intervening petition presented a case cognizable in equity; (4) in holding that the matters presented in the intervening petition were suffi-

cient to entitle appellee to the relief demanded; (5) in holding that the St. Louis, Vandalla & Terre Haute Railroad Company was not a necessary party; (6) in refusing to permit appellant to file the answer; (7) in adjudging that appellee was entitled to a crossing at grade at the point named; and (8) in rendering a final decree allowing appellee to enter upon the premises described.

John G. Williams, for appellant.

W. S. Foreman and D. M. Browning, for appellee.

Before WOODS, JENKINS, and GROSSCUP, Circuit Judges.

After the foregoing statement of the case, GROSSCUP, Circuit Judge, delivered the opinion of the court, as follows:

It is not necessary that we should determine whether the court, sitting in equity, and having jurisdiction, through the receivership, to administer the Terre Haute & Indianapolis Railroad Company had power, upon a proper showing, to order the receiver to assent to, or contract respecting, the crossing named, upon the terms named. This view of the case, manifestly, was not in the mind of the court; for the appellant was refused leave to file an answer; no cognizance was taken of the policy of the state relating to railway crossings; and no testimony heard or required that would throw light upon the suitability of the crossing proposed, or the general equity of the order asked. The demand of the appellee seems to have been regarded as one of right, subject only to the fixing and payment of compensation, as in eminent domain proceedings.

As an action, purely in eminent domain, the attitude and rulings of the Circuit Court seem to us to have been in conflict with both the letter and the spirit of the laws of the State of Illinois. Section 209, c. 114, Rev. St. Ill. (an act approved May 27, 1889) provides:

"That hereafter any railroad company desiring to cross with its tracks the main line of another railroad company, shall construct the crossing at such place and in such manner as will not unnecessarily impede or endanger the travel or transportation upon the railway so crossed. If in any case objection be made to the place or mode of crossing proposed by the company desiring the same, either party may apply to the board of railroad and warehouse commissioners, and it shall be their duty to view the ground, and give all parties interested an opportunity to be heard. After full investigation, and with due regard to safety of life and property, said board shall give a decision, prescribing the place where and the manner in which said crossing shall be made, but in all cases the compensation to be paid for property actually required for the crossing and all damages resulting therefrom shall be determined in the manner provided by law in case the parties fail to agree."

The answer offered by the appellant avers that the appellant objected to the place and mode of crossing, and there being a refusal to meet this objection, proceedings were instituted by the appellant, in pursuance of the section just recited, before the Board of Railroad and Warehouse Commissioners of Illinois, to have the place and mode of the crossing determined by the Board. The refusal to entertain this answer, or to take any account of the proceedings before the Board, ruled out, in effect, the statute as having any relation to the exercise of the right of eminent domain.

There have been no rulings by the Supreme Court of the State

involving the effect of this statute upon the pre-existing law of eminent domain; but we think it clear that Section 209 is to be regarded as in pari materia with Sections 17 and 19 of the Act of March 1, 1872. (Sections 18, 20, c. 114, Rev. St.), which, so far as material to this case, read as follows:

Sec. 18: "If any such corporation shall be unable to agree with the owner for the purchase of any real estate required for the purposes of its incorporation, or the transaction of its business, or for its depots, station buildings, machine and repair shops, or for right of way or any other lawful purpose connected with or necessary to the building, operating or running of said road, such corporation may acquire such title in the manner that may be now or hereafter provided for by any law of eminent domain."

Sec. 20: "Every corporation formed under this act" (railroad corporations) "shall, in addition to the powers hereinbefore conferred, have power: * * * Sixth—To cross, intersect, join and unite its railways with any other railway before constructed, at any point in its route, * * * and every corporation whose railway is or shall be hereafter intersected by any new railway, shall unite with the corporation owning such new railway in forming such intersections and connections * * * and if the two corporations can not agree upon the amount of compensation to be made therefor, or the points and manner of such crossings and connections, the same shall be ascertained and determined in manner prescribed by law."

Neither section 17 or 19 of the act of 1872 prescribed any tribunal by whom, in case of dispute, the place or manner of the crossing should be determined. Coming under interpretation, in this respect, of the Supreme Court of Illinois, in 1881, it was held that, where the parties did not agree, the power of selecting the place and manner of the proposed crossing belonged to the railroad seeking the right of way. *Lake Shore & M. S. Ry. Co. v. Chicago & W. I. R. Co.*, 97 Ill. 506. The statute of May 27, 1889 makes no departure from sections 17 and 19 of the act of 1872, except in its provision that in case of objection to the place or mode of crossing proposed by the company desiring the same, either party may apply to the Board of Railroad and Warehouse Commissioners, which Board, after full investigation, shall prescribe the place and manner of such crossing.

We think it clear that, in respect of the place and manner of crossing, and an independent tribunal to determine such place and manner, the latter legislation was intended to modify the former, as the former had been construed by the Supreme Court of the State. In no state is the mileage of railways so great as that of Illinois. In no state has the extension of railways been so rapid. Nearly every township is now intersected, north and south, and east and west, by these great railways. With the increase of mileage has come, also, multiplying of trains, on the roads already laid, and growing need for greater speed. There has been no time when the grade crossing was not attended with danger, and no time when the danger, from all these sources, was not rapidly increasing. The purpose behind the act of 1889 is, we think, clearly disclosed in this rapid evolution of the railway situation.

The act of 1889 doubtless looked toward an escape, as far as possible, from grade crossings. It could be accomplished only by crossing overhead or underneath, and this, in turn, depended frequently

upon the topography of the place where the crossing was made; hence the provision in the act of 1889 (to that extent modifying sections 17 and 19, act of 1872), that in case of objection, both manner and place of crossing should be left to the disposal of a state board.

Our conclusion as to the purpose of the act is reinforced by the fact that it followed shortly after the decision of *Lake Shore & M. S. Ry. Co. v. Chicago & W. I. R. Co.*, supra; by the fact that any other interpretation would leave the act emasculated of any substantial meaning; and by the fact that another Act looking to the better protection of grade crossings by interlocking devices quickly followed—an Act itself having no meaning, unless read in *pari materia* with Sections 17 and 19 of the act of 1872, and also the act of 1889.

The inquiry then arises: Is the appellee a railroad company, within the meaning of the Act of May 27, 1889; and is its exercise of the right of eminent domain subject to the provision and limitations of that Act.

It was incorporated under the law of March 1, 1872, relating to the incorporation of railroad companies. Its articles of incorporation are on file in the office of the Secretary of State of Illinois in the book of Railroad Records. It took, and unquestionably intended to take, under its charter, the powers of a railroad corporation; among them the railroad corporation's right of eminent domain.

The fact that its trains are to be operated by electricity instead of steam does not affect its place in the laws of the state, as a railroad company. There is nothing in the acts of 1872 and 1889 that restricts railroads therein mentioned to the use of steam as a motive power, or prevents existing steam roads from changing their motive power to that of electricity. There is nothing in these Acts that necessarily or fairly excludes its application to electrical roads, as they now exist; indeed, these electrical roads, in the speed of their trains, in the distances travelled, and in their capabilities for transportation, are well within the field of public utilities hitherto occupied by the steam railroads alone. We can not conceive that these acts, so far, at least, as they are reasonably applicable, were not meant to cover every form of railroad that, in the march of events, answers the purposes of general transportation. Nor does their incidental function as street railways, in the towns or cities traversed, lift them out of the railroad statutes; for it has been held that an elevated road—wholly intramural—is, in its creation and its powers, within the contemplation of the railroad statutes, and exercises its right of eminent domain by virtue of those statutes. *Lieberman v. Railroad Co.*, 141 Ill. 140, 30 N. E. 544.

Indeed, if the appellee be not a railroad, within the meaning of the Act of March 1, 1872, as modified by the Act of May 27, 1889, and other Acts relating thereto, we can find no authority for its existence, as a corporation, or for its exercise of the right of eminent domain. Since the Illinois State Constitution of 1870, no corporation can be created, except under some general statute of the General Assembly. Article 11, Const. 1870. The legitimacy of a

corporation is tested by its ability to point to the specific statute of its origin. From what general statute of the state has the appellee sprung, if not from the act of 1872? From what other statute has it invoked the spark of life that gives it existence and the rights of a corporation?

The right of eminent domain must have a like specific statutory origin. It can not exist outside of some specific statute, and statutes of this character, being in derogation of the common law, are to be strictly construed. *Ligare v. City of Chicago*, 139 Ill. 46, 28 N. E. 934. A survey of the Illinois statutes shows that the right has been granted in favor of mill sites, drains, parks, streets, highways, toll roads, telegraph lines, sanitary districts, horse and dummy roads, and railroads. To which one of this catalogue can appellee trace its right, except to the railroad acts? It is not a horse or dummy road, within the Act of March 19, 1874; for it was not so organized, and has not accepted the burdens or limitations of that act. It is not entitled to open a street; the right of eminent domain, for that purpose, is vested in the municipal authorities. It is not a highway or toll road, within the meaning of the law. Unless a railroad, within the acts of 1872 and 1889, it is a corporation, *sui generis*—exercising the high right of eminent domain from an origin *sui generis*—a conception impossible under the Constitution and laws of Illinois. This disposes of the case, so far as it may be regarded as a suit purely in eminent domain; for the right of the appellant to take the judgment of the Railroad and Warehouse Commissioners upon the manner and place of the crossing is one that can not be denied without committing error.

Nor may the court, sitting under the lesser restrictions of chancery, ignore this general and salutary policy of the state. From all that appears, a crossing at grade might have been avoided, either at the point where the crossing was proposed, or at some point adjacent; or, in the absence of this, circumstances might have been shown imposing upon the court the duty of protecting the crossing at grade by some interlocking or safety device, as contemplated by the Act of July 1, 1891. No evidence respecting these inquiries was heard or required—the answer raising them was refused; the court seemed to be under the impression that, in these respects, its hands were tied. We are compelled to hold that this attitude of the court, toward inquiries so closely related to the policy of the state, and the safety of the travelling public, was mistaken, and that the order ensuing was improvident.

The order of the Circuit Court is, accordingly, reversed, and the case remanded, with directions to enter an order not inconsistent with this opinion.

COWEN et al. v. RAY.

(Circuit Court of Appeals, Seventh Circuit. April 9, 1901.)

No. 741.

1. RAILROADS—RELIEF DEPARTMENT—RULES—INJURIES—CLAIM—RELEASE—EXECUTION.

Deceased was killed on the defendant railway while on duty as fireman, and left a widow and two minor children, and was a member of the defendant company's relief department, which had a rule that, in case of the death of a member, the benefits would not be paid until the parties entitled to sue had executed a release to the company of all claims for damages. *Held*, that the execution of a release by plaintiff as the widow and beneficiary of deceased, and an acceptance of a \$1,000 benefit therefor, did not bar an action by her as administrator of deceased's estate.

2. SAME—CONTRACT—LAW GOVERNING.

Plaintiff's intestate, who was a fireman on the defendant railway, was killed while on duty in the state of Indiana. The intestate belonged to a relief department conducted by the defendant company in Baltimore, and, by the terms of the contract, it was to be governed by the laws of Maryland. A rule of the department required that, in case the member was killed through the company's negligence, the benefit would not be paid until a release was executed by the parties entitled to sue, relieving the company from all liability. *Held*, that the question whether a release executed by plaintiff as the widow and beneficiary of deceased barred an action by her as administratrix of his estate must be determined by the laws of Indiana, since it is for the state where the negligent act occurred to prescribe when and under what circumstances a cause of action resulting therefrom shall arise against a corporation operating within its limits.

3. SAME—BENEFIT CERTIFICATE—ASSIGNMENT—EFFECT.

Deceased, who was killed on the defendant railway, was a member of a relief department conducted by the company, and pledged his certificate as security for a loan. *Held*, that the assignment of the certificate did not discharge a right of action by deceased's widow for his death, since the right to sue was not assigned.

4. SAME—CONTRIBUTORY NEGLIGENCE—JUMPING FROM TRAIN.

The fact that a fireman jumped from the engine as it was about to collide with a train was not contributory negligence.

5. SAME—NEGLIGENCE.

Rev. St. Ind. § 7083, provides that every railroad operated in the state shall be liable for personal injuries suffered by any employé while in its service, where the injury was caused by the negligence of any person in the service of the company and in charge of any signal. A freight train had but eight minutes, by the schedule, to take the side track at a station where there was no telegraph office, and, owing to a fog, ran past the switch. The air brakes refused to unset, and the train was unable to back so as to take the side track. The rules of the company required that, when a train stopped on the main track between telegraph stations, the fireman or brakeman should go forward 1,200 yards and there place torpedoes, and then still further 500 yards and place torpedoes, and then return within 1,500 yards and use his red signal until the arrival of the oncoming train. The brakeman, who was sent forward six minutes before the coming train was due, placed torpedoes about 700 yards distant, and no red signal was seen by the engineer of the approaching train, and a collision occurred. *Held*, that the defendant was guilty of negligence, rendering it liable for the death of the fireman of the approaching train.

Appeal from the Circuit Court of the United States for the District of Indiana.

J. H. Collins, for appellants.
Frank S. Roby, for appellee.

Before WOODS, JENKINS, and GROSSCUP, Circuit Judges.

The suit below was by the appellee as administratrix of the estate of Robert M. Ray, deceased, against the appellants, to recover damages for the death of Ray occurring on the 26th of April, 1890. The Baltimore & Ohio Railroad Company being in the hands of receivers appointed by the Circuit Court for the District of Indiana, this action was by way of petition in the receivership suit. The court below found in favor of the appellee in the sum of seven thousand five hundred dollars, and ordered the sum paid out of the funds in the hands of the receivers.

Ray was the fireman of the engine drawing passenger train No. 47 west bound, and due at Berlington station at four o'clock and twenty-two minutes in the morning. Freight train No. 98, east bound, was due at Berlington eight minutes earlier, and was expected to take the side track. The passenger train was not to stop. Berlington had no telegraph office. The night was so foggy that lights could be seen only a short distance ahead.

The grade at Berlington descended toward the east. The east bound freight train arrived on time. Ordinarily an employé would have gone forward and thrown the switch, so that the train would have taken the side track; but, owing to the fog, the engine was run a little way past the switch on the main track before it could be stopped, after the switch light was observed. Thereupon the train was backed until it was clear of the switch, and the switch was thrown; but the air brakes having become set, and for some reason refusing to unset, the train could not be started. The rules of the company required that when a train between telegraph stations had reason to stop upon the main track, so as to cause an obstruction, the fireman, or in case he was engaged, the brakeman, should go forward twelve hundred yards and there place torpedoes; then still further forward five hundred yards and place torpedoes again; and then, returning to within fifteen hundred yards, use his red signal; remaining there until the oncoming train arrived, if it was a passenger train.

The engineer of the east bound freight train, finding that his train, in the situation it was placed, was an obstruction, and having six or seven minutes before the arrival of the west bound passenger train, despatched the brakeman with torpedoes, and two lamps, one a red and the other a white. It is not known precisely what this brakeman did. He disappeared after the accident, and his testimony has not been obtained by either side. It is known, however, that torpedoes were placed at about seven hundred yards distance, but no red signal was seen by the engineer of the west bound passenger train.

In the mean time the east bound freight train was started upon the side track, having proceeded so far before the accident occurred, that the engine and eleven cars were already upon the siding. The headlight of the engine remained unveiled, showing, to those who approached from the eastward, that the freight train had not yet cleared the main track.

The west bound passenger train approached Berlington at the rate of about thirty miles an hour. When the whistle was blown for Berlington the engineer was upon the right of the locomotive cab, and Ray upon the left, looking over the boiler. Something was said by the engineer about taking water at Bremen; then an explosion of the torpedoes was heard; and instantly the emergency brakes were set, and the throttle reversed. At about the same instant the flagman was seen on the engineer's side of the track; and then, a moment later, the unveiled headlight of the freight train was passed. The setting of the emergency brakes and the reversal of the engine came too late. The passenger engine struck the freight train, at the switch, and, as a result of the impact, the engine was thrown partly over toward the left, into the ditch; the engineer being thrown to a place between a stationary water tank and the engine, but not sustaining severe injuries. In a few minutes thereafter Ray was found dead—his neck having been broken—about three coach lengths eastward of the rear of the passenger train, and in the neighborhood of the freight locomotive headlight. It is evident, from all the

circumstances, that, in the face of the impending collision, he jumped from the engine.

There is no question made as to the amount of the recovery, should the liability be found to exist. Upon his death Ray left a widow, the administratrix in this case, and two minor children.

As a special defense the answer of the appellants shows that the Baltimore & Ohio Railroad Company was operating a relief department, conducted as a part of the business of the road; its purpose, among other things, being to extend relief in case of sickness, injury, old age and death, to its employes; that among the rules of this department was one to the effect that, in the event of disability, or death from injuries, the benefits should not be payable until there had been filed with the superintendent, by all persons who might bring suit, release from all claims for damages by reason of such injury or death; and that Ray was, at the time of his death, a member of this department, contributing two dollars a month towards its funds, and agreeing to be bound by its rules.

It was averred, also, that in his application Ray agreed that the acceptance of benefits for injury or death, from the department, should operate as a release of all claims against the company which could be made by or through him; that the superintendent might require, as a condition precedent to the payment of such benefits, all acts deemed appropriate to effect such release; that the bringing of any suit by Ray, or his beneficiary, or legal representatives, for such injury or death should operate as a release of the relief department; that the contract thus created should be governed in its construction and effect by the laws of the state of Maryland; and that when the Circuit Court for the District of Indiana appointed appellants as receivers for said railroad all the contracts made by said railroad company, including the one in question, were adopted.

It is further averred in the answer that after the death of Ray the appellee elected to take the benefits provided by the contract with the relief department, and to waive the bringing of any suit for damages, and that thereupon the appellants, through the relief department, agreed to pay appellee "widow and administratrix" the sum of one thousand dollars; that she was furnished for that purpose with a blank release which was signed by her as widow and beneficiary, but not as administratrix of the estate of said Ray; that the release thus executed was returned to her for her signature as administratrix; but that, up to the time of the filing of the answer, the appellants had not again received such release with the signature attached. The answer tendered the said sum of one thousand dollars, and offered to bring the sum into court for her use.

It is further averred in the answer that on September 16th, 1892, Ray and his wife borrowed from the Real Estate and Improvement Company, of Baltimore City, a corporation organized under the laws of the state of Maryland, the sum of two hundred and twenty-five dollars, and as security for said loan assigned, in effect, to the said Real Estate and Improvement Company all their right, title and interest in the benefits of the relief department of the Baltimore & Ohio Railroad Company; and that the said Real Estate and Improvement Company had agreed to accept in full payment of the said loan the benefits due from the said relief department of the Baltimore & Ohio Railroad Company to the beneficiary named.

To this defense a special demurrer was filed, and by the court sustained.

After the foregoing statement of the case, GROSSCUP, Circuit Judge, delivered the opinion of the court, as follows:

The liability in this case is controlled by the following Indiana legislation: Section seven thousand and eighty-three of the Revised Statutes of Indiana, which reads as follows:

"That every railroad or other corporation, except municipal, operating in this state, shall be liable for damages for personal injury suffered by any employe while in its service, the employe so injured being in the exercise of due care and diligence, in the following cases: * * * Fourth: Where such injury was caused by the negligence of any person in the service of

such corporation who has charge of any signal, telegraph office, switch yard, shop, round-house, locomotive engine or train upon a railway, or where such injury was caused by the negligence of any person, co-employee, or fellow servant engaged in the same common service of any of the several departments of the service of such corporation, the said person, co-employee, or fellow-servant, at the time acting in the place, and performing the duty of the corporation in that behalf, and the person so injured obeying or conforming to the order of some superior at the time of such injury, having authority to direct."

Also Section seven thousand and eighty-five (a part of the same Act) which reads as follows:

"The damages recoverable under this act, shall be commensurate with the injury sustained unless death results from such injury; when, in such case, the action shall survive and be governed in all respects by the law now in force as to such actions."

The general law in force was Section two hundred and eighty-five, and provides:

"When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter for an injury for the same act or omission"; * * * and limits the damages to ten thousand dollars.

Though the answer avers that the appellee elected to take the benefits provided for by the contract with the relief department, and to waive the bringing of any suit for damages, it shows, upon further reading, that the appellee refused, as administratrix, to sign any release. Upon the answer, taken as a whole, it is apparent that, while willing to accept the one thousand dollars, as widow and beneficiary, she declined, as administratrix, to waive the right of action arising under section two hundred and eighty-five of the Revised Statutes of Indiana.

But though it has been ruled by the Supreme Court of Indiana, *Railroad Co. v. Hosea*, 152 Ind. 412, 53 N. E. 419, that an acceptance of benefits by the beneficiary is not a bar to a recovery by the administratrix for the use of the child of the deceased, under section two hundred and eighty-five, it is insisted that the case now under consideration is to be determined, not by this ruling, but by the law of Maryland; and our attention is called to the fact that, by its own terms, the contract with the relief department is to be governed, in its construction and effect, by the laws of the state of Maryland.

We can not concur in this view. The statute of Indiana, as construed by the Supreme Court of Indiana, gives a right of action to the administratrix for the use of the children, notwithstanding the contract for benefits, or the acceptance of benefits by the appellee, as beneficiary. The statute differentiates her right, as administratrix, from her interest, as beneficiary. As administratrix, she has not consented that her right of action, conferred by the laws of Indiana, shall be governed by the laws of Maryland; and it is for the state within whose limits the negligent act is done to prescribe when, and under what circumstances, a cause of action resulting in death shall arise against a person or corporation operating within its limits.

Nor is the acceptance of benefits by the Real Estate and Improvement Company of Baltimore a discharge of this right of action of the administratrix. The assignment was to secure a loan. Any payment made on account of the relief contract to the extent of the unpaid portion of the loan, could, in a proper way, be claimed by the assignee. But there was no assignment by Ray of his right to sue for injuries resulting from the railroad company's negligence, nor by the administratrix of her right to sue under Section two hundred and eighty-five.

Nor upon the main issue is there, in our opinion, any error in the decree of the Circuit Court. There can be no question that, so far as the record discloses, Ray acted in the exercise of due care and diligence. Jumping from an engine at the moment it is about to collide with another train, under the circumstances disclosed, can not be held to be contributory negligence.

The proof of negligence on the part of the appellants is equally clear. One of two things is apparent: Either the schedule upon which the train ran did not, considering all possibilities, provide sufficient time for the siding of the freight train at Berlington; or the brakeman, despatched with the torpedoes and signals, negligently failed to comply with the rules. In case of the former, liability could not be disputed. In case of the latter, although the brakeman may be regarded as a fellow servant of Ray, liability exists, if the brakeman falls within the persons enumerated in paragraph four of Section seven thousand and eighty-three of the Revised Statutes of Indiana.

We are of the opinion that the brakeman was, within the meaning of that statute, a person in the service of the appellants, having charge of a signal. The rule of the company, framed to meet the emergency that came into existence, made it the duty of the fireman, or in case he was engaged, the brakeman, to go forward the stipulated distances, place the torpedoes and give the signal. It is not necessary to inquire why the fireman did not go. The engineer, in command over the fireman, unquestionably determined that he should not go, and despatched instead the brakeman. From that moment, and for that occasion, the brakeman was in charge of the signal. Upon his discretion and fidelity depended the proper giving of the signal. His negligence, therefore, under the statute, was, constructively, the negligence of the appellants.

The decree will be affirmed.

TRACY et al. v. EGGLESTON et al.

(Circuit Court of Appeals, Fifth Circuit. April 16, 1901.)

No. 909.

1. BOUNDARIES—EVIDENCE—DECLARATION OF DECEASED SURVEYOR.

Under the rule established by decision in Texas, which, as a rule of property, is binding upon the federal courts sitting in that state, declarations of a deceased surveyor in regard to the lines and corners of a survey which was originally made by him, made on the ground while pointing out

a monument placed there by him in making the survey, are admissible in evidence in an action involving the location of the survey, although at the time the declarations were made he was part owner of the land embraced in such survey, and interested in a controversy then pending as to its boundaries. The objection that such declarations were self-serving is not fatal, since they could not be used as evidence during his lifetime, or while his testimony was obtainable.

2. APPEAL—REVIEW OF INSTRUCTIONS—EXCEPTIONS.

A general exception to a charge, which does not direct the attention of the trial court to the particular portion or portions to which objection is made, raises no question for review in the appellate court.

Pardee, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Western District of Texas.

This action was brought by Eustace R. Tracy and others, citizens of the state of New York, against Mary S. Eggleston and others, citizens of the state of Texas. It is an action of trespass to try title to 640 acres of land situated in Sutton county, Tex. The jury found a verdict for the defendants, on which judgment was entered. During the trial a bill of exceptions was reserved by the plaintiffs. The following is a part of the bill of exceptions: "E. Von Rosenberg, a witness for the defendants, duly sworn, was, over plaintiffs' objection, permitted by the court to testify that in 1885 witness was an employé of the state land office; that Jacob Keuchler, formerly land commissioner of the general land office, requested the commissioner of the land office to issue no patents to lands lying between block C, H. E. & W. T. Ry. Co., and the Devil's river, until the real location of the surveys now claimed by defendants could be ascertained; that in the fall of 1885, witness, Jacob Keuchler, and others went to the place of alleged conflict, and witness was there sworn in as a special state surveyor; that Jacob Keuchler pointed out to witness a loose mound of rock on the north bank of Elbow Lake, and informed witness that the same was a mound of rock placed there by himself (Keuchler) at the time he located Rusk Transportation No. 3 and its constructed surveys; that Keuchler informed witness that the beginning corner of Rusk Transportation No. 3 was 950 varas S., 45 degrees W., from said loose mound of rock; that witness did not go S., 45 degrees W., 950 varas, to ascertain whether said beginning corner of No. 3 was located there or not; that he did not run out any of the lines of No. 3 at the time, and did not see any of the corners thereof; that the stone mound shown him by Keuchler on the bank of Elbow Lake was not called for by Keuchler in the original field notes of survey No. 3; that, while there were trees there, which might readily have been used as bearing trees, he did not then, nor has he since, discovered any marked bearing trees there; that, ordinarily, a surveyor, in making an actual survey, where bearing trees were accessible, would have used the same. All of which testimony as to the declarations of Jacob Keuchler made to witness was objected to upon the grounds that, defendants admitting that Jacob Keuchler at the date of said declarations was a joint owner and tenant in common with defendants in said lands, said declarations by Keuchler were self-serving, and made post litem motam, at the time when he (Keuchler) had requested that no patents issue by the state until he could go upon the ground and designate where he intended the location of his surveys; because said declarations permitted said Keuchler, in his own interest, after the location of plaintiffs' certificate and the issuance of their patents, to go upon the ground, and select and designate the land which he intended, or claims to have intended, to have appropriated by his original entry, notwithstanding such location varied the relative location of his original field notes, placed his said survey at the junction of streams different from those named in his original field notes, and appropriated lands in conflict with plaintiffs' lands at a point shown by the official records and his field notes to have been vacant and unappropriated at the time of plaintiffs' location of their surveys; because said statement of said Keuchler was an ex parte statement, made in his own interest, without affording opportunity of cross-examination; because said testimony of the

witness Von Rosenberg was hearsay,—which objections so made were each and all by the court overruled, and the testimony of said witness was by the court permitted to go before the jury; to which action of the court in overruling said objections and allowing said testimony to go before the jury plaintiffs then and there, in open court, before the retirement of the jury, excepted.”

The court charged the jury as follows: “Gentlemen of the jury, this is an action brought by the plaintiffs named in the petition against the defendants, Mary S. Eggleston and O. T. Word, in the ordinary form of trespass to try title for the recovery of five sections of land surveyed and patented by certificates issued to the Houston, East & West Texas Railroad Company. The defendants allege, substantially, that they are the owners and are in possession of six sections of land set out in their answer, surveyed and patented,—one of said tracts being survey No. 3, patented by virtue of a certificate issued to the Rusk Transportation Co.; that defendants’ locations, surveys, and patents were all prior to those of plaintiffs, and hence that, if the lands described in plaintiffs’ patents include the lands described in defendants’ patents, that defendants have the superior title, because their locations and patents were prior in point of time to those of plaintiffs. I charge you that defendants admit that plaintiffs are the owners of the certificates by virtue of which their patents were issued, and that plaintiffs admit that the defendants are the owners of the certificates by virtue of which their patents were issued; consequently, there is no issue as to titles between the parties to be submitted to you. The sole question for you to determine is, ‘Where were all the surveys of the defendants located on the ground?’ If the lands embraced in the patents of plaintiffs are the same lands embraced in the patents of defendants, then defendants are entitled to a verdict in their favor, because their locations and patents are prior in point of time to those of plaintiffs. The plaintiffs contend in this case that defendants’ surveys should be constructed by beginning at the northeast corner of survey No. 21, as shown by the map, and thence by running east 11,400 varas for the beginning corner of No. 3, and that by thus locating defendants’ land such lands will not embrace those of plaintiffs, and that in such case plaintiffs would be entitled to recover the land in controversy. Defendants, however, contend that the call above named for the northeast corner of survey No. 21, thence east 11,400 varas, made by the surveyor Keuchler, is a mere random or guess call, and by mistake, and that their survey No. 3 was in fact made by this surveyor Keuchler on Elbow Lake, as explained to you by the map and by the evidence. In order to determine the location of a survey made on the ground, it is your duty to follow the footsteps of the surveyor on the ground, and to locate the survey on the ground as the surveyor made the survey. If you believe from the testimony that Keuchler, the surveyor who made the survey of the defendants, actually surveyed on the ground defendants’ survey No. 3, commencing at Keuchler or Elbow Lake, and that from that point he constructed said survey No. 3, you will return a verdict for defendants. If, on the other hand, you do not believe from the evidence that said Keuchler actually made said survey on the ground (and the presumption of law is that it was made on the ground, unless the evidence in the case shows to the contrary), then you will endeavor, from the evidence and the field notes, to ascertain where the surveyor intended to locate said survey No. 3. The law in such cases lays down certain rules for your guidance, and they are as follows: Calls in field notes are divided into three classes, and their dignity and importance are stated in the following order: First, calls for natural objects, such as rivers, creeks, etc., which stand first; second, calls for artificial objects, such as stakes, mounds, etc., which come next; and, third, course and distance, which come last. Course will prevail over distance. Where there is a conflict between calls in a grant, you must reject those which are most uncertain, and adopt those which are most certain, and which will the more nearly preserve the configuration of the survey, and conform the more nearly to all the other calls, and reflect the intention of the surveyor in locating the grant. In this case there is a conflict between the northeast corner of survey No. 21 and the other calls in the grant; and, if you do not believe that the surveyor actually made a survey of No. 3 on the ground, then you will apply the above rules to the evidence in

determining whether the surveyor intended to locate said survey No. 3 11,400 varas from the northeast corner of survey No. 21, or whether he intended to locate the same on Elbow or Keuchler Lake. If you believe that said surveyor, under the above instructions, intended to locate said survey No. 3 11,400 varas from the northeast corner of said survey No. 21, then in such case you will return a verdict in favor of plaintiffs. But, on the other hand, if you believe that the surveyor intended to locate said survey No. 3 on Keuchler or Elbow Lake, then you will disregard the call for the northeast corner of survey No. 21, and in such case your verdict will be for the defendants. Each call in the survey must be given effect to, if possible; but where all cannot be, and one call conflicts with many others, which, if given effect to, would override many other calls, then it would be your duty to disregard this one call so conflicting with many others. When a survey is actually made upon the ground, and some of its lines and corners are fixed, and can be found and identified, then the survey must be located by those lines and corners so found and identified. If you believe that the surveyor actually surveyed No. 3 on the ground, on Keuchler or Elbow Lake, and that some of the corners and lines established by him can be found, then in such case you will disregard the call 11,400 varas for northeast corner of No. 21, and return a verdict for defendants. You are the exclusive judges of the credibility of the witnesses, and the weight to be given their testimony; and in a civil suit, such as the present, you may predicate your finding on a preponderance of the evidence. If your verdict be in favor of the plaintiffs, you will return it in the following form: 'We, the jury, find for the plaintiffs for the lands described in their petition.' If your finding be in favor of the defendants, you will simply say: 'We, the jury, find for the defendants.'"

The bill of exceptions shows that an exception was reserved to this charge, as follows: "To which charge of the court so given the jury plaintiffs then and there in open court excepted, because the same did not charge the law applicable to the case made by the evidence; because the same was on the weight of the evidence; because the same incorrectly stated the issues involved, and failed to present the law of the entire case under the pleadings and evidence, and incorrectly states the law as given."

It is assigned as error, and insisted on in the argument: (1) That the court erred in permitting the declarations and statements of Keuchler, the deceased surveyor, to be proven; and (2) that the court erred in the charge given.

John D. Rouse and Wm. Grant, for plaintiffs in error.

R. H. Ward, for defendants in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge, after stating the case as above, delivered the opinion of the court.

There had been offered in evidence a map or survey of 1878, which was in use in 1879 in the general land office and Bexar land district. This map was based on a survey made by Jacob Keuchler, who died before the trial. In the fall of 1885, E. Von Rosenberg, accompanied by Jacob Keuchler and others, went on the lands alleged to be included in the survey, and Von Rosenberg was sworn in as a special state surveyor. Jacob Keuchler pointed out to the witness a loose mound of rock on the north bank of Elbow Lake, and informed the witness that it was a mound of rock placed there by himself (Keuchler) at the time he located Rusk Transportation No. 3 and its constructed surveys. He said that the beginning corner of Rusk Transportation No. 3 was 950 varas S., 45° W., from this loose mound of rock. The defendants objected to this testimony as to the declarations of Jacob Keuchler. The first question for consideration is whether or not these declarations of Keuchler

were admissible in evidence. Von Rosenberg was acting officially. He was on the ground as special state surveyor, and his acts in that connection are clearly admissible in evidence. No objection is made to them. No objection is made to proof of the fact that the mound of rock was on the land as stated. No objection is made to the fact that Keuchler pointed out the mound of rock. This part of Von Rosenberg's evidence is a statement of facts to which no objection was or could properly be made. The objection, therefore, is confined to the declaration of Keuchler, made at the time he pointed out the mound of rock, that they were placed there by himself at the time he located the corner, and that the corner was at a certain distance and in a designated direction from the mound of rock. It was said by the supreme court in 1880, after an examination of the Texas cases, that there was no essential difference between the rule there as to the question here considered and the general rule held by the American courts. The court observed, however, that, if there was a difference, which had become a rule of property in Texas applicable to the determination of controversies respecting disputed boundaries, such rule would be controlling in the federal courts. *Hunnicutt v. Peyton*, 102 U. S. 333, 364, 26 L. Ed. 113.

• In *George v. Thomas*, 16 Tex. 74, 92, the court admitted the declarations of a public surveyor. "He was a public surveyor," said the court, "and his declarations while making the survey were clearly admissible as a part of the original *res gestæ*. On these questions of boundary the courts have gone much further, and, under certain restrictions, have freely admitted hearsay evidence to establish old surveys and boundary lines."

In *Stroud v. Springfield*, 28 Tex. 649, 665, a memorandum was offered in evidence as having been made by a surveyor. It was found among the surveyor's papers, but the handwriting was not proved, and no effort was made to show its genuineness. The paper was excluded, but the court said:

"If the genuineness of these papers had been sufficiently proved, we are of opinion that they would have been admissible in evidence as the declarations of the party making them, for the purpose of aiding in the ascertainment of the boundaries of the Powell league."

In *Welder v. Hunt*, 34 Tex. 44, 48, the court said:

"The declarations of public officers are held admissible to prove their official acts, and we see no reason why the declarations made by a surveyor, who claims to have run the line upon the ground, as to the location of a boundary line, may not, after the death of the surveyor, be proved by the witness to whom he made the declarations. We might hesitate to go so far as to admit the declarations of an interested party, yet we have no hesitation in saying that the declarations of a surveyor as to an official act of his own, made upon the ground, may be given in evidence, after his decease, by any competent witness who heard the declarations."

In *Hurt v. Evans*, 49 Tex. 311, 316, it was held that the declarations of a deceased owner of a tract of land as to the corners of the tract of which he was in possession at the time they were made are admissible in a contest as to the locations of such corners and lines.

The case of *Reeves v. Roberts*, 62 Tex. 550, is very much like the case at bar. A witness was on the stand, who had made a survey of the land in question. He testified that one Tinnon, an old surveyor, told him that he had been at that place (on the land surveyed) 20 years before that time, and recognized it as the southeast corner of the grant; that he had seen bearing trees, and the marks on them, while they were standing; and that in making surveys in the neighborhood he had made that a beginning point. The court held that the evidence of declarations made by Tinnon, in connection with his acts and means of knowledge, reaching back as they did for a period of 36 years prior to the trial, in connection with the other evidence in the cause, was admissible for the purpose of establishing the ancient boundary.

In *Russell v. Hunnicutt*, 70 Tex. 657, 8 S. W. 500, the declarations of a surveyor, giving his opinion as to the identification of corners and lines of the survey, were excluded because the land was not originally surveyed by him, and because it appeared that he had no previous knowledge of the original survey. The court, however, said:

"Where it is shown that the surveyor was in a position to know the truth of his declarations from having made the original survey, or from other knowledge possessed by him, the rule is different."

In the recent case of *Ayers v. Harris*, 77 Tex. 108, 115, 13 S. W. 768, a memorandum, being properly identified as being made by the surveyor, who died before the trial, was received in evidence. The court observed:

"It is a well-recognized rule that the declarations of the surveyor may be proved under the circumstances existing at the time of the trial of this cause. Such evidence can certainly rank no higher, and cannot be so safe or satisfactory, as evidence written down by the surveyor at the time."

The opinion of the supreme court in *Hunnicutt v. Peyton*, *supra*, indicates that in questions of private boundary declarations of particular facts, as distinguished from reputation, made by deceased persons, are admissible when "made by persons who it is shown had knowledge of that whereof they spoke, and who were on the land, or in possession of it, when the declarations were made."

In one of the Texas cases which we have quoted the court refers to the declarations which were admitted as being those of persons who are disinterested, and in another one of the cases the court said it might hesitate to go so far as to admit the declarations of an interested party. We have found no case, however, that excluded the declarations, which were otherwise relevant, because the declarant was interested. In several of the cases where the declarations of owners in possession as to boundaries were received the declarant manifestly had an interest, and yet the declaration was received. Such declarations, when not received as a part of the *res gestæ*, and when not received as declarations against interest, are really accepted in evidence as a substitute for the dead or absent declarant. If he were present as a witness, as the statutes now stand, his interest, or his being a party to the action, would not make him incompetent. Rev. St. Tex. 1895, § 2300; Rev. St. U. S. (2d Ed.) § 858. We do not think, therefore, that the fact that Jacob Keuchler had

an interest in the real estate involved in the controversy rendered his declarations inadmissible.

The only other question raised by the plaintiff in the argument at bar or in the briefs relates to the charge of the court. The charge and exception have been given in full in the statement of the case. It will be seen that the charge was intended to cover the several questions in the case. There are portions of it that are not objected to in the argument at the bar or in the briefs filed. An excerpt consisting of three sentences is selected by the learned counsel for the plaintiff in error as being erroneous. It is as follows:

"In order to determine the location of a survey made on the ground, it is your duty to follow the footsteps of the surveyor to locate the survey on the ground as the surveyor made the survey. If you believe from the testimony that Keuchler, the surveyor who made the survey of the defendants, actually surveyed on the ground defendants' survey No. 3, commencing at Keuchler or Elbow Lake, and at which point he constructed said survey No. 3, you will return a verdict for defendants. If, on the other hand, you do not believe from the evidence that said Keuchler actually made said survey on the ground (and the presumption of law is that it was made on the ground, unless the evidence in the case shows to the contrary), then you will endeavor, from the evidence and the field notes, to ascertain where the surveyor intended to locate survey No. 3."

This part of the charge was not singled out and excepted to on the trial. The exception there taken was to the entire charge. The objections which were stated in the exception reserved related to the entire charge. The objections were that the court did not charge the law applicable to the case made by the evidence; that the charge was on the weight of the evidence; and that it incorrectly stated the issues involved, and failed to present the law of the entire case under the pleading and evidence, and incorrectly stated the law as given. These exceptions and objections manifestly go to the entire charge. No portion of it was selected for exception or objection. No separate objection was made to the part of the charge now singled out in argument for objection. It is well settled that a general exception to the whole of a charge to the jury will not avail a plaintiff in error if the charge contains distinct propositions, and any one of them is free from error. If the exception does not direct the attention of the trial court to a particular portion or portions of a charge to which objection is made, it raises no question for review in the appellate court. *Burton v. Ferry Co.*, 114 U. S. 474, 5 Sup. Ct. 960, 29 L. Ed. 215; *Anthony v. Railroad Co.*, 132 U. S. 172, 10 Sup. Ct. 53, 33 L. Ed. 301; *Lincoln v. Clafin*, 7 Wall. 132, 19 L. Ed. 106; *Cooper v. Schlesinger*, 111 U. S. 148, 4 Sup. Ct. 360, 28 L. Ed. 382.

The assignments of error, we think, are not well taken. The judgment of the circuit court is affirmed.

PARDEE, Circuit Judge (dissenting). The record shows that Jacob Keuchler, the deceased surveyor, whose declaration was offered and admitted in evidence, was, at the time the declaration was made, directly interested in a controversy inaugurated by him, then pending in the land office, as to the boundaries of the tracts of land involved. He was making declarations as a bystander not

engaged in the act of running lines, and in his own interest, and presumably to his own advantage. Under no well-adjusted case that I have been able to find are self-serving declarations, particularly when made after contest commenced, admissible in evidence. For the authorities and a full, exhaustive discussion of the subject, see 1 Phil. Ev. (Cow., H. & Edw. Notes) pp. 218 et seq., 245.

The majority opinion seems to rely on Texas cases, and a short review of them may be indulged in. The declarations admitted in *George v. Thomas*, 16 Tex. 74, 92, were the declarations of a public surveyor, made while making the survey in question, and there was no suggestion whatever of self-interest in the survey.

The papers offered in evidence in *Stroud v. Springfield*, 28 Tex. 649, 665, in regard to which it was said that, "if the genuineness of these papers had been sufficiently proved, we are of opinion that they would have been admissible in evidence as the declarations of the parties making them," were papers purporting to be field notes and copies of field notes actually made when running a survey, and I can find very little authority from this obiter to hold that the subsequent declarations of a surveyor after contest commenced, and in his own interest, can be admissible as evidence; particularly when I consider the case of *Speer v. Coate*, 3 McCord, 229, cited by the court as authority, wherein it is said:

"It cannot be doubted at this day that the declarations of deceased persons, who shall appear to have been in a situation to possess the information, and are not interested, shall, on a question of boundary, be received in evidence."

The statement by the court in *Welder v. Hunt*, 34 Tex. 44, 48, to the effect that "we see no reason why the declarations made by a surveyor, who claims to have run the line upon the ground, as to the location of a boundary line, may not, after the death of the surveyor, be proved by the witnesses to whom he made the declaration," evidently refers to declarations made by the surveyor at the time of running the alleged survey; but in that case the court took care to say, "We might hesitate to go so far as to admit the declarations of an interested party."

In *Hurt v. Evans*, 49 Tex. 311, the ruling was in regard to the declarations of a deceased owner, and was as follows:

"Surely, if the declarations of a deceased person in reference to ancient boundary lines are admissible at all, as has been held by this court, those of James Lynch, the grantee of the land, who lived on his league, and sold all three of these tracts, would be of the very highest authority, having been made when he had no interest whatever in favor of one or the other party."

I am at a decided loss to understand how this case can be cited as authority for the proposition that the declarations of a deceased surveyor, made after contest, and in his own interest, are admissible in evidence.

In *Reeves v. Roberts*, 62 Tex. 550, which is said by my Brethren to be very much like the case at bar, the declarations admitted were those of one Tinnon, an alleged surveyor, made in connection with his acts and means of knowledge, reaching back as they did for a period of 36 years prior to the trial, in connection with other evi-

dence in the case, and were held to be admissible for the purpose of establishing an ancient boundary. A most careful examination of this case fails to show that at the time the declarations were made by Tinnon there was any contest as to the location of the ancient boundary, or that Tinnon had any interest whatever in the matters in regard to which he made the declarations. The court cites *Stroud v. Springfield*, 28 Tex. 661, and it must have taken as a part of the authority in that case *Speer v. Coate*, 3 McCord, 229, which seems to insist that the declarations of deceased persons admissible in evidence must be the declarations of persons who were not interested. It would seem that the likeness of *Reeves v. Roberts* to the instant case is not so very apparent.

In *Russell v. Hunnicutt*, 70 Tex. 657, 8 S. W. 500, wherein the court indulges in an obiter which my Brethren cite as authority, the court cites *Speer v. Coate*, 3 McCord, 229, *Sutherland v. Keith*, Id. 258, and *Stroud v. Springfield*, 28 Tex. 649, in all of which stress is laid upon the proposition that the declarations must be disinterested. The court says, citing *Hurt v. Evans*:

"One who has been the owner of a survey is presumed to know his own boundaries, and his declarations as to boundaries, made after he has parted with his title, and when he has no interest in favor of either party, are admissible after his death."

In *Ayers v. Harris*, 77 Tex. 110, 115, 13 S. W. 768, the court certainly said:

"It is a well-recognized rule that the declarations of the surveyor may be proved under the circumstances existing at the time of the trial of this cause. Such evidence can certainly rank no higher, and cannot be so safe or satisfactory, as evidence written down by the surveyor at the time."

But the declarations referred to by the court were field notes and survey made by one Johnson, who made a survey of the tract in controversy prior to the Moreno grant, and the memorandum of which, made by him at the time of the survey, was deposited in the general land office at the same time that the title itself was deposited there, and carefully preserved ever since, and spoken of with veneration as "an archive," and which the court held to be, if not an archive of the general land office, at least a memorandum made by a surveyor at the time the work was done.

These are all the Texas cases cited in the opinion of the majority bearing on this question, but I go further, and quote, as having pointed application, from *Wallace v. Berry*, 83 Tex. 328, 332, 18 S. W. 595:

"Appellant sought to give character to a transaction occurring between John Lee and Thurmond & Ray in 1874 by the declarations of Lee made many years afterwards, and we think it clear that such declarations were not admissible as *res gestæ*; and, being self-serving, the fact that they were made while in possession of the land would not make them admissible for any purpose bearing on the question of title. *Whart. Ev. § 1101*; *Whitney v. Houghton*, 125 Mass. 451; *Nourse v. Nourse*, 116 Mass. 102; *Duvall's Ex'r v. Darby*, 38 Pa. 59; *Hogsett v. Ellis*, 17 Mich. 371; *Morrill v. Titcomb*, 8 Allen, 100."

Considerable reliance seems to be placed on the case of *Hunnicutt v. Peyton*, 102 U. S. 333, 26 L. Ed. 113, which, after considering many cases herein cited, decides that the rule in Texas with regard to the

admission of declarations of deceased surveyors where boundaries are in suit is in accordance with the general rule. In that case, however, it is to be noticed that exceptions to the rule are well recognized, and therein the declarations of a deceased surveyor who had previously run the survey were rejected because not made when the surveyor was actually upon the ground. There was no question made as to the self-serving character of the declarations offered, and the court distinguishes and approves *Ellicott v. Pearl*, 10 Pet. 412, 9 L. Ed. 475, as follows:

"In that case, which was a writ of right for a tract of land, in which the location of a survey was a matter in controversy, a witness was offered to prove that one Moore, who was dead, but whose name was put down as one of the chain carriers in making the original survey, and who was subsequently present when lines were run on the same land, had declared that a certain corner was the corner made by the surveyor when the original survey was made and the line was run for that survey. The evidence was rejected, and, this court ruled, correctly rejected, though the declarations offered were made by one who was proved by other evidence to have assisted in running the line. This case is instructive, and we believe it is in harmony with the rule generally enforced in this country. It certainly is in accord with the ruling of the English courts."

In the examination of this case I have made a study of all the adjudged cases and text-books at hand bearing on the point in question, and I have failed to find in a single adjudged case or in any text-book any countenance for the proposition that declarations made by an interested party, owner, surveyor, chain man, after contest commenced, are admissible in evidence.

It appears that Surveyor Keuchler made the surveys under which both parties in this case claim on the 10th day of November, 1877, as deputy surveyor of the Bexar land district; that thereafter, having a locative interest to the extent of one-half in the survey under which the defendants claim, which his heirs still hold, he instituted proceedings in the land office to withhold the patents until further surveys; and thereafter, in 1885, on a resurvey by the state surveyors, one Von Rosenberg and others, Keuchler made declarations in his own interest as to the location of the corner from which the original surveys were made. These declarations of this interested party in his own interest were admitted in evidence over the objections of the plaintiffs. In my judgment, this was erroneous, and so decidedly prejudicial as to require the reversal of the judgment of the circuit court, and a trial *de novo*.

On Rehearing.

(May 14, 1901.)

SHELBY, Circuit Judge. The case of *Wallace v. Berry*, 83 Tex. 328, 18 S. W. 595, we think, has no application here. It did not involve a question of boundary. In that case it was held that the declarations of a grantor by deed absolute, remaining in possession, were not admissible to show that the deed was a mortgage. That was the point decided. The court said such declarations were not admissible for any purpose "bearing on the question of title." That case surely cannot be considered as overruling the previous cases

holding that the declarations of one in possession are admissible on the question of the boundaries of the tract held by him. Wharton distinguishes between the two classes of cases, saying, in section 262, that declarations of a party taking possession of land are admissible "as to the boundaries," and, in section 1101, that declarations of a person in possession of land "in support of his own title are inadmissible." Whart. Ev. §§ 262, 1101. In the opinion handed down we quoted from *Welder v. Hunt*, 34 Tex. 44, 48, this expression, referring to declarations as to boundaries: "We might hesitate to go so far as to admit the declarations of an interested party." That case was decided before the passage of the act of May 19, 1871, that made parties and persons interested in the suit competent witnesses. Acts Tex. (21st Sess.) pt. 2, p. 108. The expression quoted shows that the court would hesitate to exclude such declarations, even before the passage of the statute. The incompetency as witnesses of parties and persons who are interested will account for many similar expressions in the older American cases. The reason for excluding declarations as to boundaries made by a deceased person, who was a party or interested in the case, was that, if he were alive and present, and his interest continued as at the time the declarations were made, he would not be allowed to testify. Now, when the parties and witnesses having interest are permitted to testify, there can be no logical reason for excluding the declarations, if otherwise admissible, because of such interest. The fact that Keuchler pointed out the loose pile of stone placed there when the survey was made was admitted in evidence without objection. It was an act, and not hearsay. No tenable objection could be made to proof of the act. A remark made by him relevant to the question of boundary, while so pointing out the object, is a part of his act. Whart. Ev. § 262. Even before the statutes making parties and persons interested competent witnesses, the rule was that self-serving declarations were admissible as a part of a transaction into which they immediately entered. Whart. Ev. § 1102. The objection that the rule, as applied in this case, will permit a litigant to make evidence for himself, is not well taken. When such declarations are admitted as a part of the *res gestæ*, the usual limitations should always be applied, limiting the admissibility of the declarations to such as accompany and become parts of an act admissible in evidence. When admitted under the rule relating to boundaries, they are admissible, under the Texas cases, only when the declarant is dead, or not obtainable as a witness. It is not probable that such declarations would be made with self-serving premeditation, to be used as evidence after the death of the declarant. The fact that the declarant must die, or at least become unobtainable as a witness, to make his declarations admissible, prevents the rule being dangerous to the property interests of his adversary. We think the declarations objected to are admissible in evidence, and the application for a rehearing must be denied.

LAFAYETTE BRIDGE CO. v. OLSEN.

(Circuit Court of Appeals, Seventh Circuit. April 30, 1901.)

No. 717.

1. MASTER AND SERVANT—DUTY OF MASTER—APPLIANCES AND PLACE TO WORK.

A master owes a positive duty to his servants to use ordinary care to furnish appliances reasonably safe for their use considering the nature of the service, and to provide a safe place to work, and keep it in suitable condition. Where he delegates such duty to another, he is responsible for its proper performance by such other, although the latter may be, as to other matters, a fellow servant with the other employes, for whose negligence the master is not responsible to them.

2. SAME—DUTY OF INSPECTION.

A bridge company owes a positive duty to its employes engaged in building a steel bridge over a river, the materials and parts of which are supported by a temporary wooden structure during the work, to furnish timbers for such structure which are reasonably fit for the purpose, and to have the same inspected by a person having the requisite technical knowledge and experience to qualify him for the duty. Where, in such a case, no inspection was made, but the timbers and plank used were selected from a larger quantity by common workmen, by direction of the foreman in charge of the work, the company is liable for the death of a workman caused by the breaking of a defective plank, which was required to support a heavy load, the unfitness of which would have been disclosed by a proper inspection by a competent person, but was not apparent to an unskilled man.

3. SAME—ACTION FOR DEATH OF SERVANT—QUESTIONS FOR JURY.

Where it was the duty of a master to cause proper inspection to be made of the timbers used in the false work built to support a steel bridge in course of construction and the workmen engaged upon it, the question whether the breaking of a plank used in such construction, which was not inspected, was due to a defect which such inspection would have disclosed, so as to charge the master with notice of it, is one for the jury in an action to recover for the death of an employe resulting from such breaking.

4. TRIAL—INSTRUCTIONS—WEIGHT AND EFFECT OF EXPERT TESTIMONY.

Where a question at issue in an action against a master to recover for the death of an employe was whether the defect in a plank, the breaking of which was the cause of such death, was one which would have been disclosed by a proper inspection, and one piece of such plank was introduced in evidence, the jury were properly instructed that in determining such issue they were not restricted to the opinions of the expert witnesses, but had the right to use their own intelligence and the knowledge and experience of lumber which they brought with them into the jury box, in connection with their inspection of the exhibit.

5. APPEAL—REVIEW OF CHARGE—SUFFICIENCY OF EXCEPTION.

To entitle a plaintiff in error to the review of instructions, the exception taken must have been sufficiently specific to point out to the trial court the particular matter of law objected to.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

The defendant in error brought suit to recover damages for the death of her intestate, John Olsen, who was drowned in the Illinois river through falling from a temporary bridge or scaffolding while in the service of the Lafayette Bridge Company. The declaration contains six counts. The first four counts substantially charge that the Lafayette Bridge Company, in charge of and engaged in constructing a bridge across the Illinois river near the city of Spring Valley, negligently suffered the bridge to be in bad and unsafe condi-

tion, and to be erected in an unsafe manner; that the bridge and the scaffolding used in its construction rested upon planks of insufficient size and strength, and insufficiently braced or supported to bear the weight placed upon them, by reason whereof one of the planks was broken, and Olsen, then pushing a car laden with material for the bridge, was cast into the waters of the Illinois river, and killed. The fifth count, charging incompetency of the foreman, need not be stated, as no evidence was adduced to support it. The sixth count charges that the bridge company furnished for the scaffolding to be used in the erection of the bridge unsound, knotty, imperfect, weak, and insufficient planks and boards for the construction of the scaffolding, or temporary structure, to support the permanent structure of the bridge while in course of erection; and that one of the planks used broke, causing Olsen to be cast into the waters of the river and drowned. Concerning the principal facts of the case there is not much dispute, and they are, in the main, stated correctly in the briefs. In the spring of 1898 two spans of a bridge extending north and south over and across the Illinois river near Spring Valley were washed out. The bridge company contracted to put in a temporary structure for immediate use, and then to replace the two spans washed out with two spans of a steel bridge. In May, 1898, the bridge company constructed the temporary bridge, supported on rows of piles driven into the bed of the river, with a flooring of 3x12 inch pine boards. In July, 1898, the construction of the new bridge was commenced. The temporary bridge was removed, with the exception of the rows of piles, and possibly the crossbeams fastened across the top of each row. The planks were piled upon the uninjured part of the original bridge for use in making the floor of the permanent bridge. From this pile of planks, estimated at 230, were taken such as were needed to construct the false work or scaffolding, which was a temporary structure built upon the rows of piles, and the span of the new steel bridge rested upon it during the process of construction and until put together so as to become self-supporting, when the false work and piles were to be removed. In the construction of the permanent bridge the steel work was hauled upon the temporary bridge to the point where it was to be used on a hand car pushed upon one of the spans of the new bridge. Each span was about 200 feet in length, and consisted of 10 panels, each panel being 19 feet 10 inches in length. At the time of the accident the north span, including the laying of the floor, and the steel work of four panels of the south span, had been completed. Work was then being done on the second panel from the north end of the south span. The flooring of the temporary structure on that part of the bridge had been necessarily torn up. A track was made on which to run the car upon which the steel was hauled to the point where it was to be used. In the panel where the accident occurred there were two planks upon which the I-beam rested on the west or down-stream side. They were designed to extend the distance between two bents, about 17 feet; but for a distance of about 8 feet from the north piling there was but one plank, the top plank extending only to a point 8 feet from the north piling, the other end of it extending over a portion of the panel immediately south. On the evening before the accident the car was loaded with two steel chords each 19 feet long, and each of the weight of 925 pounds, placed lengthwise on the car. The car was 8 feet long and 4 feet wide, and weighed 300 pounds, and was pushed to the edge of the completed span, and there left for the night. Upon resuming work in the morning, four or five men, including the foreman and Olsen, began to push it along the track to the place desired. When the car had gone a distance of about 15 feet, the lower one of the planks supporting the I-beam, which in turn supported a portion of the track and load, broke, causing the track to sag, producing displacement of the track and boards at that point. Immediately afterwards Olsen was seen in the river, coming near to the surface of the water, but he sank again, and was drowned, his body being recovered about an hour afterwards. The plank that broke was defective, having in it a curl in the grain of the wood at the point where it broke which weakened it, and rendered it insufficient to support the weight placed upon it. It had been in use in the floor of the temporary bridge, and was a 3x12 inch pine plank, and new when put into the temporary floor, where it had been in use from two to three months. It had been taken out with the rest of the planking, and

placed at the north end of the bridge in a pile, for use as occasion might require. Olsen had assisted in removing and piling up these boards and in taking the planks from the pile and laying them upon the structure. The material was furnished by the bridge company. The work was in charge of one Luke, who was the sole representative in the state, of the bridge company, hiring, paying, and discharging the men, doing all the buying and all the paying. Olsen was a common laborer, principally engaged as a teamster and roustabout. He did not work on the temporary structure, the uncompleted part of the bridge, but, under the direction of Luke, assisted in hauling the planks to the point desired. It is assigned for error that the court erred in its refusal to direct a verdict for the defendant; that it erred in the admission of evidence; that it erred in its refusal to instruct and in its instructions to the jury, as sufficiently stated in the opinion of the court.

George P. Haywood, for plaintiff in error.

A. R. Greenwood and Henry S. Robbins, for defendant in error.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

JENKINS, Circuit Judge, after the foregoing statement of the case, delivered the opinion of the court.

We have held in *Reed v. Stockmeyer*, 34 U. S. App. 727, 20 C. C. A. 381, 74 Fed. 186, that it is the duty of the master to use ordinary care to furnish appliances reasonably safe for the use of servants,—such as, with reasonable care on his part, can be used without danger save such as is incident to the business in which such instrumentalities are employed; that it is also the duty of the master to use like care to provide a safe place in which the laborer may perform his work, and to keep it in a suitable condition. These duties may not be foregone, and, when delegated to be performed by another, that other is a vice-principal, and quoad hoc represents the principal, so that his act is the act of the principal. That other may have a dual character,—vice principal with respect to the duty due from the master to the servant, and co-servant with respect to his acts as a workman. In case of injury, the question of the liability of the master turns rather on the character of the act than on the relations of the servants to each other. If the act is in the discharge of some positive duty owing by the master to the servant, then negligence therein is the negligence of the master; otherwise, there should be personal wrong on the part of the master to render him liable. These principles we understand to be established by the ruling of the ultimate tribunal. *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772; *Railroad Co. v. Keegan*, 160 U. S. 259, 16 Sup. Ct. 269, 40 L. Ed. 418; *Railroad Co. v. Charless*, 162 U. S. 359, 16 Sup. Ct. 848, 40 L. Ed. 999; *Railroad Co. v. Conroy*, 175 U. S. 323, 20 Sup. Ct. 85, 44 L. Ed. 181. This duty of the master owing to the servant is not absolute, but relative, measured by the nature and character of the employment and the nature of the location and the surroundings. In the case at bar the work to be done was accompanied by danger arising not only from location, but from the great weight to be supported. In furnishing plank to be used for such support, the master owed to the servant the positive duty of furnishing material reasonably fit for the purposes of the contemplated use. In the reasonable dis-

charge of his duty he should ascertain if the plank furnished were reasonably sufficient to bear the weight to which they were to be subjected. That was matter of technical knowledge and experience, which could not be left to the judgment of a common laborer. It was also the duty of the master to have proper inspection of the lumber furnished, to ascertain its soundness, for upon that depended its breaking strength and its ability to sustain the ordinary working strain to which it would be subjected. It was incumbent upon the master, under the circumstances of this case, and in view of the peculiar defectiveness of the plank that broke, to have shown that such inspection was had before the employment of the material in work in which life was at stake if the material was defective. So far as the record discloses, no such inspection was had. The plank in question had a curl in the grain of the wood at the point where it broke, rendering it wholly unfit to support the weight placed upon it. Mr. Modjeski, a witness for the plaintiff in error, and a consulting engineer of considerable experience, states, with reference to the defective plank, a portion of which was produced as an exhibit: "The curl would very much diminish the strain the board would bear. It is curled on both edges. It looks as though the fiber was discontinued entirely." He further asserted that ordinarily the defect or curl would probably pass unnoticed; that he did not think a foreman in constructing the false work for the bridge would notice the defect; that there was a break in the plank which could be seen by close observation; that the defect might be observed by close inspection; that "I think that a man whose business it was to construct scaffolding upon which the lives of men depended, and whose duty it was to see that he got sound lumber, would see the curl of the lumber with the naked eye." The engineer of the bridge company testified that a man of ordinary care would very likely not have observed the defect, although "it is a question hard to answer, unless you have it all here" (referring to the fact that but part of the broken plank had been produced); that planks sometimes have such defects that cannot be observed except upon careful inspection. If the duty of inspection was delegated to the foreman in charge of the work, it was not performed. He instructed common laborers to select the plank, and to pick out the best. Such selection, however, is not the inspection which duty to the servant required. The common laborer might form some judgment between two sticks of timber, and select the better one as they appeared to his uninformed and inexperienced mind; but he could not discover that which required for its ascertainment technical knowledge of woods and the ripened judgment of an expert. There is no evidence of inspection by principal or by vice principal; and, failing therein, the master is chargeable with knowledge of such defects as would have been ascertained by proper inspection by a competent person. The evidence produced by the master renders it probable that proper inspection would have discovered the defect. It was a question to be submitted to the jury whether the duty of inspection and the duty to furnish suitable material had been performed. The request to direct a verdict was, therefore, properly overruled.

The plaintiff in error preferred three requests to charge the jury, which are substantially to the effect that, if the bridge company had furnished an abundance of suitable material and appliances from which the foreman and other workmen engaged in the construction of the bridge could select such as was needed for the several parts of the temporary structure, then the defendant had performed its duty, and is not liable for any mistake in judgment by the foreman or other servants in the selection of suitable material out of the mass provided for use, although the plank in question was defective. There is one objection common to the three requests which renders them improper. Each of them excludes the question of the duty of the defendant in a work of this character to have proper inspection of the lumber furnished. It is not sufficient discharge of the master's duty that sufficient good material should be mingled with bad material in a common mass. As we have pointed out, the duty of inspection could not be put aside or delegated for performance to ignorant and inexperienced men. If the defect were obvious, the master failed in duty in permitting the use of the defective plank. If proper inspection would have disclosed the defect, although it was not apparent to the uneducated eye, there is imputed to the master knowledge of that which a proper inspection would have furnished. If the defect were latent, and not discoverable upon proper inspection, the master would not be responsible, for his failure to inspect worked no harm. The requests to charge wholly ignored this duty of the master, and their rejection is therefore unavailing.

In submitting to the jury the question whether the defect was such as to charge the master with notice of it, and referring to the fact that only a part of the defective plank which was broken was exhibited, and to the testimony of expert witnesses that had examined the part of the plank in evidence, the court charged the jury that they had a right, from all the circumstances in the case, and from their inspection of the piece exhibited, to determine what, in all probability, the other side or end of the plank would show if produced; that the jurymen had a right to use their experience of lumber of this kind, and supply, as far as that experience and their good judgment went, the missing portion of the plank; that they were not restricted to the testimony of witnesses; that they might use their own intelligence, and their own experience with lumber, and the knowledge which they brought with them into the jury room; and that it was their duty to use that information as much as the information they got from the witnesses. The question then being considered was whether the defect was obvious, and whether proper inspection of the plank would have disclosed the defect. Experts in woods had testified upon the subject, and there was possibly some conflict in their evidence, although, as we read their testimony, there was not much dispute that a proper inspection by an expert competent to judge of the sustaining strength and the character of woods would have discovered the defect; but, assuming the conflict, we think it competent for a jury, in judging of the opinions of experts, to bring to the question the application of their own

knowledge and experience. The experts testified to their opinions. The force of such opinion is to be determined by the jury, and they might properly bring to bear, in considering the value which they should place upon the opinions expressed, their own good sense, judgment, and experience.

In *Head v. Hargrave*, 105 U. S. 45, where witnesses had testified to the value of professional services, the court, by Mr. Justice Field, said:

"To direct them [the jury] to find the value of the services from the testimony of the experts alone was to say to them that the issue was to be determined by the opinions of the attorneys, and not by the exercise of their own judgment of the facts on which their opinions were given. The evidence of experts as to the value of professional services does not differ in principle from such evidence as to the value of labor in other departments of business, or as to the value of property. So far from laying aside their own general knowledge and ideas, the jury should have applied that knowledge and those ideas to the matters of fact in evidence in determining the weight to be given opinions expressed, and it was only in that way that they could arrive at a just conclusion."

In *The Conqueror*, 166 U. S. 110, 17 Sup. Ct. 510, 41 L. Ed. 937, damages were claimed for the detention of a boat, and it was urged that the amount of the damage should be determined by the testimony given as to the value of the use of the boat. The court, by Mr. Justice Brown, observed:

"While there are doubtless authorities holding that a jury * * * has no right arbitrarily to ignore or discredit the testimony of unimpeached witnesses so far as they testify to facts, * * * no such obligation attaches to witnesses who testify merely as to their opinion; and the jury may deal with it as they please, giving it credence or not, as their own experience or general knowledge of the subject may dictate. * * * The ultimate weight to be given to the testimony of experts is a question to be determined by the jury, and there is no rule of law which requires them to surrender their judgment, or to give a controlling influence to the opinion of scientific witnesses."

In the fourteenth, fifteenth, sixteenth, and seventeenth paragraphs of the charge, to which exceptions were taken, the court below dealt with the question of the character which the foreman assumed with respect to the selection of this plank, and whether selection of it by him would be selection by the company, and his negligence in the selection the negligence of the company; or whether he stood in the light of a fellow servant, and therefore the master would not be responsible for his act. The court charged that under the circumstances the foreman stood in the stead of the company, and his act in that respect was the act of the company; "that, if it were within his opportunity to prevent the use of this plank, and from his neglect this plank went into the structure of the false work, then that negligence is imputable to the company, the same as if the company were itself present, and had taken the plank he actually took, and placed it in the structure." The court further charged that, if the jury were satisfied "that the plank in question was defective, and that the defect was obvious, and that it being placed there in this false work was negligence of the foreman, and that the foreman had an opportunity or had knowledge of its having been placed there, and that the foreman had all the powers which I have named, and which

are not disputed, the company would be responsible for his neglect." It may not be denied that in the argumentative part of the charge leading up to the instruction stated there are some things stated of doubtful correctness, and, if given in a charge to a jury, when the question of principal or vice-principal hung in the balance, we should hesitate to sustain them. It must be remembered, however, that there is here total failure of evidence that the master had procured this lumber to be inspected; that by authority of the master the lumber was purchased by, and used under the direction of, this foreman in this work. The duty of inspection would seem from the evidence to have been delegated to the foreman. There is no evidence that that duty was performed by him. In respect thereof he stood for the master, and was vice-principal, and was not co-servant with those employed upon the structure. The charge to which objection is taken makes the question of liability to depend upon the question whether the defect was obvious, and the defective plank placed in the false work through the negligence of the foreman. If any just exception can be taken to this charge, it is that it was too favorable to the bridge company. It was not bound only in the event that the defect was obvious. It was chargeable with such knowledge as a proper inspection would have given. The defect may not have been obvious to the untrained eye and the unskilled laborer, or to the foreman; but to one experienced in woodcraft, as the evidence shows, the defect might have been discovered, and, if discoverable, the master is chargeable with the knowledge which inspection would have given.

Certain evidence was objected to upon the ground that it was not cross-examination. It is largely a matter of discretion with the trial court to determine the extent to which a cross-examination will be permitted, and we are not disposed to interfere with that discretion where it is manifest—as we think it here is—that a just verdict has been rendered, and that the testimony objected to could not have improperly affected the result. The exception to that part of the charge bearing upon the testimony so adduced is too general, failing to indicate the ground of objection. *Stewart v. Morris*, 37 C. C. A. 562, 96 Fed. 703; *Columbus Const. Co. v. Crane Co.*, 40 C. C. A. 35, 98 Fed. 946; *Id.*, 41 C. C. A. 189, 101 Fed. 55; *Adams v. Shirk*, 43 C. C. A. 407, 104 Fed. 54.

We have considered the other objections urged, and do not find them of sufficient merit to warrant discussion of them. The judgment is affirmed.

NEWGOLD V. AMERICAN ELECTRICAL NOVELTY & MFG. CO.

(District Court, S. D. New York. April 17, 1901.)

1. DISCOVERY—REQUIRING PRODUCTION OF BOOKS OR PAPERS—ACTION FOR PENALTY.

In a *qui tam* action under Rev. St. § 4901, to recover the penalties thereby imposed for falsely marking an article as patented, the defendant cannot be compelled, under section 724, to produce books or papers containing evidence against himself, either for use in evidence or for the inspection of the plaintiff before the trial. Such an action is penal in

character, while section 724 expressly applies only to cases where the party might be compelled to produce the books or papers "by the ordinary rules of proceeding in chancery," which never allowed a bill of discovery to be maintained in aid of an action for a penalty or forfeiture.

2. SAME—WAIVER OF PRIVILEGE.

The fact that a party produced certain books or papers in an equity suit is not a waiver of his privilege to refuse to produce them in another action against him to recover a penalty, in which they are desired to furnish evidence against him.

At Law. On motion to compel defendant to produce books and papers.

Clifford E. Dunn, for plaintiff.

Ewing, Whitman & Ewing, for defendant.

BROWN, District Judge. In the above *qui tam* action, which is brought under section 4901 of the United States Revised Statutes for the recovery of \$40,000 for the alleged false marking of 400 articles as patented, a motion is made that the defendant be compelled to produce its books and papers before trial for examination by the plaintiff, for the purpose of showing the number of penalties alleged to have been incurred.

The right to the production or discovery of these papers is based upon section 724 of the United States Revised Statutes, which provides as follows:

"Sec. 724. In the trial of actions at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery."

In the case of *Bloede Co. of Baltimore City v. Joseph Bancroft & Sons Co.* (C. C.) 98 Fed. 175, it was held that the provisions of the above section, together with other provisions of the state statute, would authorize an order for the production of books and papers before the trial, as well as at the trial itself.

Without considering the other objections that have been raised to the relief sought, it is sufficient to point out that the last clause of the section above quoted, as well as the provisions of section 860 of the United States Revised Statutes forbids the granting of this motion. The language of section 4901 expressly describes the recovery in actions like the present as the recovery of a "penalty." For every such offense it is declared "the defendant shall be liable to a penalty of not less than \$100; one-half of said penalty to the person who shall sue for the same, and the other to the use of the United States to be recovered by suit," etc.

In the case of *French v. Foley* (D. C.) 11 Fed. 801, 804, this statute was described as being "a highly penal one," and the rules applicable to penal statutes were considered to be applicable to section 4901. I do not see how it can be otherwise construed; and upon this view of the statute, a motion like the present cannot prevail. In the case of *Counselman v. Hitchcock*, 142 U. S. 547, 563, 12 Sup. Ct. 198, 35 L. Ed. 1114, it is said:

"It is an ancient principle of the law of evidence, that a witness shall not be compelled, in any proceeding, to make disclosures or to give testimony which will tend to criminate him or subject him to fines, penalties or forfeitures:"

—And numerous cases are there cited to that effect. See, also, *In re Feldstein* (D. C.) 103 Fed. 269. The provision of section 724 above quoted, expressly limits its application to cases and circumstances where the party "might be compelled to produce the books and papers by the ordinary rules of proceeding in chancery." But no such production as here sought would be required by the ordinary rules of proceeding in chancery for use in an action for penalties like the present. "It is a universal rule in equity," says Story, J., "never to enforce either a penalty or a forfeiture; and a bill of discovery will not lie in a case which involves a penalty or a forfeiture." 2 Story, Eq. Jur. §§ 1319, 1494, 1509; Story, Eq. Pl. § 575; 1 Greenl. Ev. § 4512; Fost. Fed. Prac. § 84, p. 140; *Stewart v. Drasha*, 4 McLean, 563, Fed. Cas. No. 13,424; *Atwill v. Ferrett*, 2 Blatchf. 39, 44, 45, Fed. Cas. No. 640; *Johnson v. Donaldson*, 18 Blatchf. 287, 288, 3 Fed. 22; *U. S. v. White* (C. C.) 17 Fed. 561, 565.

Section 860 of the United States Revised Statutes, moreover, provides that no "discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country shall be given in evidence, or in any manner used against him * * * in any court of the United States in any criminal proceeding or for the enforcement of any penalty or forfeiture." See, also, the case of *Boyd v. U. S.*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, where the general subject is considered in its broadest relations, and even an express provision of an act of congress for the discovery of books and papers was held to be unconstitutional and void.

In the case of *Johnson v. Donaldson*, 18 Blatchf. 287, 3 Fed. 22, where "forfeitures" of money and property were sought under section 4965 for an unauthorized sale of copyrighted chromos, it was held by Wallace, J., on appeal for the reasons above stated that no error was committed by the court below in refusing to compel the defendant to furnish evidence against himself by the production of his books and papers. In section 4965, which was under consideration in that case, the language of the statute is that an offender "shall forfeit to the proprietor all the plates, and shall further forfeit \$1, for every sheet of the same found in his possession, and in case of a painting," etc., "he shall forfeit \$10 for every copy of the same in his possession or by him sold or exposed for sale; one-half thereof to the proprietor and the other half to the use of the United States." The action was treated as of course one for a penalty or forfeiture.

In the case of *Brady v. Daly*, 175 U. S. 148, 20 Sup. Ct. 62, 44 L. Ed. 109, where "damages" were sought to be recovered under section 4966 for an unauthorized performance of a copyrighted dramatic composition, it was held that actions under that section were not penal actions, referring to the previous ruling and discussion of that subject by the supreme court in the case of *Huntington v. Attrill*, 146 U. S. 657, 667, 13 Sup. Ct. 224, 36 L. Ed. 1123. The grounds of the decision were that section 4966 describes the recovery as "damages" for the

private wrong alone, and it is not called a penalty or a forfeiture; and because the recovery inures wholly to the person injured.

Qui tam actions like the present are expressly distinguished, in which the recovery inures in part to the government and is given to redress a wrong to the public, as well as to the individual. Section 4901, moreover, under which the present action is brought, not only describes the recovery as a penalty, but omits altogether any special reference to any private injury to the patentee, but seems to contemplate only the deceit of the public and the public wrong; and it accordingly makes the penalty recoverable "by the person who shall sue for the same" one half for his benefit, and the other half to the use of the United States, without distinction whether the suitor be the patentee or an informer.

Upon the reasoning and authority of the decisions last cited, I cannot doubt that the rulings in *Johnson v. Donaldson* and in *French v. Foley*, supra, holding that actions under section 4901 and section 4965 are penal actions were correct, and that the defendants therefore cannot be required to furnish evidence against themselves.

The moving affidavits do not show any waiver of defendant's privilege, but only that in a prior equity suit between other parties, an officer of the defendant voluntarily testified that the mark here complained of had been affixed by defendant to certain goods. That would not operate as a waiver in this action; nor were any books there produced. Before this motion was made the defendant refused to produce its books. Even had they been produced in another suit for another purpose, and on a different issue, that would not constitute any waiver in this suit for penalties. On that point the case of *Daly v. Brady* (C. C.) 69 Fed. 285, is precisely applicable, and as to that point there has been no reversal.

As it is clear that no evidence obtained by the plaintiff in the way desired could be used by him on the trial, the motion must be denied.

KANSAS CITY STAR CO. v. CARLISLE.

(Circuit Court of Appeals, Eighth Circuit. March 29, 1901.)

No. 1,447.

1. LIBEL—ACTION FOR DAMAGES—EVIDENCE.

In an action for libel based on the publication by defendant in its newspaper of an article purporting to give an account of the plaintiff's arrest on a criminal charge and removal to another state for trial, and making certain libelous statements regarding the plaintiff to the effect that he was a member of a gang of cattle thieves, defendant filed a plea in justification and also a plea in mitigation of damages, in the latter of which pleas was embodied an article, subsequently published by the defendant, which stated that the case against the plaintiff had been dismissed and that he had been able "to convince the prosecutor that the charges were false." Defendant also averred in its plea of justification that the criminal case "was never tried on its merits," and counsel for the defendant in his opening statement said to the jury, in substance, that the criminal proceeding was dismissed as against the plaintiff because he turned state's evidence. A contested issue arose during the trial and was sub-

mitted to the jury as to whether the defendant filed its plea of justification in good faith, believing or having reason to believe that the plaintiff was guilty of the crime charged against him. The trial judge admitted in evidence over an objection of the defendant the entire record of the criminal case against the plaintiff, consisting in part of a sworn statement of the prosecuting attorney, which he had filed, giving his reasons for the dismissal of the action without a trial; but in doing so the trial judge instructed the jury that such evidence should not be considered as bearing upon the question of plaintiff's guilt or innocence of the charge made against him. *Held*, that such action was proper; that in view of the false inferences which might be drawn from the statement made by the defendant's attorney in his opening, and from the statements contained in the defendant's pleas, the plaintiff was entitled to show all of the circumstances attending the dismissal of the criminal proceeding, so far as the record of the court in that case would disclose; that the entire record in said case was also admissible as bearing upon the issue whether the defendant had filed its plea of justification in good faith, inasmuch as it appeared that the defendant was fully acquainted with the contents of the entire record in the criminal case before such plea was filed. Sanborn, Circuit Judge, dissenting.

2. SAME—PLEA IN MITIGATION OF DAMAGES—EVIDENCE OF GOOD FAITH.

In those states where by statute a plea in mitigation of damages may be filed in connection with a plea of justification, and evidence in support of the former plea may be received although the latter plea is not established, an issue concerning the good faith of the defendant inheres in every action for slander or libel where a plea in justification is filed and is not sustained by the proof, since the jury, in determining whether punitive damages should be assessed, are entitled to consider whether the plea was interposed in good or in bad faith, and evidence having any legitimate tendency to develop the defendant's motive should be received. Sanborn, Circuit Judge, dissenting.

3. SAME—ISSUES AND PROOF.

Where the plaintiff in an action for libel or slander introduces in evidence facts not pleaded by him, to create an inference of express malice, and to lay a foundation for punitive damages, the defendant may, in turn, prove facts not pleaded, but which have a tendency to rebut such inference.

4. SAME—PLEA OF JUSTIFICATION.

Where an article published by defendant, which is made the basis of an action for libel, in substance charged that plaintiff was a member of a band of cattle thieves, and the agent through whom stolen cattle were sold, a plea of justification must allege specific instances of the theft of cattle by plaintiff, or of the receipt and sale by him of stock, knowing them to have been stolen; and the evidence in support of such plea must be confined to the instances so pleaded.

5. SAME—EVIDENCE—COMPETENCY OF PARTY'S OWN DECLARATIONS.

In an action for libel, defendant filed a plea of justification, in which it was alleged that plaintiff had received certain cattle, knowing them to have been stolen, and that such cattle had been cut out from his herd by a person deputized by the sheriff for that purpose. *Held*, that plaintiff was entitled to show, either by his own testimony or that of other witnesses, what was said and done at the time he was notified by the person so deputized that the stolen cattle had been found in his herd, including the statement made by him to such person in explanation of the manner in which such cattle came into his possession.

In Error to the Circuit Court of the United States for the Western District of Missouri.

This is an action of libel, which was brought by Harold Carlisle, the defendant in error, against the Kansas City Star Company, the plaintiff in error. The libel complained of was published in the Kansas City Star, a daily newspaper published by the defendant company, in its issue of February 20, 1897;

the entire article being as follows (those portions of the article which were complained of as libelous are indicated by italics):

"Arrested as a Thief.

"Harold Carlisle, a Main Street Merchant, under a Cloud—Said to have been a Member of a Band of Cattle Thieves—To be Taken to Colorado To-morrow to be Prosecuted—Had a Denver Office.

"Harold Carlisle, of the firm of Carlisle, Peters & Co., dealers in furnishing goods at 818 Main street, was arrested this morning at his home, in Westport, by Detective O'Hare and Sheriff John D. Reeder, of Mesa county, Colorado, charged with receiving eight head of cattle stolen from the Utah Cattle Company's ranch in Mesa county. Sheriff Reeder has secured requisition papers for Carlisle, and will start for Colorado to-morrow morning with his man. Before Carlisle engaged in the furnishing goods business in this city, four years ago, he was a stock dealer in Colorado, in which state he is well known. Although doing business in this city, he has spent most of his time in Denver and other Colorado cities. His family live at 205 Woodworth avenue, Westport. *Carlisle's arrest is the outcome of the capture of Frank White, a noted Colorado cattle thief. He is now in jail at Grand Junction, Colo., and has confessed to shipping cattle to Carlisle, who has a cattle office in Denver. The eight head of cattle with which Carlisle is charged with receiving were stolen last June by White from the Utah Cattle Company's ranch in Mesa county. They were shipped to Carlisle at Dallas, Colo., where they were seized by Sheriff Reeder. Shortly after that sixty more head of stolen cattle, consigned to Carlisle at Denver, were seized by the sheriff. Reeder says Carlisle was not arrested at that time because the authorities did not have sufficient evidence to show that he knew the cattle had been stolen. Reeder says that now he has conclusive evidence that Carlisle was a member of the gang of cattle thieves which has been operating extensively in the western part of the state of Colorado; that he acted as agent for the thieves in disposing of their stolen stock. Carlisle had nothing to say about the charge, and refused to discuss the matter with the officer. He is an Englishman of medium size, with dark hair, and wears gold-rimmed glasses."*

The defendant admitted the publication of the article aforesaid, and filed a plea justifying the publication, the material parts of which plea were as follows:

"Defendant says: That on or about the months of April, May, and June, 1896, and for a long time prior thereto, plaintiff, Harold Carlisle, one William E. Gordon, and others were engaged in conspiracy, and were members of a band of cattle thieves organized for the purpose of rustling (that is, stealing cattle) in the states of Colorado and Utah, or at such place or places as such larceny might be perpetrated. That the part performed in said conspiracy by plaintiff was to guide and direct the same, as a rule, from a distance; to take no hand in the actual rustling of cattle, but to only receive and sell the same, and by standing ostensibly aloof, and maintaining as far as possible a seemingly honest bearing amongst certain business men and cattle buyers, be thereby the better enabled to get said stolen cattle past the inspectors and others, and convert them into money. That the part performed by said William E. was to act as a go-between between said cattle rustlers and the plaintiff; to immediately control said rustlers in the larceny of cattle, or to purchase cattle from outsiders knowing them to have been stolen; and, having collected said stolen cattle, to deliver them to plaintiff at some designated place, or to so mingle said stolen cattle with others honestly acquired, and so mutilate the brands on said stolen cattle, as to elude discovery. That the other conspirators above referred to were men employed by plaintiff and said Gordon in and about the ranch and range of said plaintiff and said Gordon, and who, in connection with their other duties, rustled cattle for their employers as opportunity presented, or they were men who, while not regularly employed at said ranch, were cattle thieves, and became a part of said conspiracy, and stole and sold cattle to said Gordon. And defendant says that one E. Frank White and one Edward Young, hereinafter mentioned, became parties to said conspiracy on or about April, May, or June, 1896, or

prior thereto; that the ranch of plaintiff and said Gordon, who was the foreman thereof, was located in the Blue Mountains of Utah, a most suitable place for the furtherance of said conspiracy; that plaintiff and said Gordon employed at said ranch desperate and dishonest men, who bore the reputation of being desperate and dishonest, and who were known to plaintiff and said Gordon to be cattle rustlers and thieves, and who were employed in furtherance of the conspiracy and common enterprise aforesaid. Defendant states that in pursuance of said conspiracy, and as a part of the common enterprise, one E. Frank White and one Edward Young, who joined in said conspiracy about the spring of 1896, or prior thereto, and who were cattle thieves, and reputed to be such, and known to plaintiff and Gordon as such, at the county of Mesa, in the state of Colorado, in the spring of 1896, eight head of neat cattle, to wit, eight steers, of the aggregate value of two hundred dollars, of the personal property of the Utah Colorado Cattle & Improvement Company, a corporation organized according to law, feloniously took, stole, and carried away; and defendant alleges that at or near the county of San Juan, in the state of Utah, in the spring of 1896, plaintiff, Harold Carlisle, and said William E. Gordon, the said eight head of cattle, to wit, eight steers, of the aggregate value of two hundred dollars, of the property of the Utah Colorado Cattle & Improvement Company, a corporation organized according to law, the said cattle having been then lately before feloniously stolen, taken, and carried away as aforesaid, feloniously did buy and receive; they, the said Carlisle and Gordon, then and there well knowing the said cattle to have been feloniously stolen, taken, and carried away as aforesaid. Defendant alleges that at or near the county of San Juan, in the state of Utah, on or about the spring of 1896, the plaintiff, Harold Carlisle, and William E. Gordon, other neat cattle, to the number of thirty or more, and of the aggregate value of over six hundred dollars, being the property of certain persons and corporations, said cattle having been then lately before feloniously stolen, taken, and carried away, feloniously did buy and receive; they, the said Harold Carlisle and William E. Gordon, then and there well knowing the said property to have been feloniously stolen, taken, and carried away as aforesaid. Defendant says that all the stolen cattle above referred to, to the number of about forty or more, were about the month of May, 1896, driven by said Gordon from said ranch in Utah to Ridgeway and Dallas, Colorado, and there, while in the possession of said Carlisle and Gordon, some nineteen head or more of said stolen cattle were cut out and taken away by one Thomas Mostyn, at the suggestion of John D. Reeder, sheriff of Mesa county, Colorado, and delivered by him to the owners thereof. The other cattle then in the possession of Carlisle and Gordon, to the number of about five hundred or more, and including the remaining stolen cattle above referred to, were shipped by plaintiff from Dallas, Colorado, to Denver, Colorado, at which last place some twenty-seven head or more (being the stolen cattle above referred to) were cut out by Charles Hartman and James Talbot, state cattle inspectors of Colorado, and sold, and the proceeds went to the owners. After the cattle above referred to were so stolen and retaken and restored to the owners, on or about October 6, 1896, four informations were filed by Lyman I. Henry, then district and prosecuting attorney of Mesa county, Colorado, in the district court of that county, charging said E. Frank White with stealing certain of said cattle. On October 15, 1896, said Lyman I. Henry, district attorney, filed in the office of the clerk of the district court of said Mesa county the affidavit of S. P. Chipman, charging plaintiff and said Gordon with receiving eight head of cattle of the Utah Colorado Cattle & Improvement Company, knowing them to have been stolen, and thereupon, on October 16, 1896, said Henry filed an information in said district court of said Mesa county, based on said affidavit, and charging said Carlisle and Gordon with receiving said eight head of cattle, knowing they were stolen. Said White pleaded guilty to the charge against him, and was sentenced to the penitentiary of Colorado for four years; but said prosecuting attorney, within a few days after plaintiff was taken to Colorado for trial, dismissed the information against said Carlisle and Gordon, and the same was never tried on the merits. Defendant says that, prior to the time it had published in its evening paper the words above alleged by plaintiff to be libelous, it was true that plaintiff had 'had

nothing to say about the charge, and refused to discuss the matter with the officers.' Wherefore defendant says plaintiff ought not to recover."

In addition to the aforesaid plea the defendant company also filed a plea in mitigation of damages, the material parts of which were as follows:

"Defendant further says, by way of mitigation, that in the spring of 1896 E. Frank White stole, took, and carried away about thirty-five head of cattle from various owners (among others, the Utah Colorado Cattle & Improvement Company, in Mesa county, Colorado), and W. E. Gordon, partner of plaintiff, bought for the partnership said cattle of said White, and the same were put with a herd of cattle of plaintiff's in the Blue Mountains of Utah, and driven to Ridgeway and Dallas for shipment about June 1, 1896. In the meantime John D. Reeder, sheriff of Mesa county, Colorado, learned of the fact of said cattle having been so stolen, and sent one Thomas Mostyn to Ridgeway and Dallas to identify and intercept the stolen cattle. Said Mostyn, at Ridgeway or Dallas, on behalf of said sheriff, about June 3d or 4th, cut out some nineteen head of stolen cattle then in the possession of said plaintiff and Gordon, and restored them to their owners; and said E. Frank White, who was present, was then arrested for larceny of the cattle and taken to Grand Junction, the county seat of Mesa county, Colorado, for prosecution, and the plaintiff shipped the balance of the herd (about five hundred head) to Denver. While en route he sold the cattle to one Bailey, subject to inspection at Denver, Colorado. When the cattle arrived at Denver, Charles Hartman and James Talbot, state cattle inspectors, cut out some twenty-seven head or more of cattle as stolen cattle, and the same were taken from the possession of plaintiff and sold, and the proceeds remitted to the real owners from whom the cattle were stolen. Four informations were on the ——— day of October, 1896, duly made and filed in the district court of Mesa county, Colorado, by Lyman I. Henry, district attorney, charging said White with stealing said cattle, and said White was incarcerated pending a trial. On the 15th day of October, 1896, one S. P. Chipman made affidavit, and the same was filed with the clerk of said district court, that plaintiff and W. E. Gordon received eight head of cattle of the Utah Colorado Cattle & Improvement Company that were stolen, knowing that they were stolen. Thereupon said district attorney, Lyman I. Henry, duly made and filed his information on said affidavit on the 16th day of October, 1896, in the district court of Mesa county, Colorado, charging said H. Carlisle and W. E. Gordon with having received eight head of cattle of the Utah Colorado Cattle & Improvement Company, which had been stolen by said White and one Young, knowing them to have been so stolen. Thereupon a capias was duly issued out of said court for the arrest of plaintiff and said Gordon, and the same was duly delivered to John D. Reeder to arrest them. The plaintiff being then in Kansas City, Missouri, proper requisition papers were obtained from the governor of Colorado, on the governor of Missouri, upon affidavit of the assistant prosecuting attorney of said Mesa county, and placed in the hands of said Reeder, who proceeded to Kansas City, Missouri, to arrest plaintiff. Defendant further says, by way of mitigation, that it was on February 20, 1897, and prior thereto, engaged in the business of publishing a daily newspaper called 'The Kansas City Star,' and that Charles U. Becker was then a newspaper reporter of defendant, whose duty it was to procure news of public interest for publication in said paper, and it was part of his duty to attend the police station in Kansas City for that purpose. In the course of this employment said Becker ascertained and learned that plaintiff on February 20, 1897, was arrested by City Detective Andy O'Hare, then on the police force of said city, under a warrant duly issued on proper requisition papers duly issued in pursuance of a request of the governor of Colorado on the governor of Missouri, upon proper affidavit, and was to be taken by J. D. Reeder, sheriff of Mesa county, Colorado, then in Kansas City for that purpose, to Grand Junction, Colorado, the county seat of Mesa county, then and there to answer to an information duly made and filed by Lyman I. Henry on October 15, 1896, then district attorney of Mesa county, Colorado, duly charging plaintiff and W. E. Gordon with having feloniously purchased and received eight head of cattle from Ed Young and E. Frank White, belonging to the Utah Colorado Cattle & Improvement Company, knowing the same had been stolen, and that said Young and White had

no lawful right to sell the same; that said information was duly issued on the authority of an affidavit of one S. P. Chipman. While plaintiff was so under arrest, said reporter, desiring to get at the facts for publication in said paper, talked with John D. Reeder, then sheriff of Mesa county, Colorado, who was in Kansas City, armed with said papers, to take plaintiff to Grand Junction as aforesaid; and said Reeder told said reporter that Carlisle's arrest was the outcome of the capture of Frank White, a noted Colorado cattle thief, and that said White was then in jail at Grand Junction, Colorado, and had confessed to shipping cattle to Carlisle, and that Carlisle had a cattle office in Denver, and that the eight head of cattle with which Carlisle was charged with receiving were stolen in June, 1896, by White from the Utah Colorado Cattle & Improvement Company's ranch in Mesa county, and that they were shipped to Carlisle at Dallas, Colorado, where they were received by Reeder, and that shortly after that sixty more head of stolen cattle, consigned to Carlisle at Denver, were received by said sheriff, and that Carlisle was not arrested at that time because the authorities did not have sufficient evidence to show that he knew the cattle had been stolen; that he (Reeder) then had conclusive evidence that Carlisle was a member of a gang of cattle thieves which had been operating extensively in the western part of the state of Colorado, and that he acted as agent for the thieves in disposing of their stolen stock; and that he (Reeder) was going to take him (Carlisle) to Colorado to be prosecuted. Said reporter, having confidence in said Reeder as such sheriff, and having examined the papers aforesaid, was led to believe, and did honestly believe, the said statements of said Reeder to be true. Thereupon, to make further inquiry, he wanted to see said Carlisle and get his version, and tried to do so, but was informed that Carlisle refused to discuss the matter, and would neither deny nor affirm the truth of the charge. In an effort to see said Carlisle, said Becker asked Andy O'Hare, who had arrested him, and Officer Flahive, who had him in custody, for the privilege of seeing him and talking with him; but they told him that Carlisle refused to talk with him, and would not give any information at all. This further confirmed said Becker in the honest belief of what said Reeder had told him. Thereupon said Becker, in his capacity as such reporter, wrote the following article, and the same was printed on February 20, 1897, in said Kansas City Star newspaper, and was published by defendant in good faith, without malice, and in the honest belief of its truth. [Here follows the libelous article copied above.] After this article was so published, said Becker, as such reporter, learned that plaintiff, before leaving Kansas City, and after consulting with his attorney, declared his innocence of said charge; and thereupon said Becker wrote the following, on information then in his possession, and the same was published in said newspaper on the afternoon of February 21, 1897. This publication was made in good faith, in the honest belief in its truth, and without malice:

“Carlisle Taken to Colorado.

“The Main Street Merchant Goes with the Sheriff without a Legal Fight.

“Harold Carlisle, the furnishing goods dealer at 818 Main street, who was arrested yesterday morning for receiving eight head of stolen cattle, started for Colorado last night in charge of Sheriff John D. Reeder, of Mesa County, Colo. A few hours after being arrested yesterday, Carlisle sent for his attorney, I. N. Watson, of the firm of Beebe & Watson. The advisability of getting out of jail on a writ of habeas corpus was discussed. It was decided not to fight extradition, and Carlisle announced that he would return to Colorado with Sheriff Reeder, without appealing to the courts. Before leaving Kansas City, Carlisle declared he was innocent of the charge against him. He said that, while he was engaged in the furnishing goods business in this city, he was also interested in the cattle trade in Colorado. He had an agent (Gordon by name) stationed at Dallas, Colorado, who purchased Colorado cattle for him. Mr. Gordon, he admitted, purchased cattle from Frank White, the noted cattle thief, now in jail at Grand Junction, Colorado, who, Sheriff Reeder says, has confessed to being an agent for Carlisle. Carlisle admits that White is a member of a gang of cattle thieves who have been stealing cattle on a large scale for two years in Western Colorado. Sheriff Reeder is

firmly convinced that White and his band have been selling all their stolen stock to Carlisle's agent at Dallas. Carlisle says he believes the animus of his arrest is to get him back to Colorado as a witness against White. He intimated that he did not fancy the idea of telling what he knew of White, but Sheriff Reeder was armed with requisition papers, and there was nothing for Carlisle to do except to go with the officer. Carlisle drew a draft of \$2,000 on a local bank, which he intends to use as bond money on reaching Colorado. He said he was satisfied he would have no difficulty in settling the matter on reaching Colorado, in which state he says he is well known as a stock man. He dealt exclusively in cattle in Colorado before moving his family to Westport and engaging in the furnishing goods business. He was accompanied to Colorado by Attorney Watson. Carlisle's friends in Kansas City were greatly surprised yesterday on learning of his arrest, for they had always considered him an upright business man.'

'The aforesaid information against plaintiff and Gordon so filed by said prosecuting attorney was dismissed or nolleed in said district court at Grand Junction, and defendant, learning thereof, published in its newspaper on March 7, 1897, the following:

"Harold Carlisle Exonerated.

"The Kansas City Merchant Shows that He was Wrongly Prosecuted.

"Grand Junction, Colo., March 6th.

"In the district court this afternoon the district attorney asked the judge to enter a nolle prosequi in the case against Harold Carlisle, charged with receiving stolen stock. Carlisle was arrested about ten days ago in Kansas City, where he is engaged in business. He was able to convince the prosecutor that the charges were false.'

"Defendant further says, by way of mitigation, that at and prior to February 20, 1897, the general reputation of plaintiff for honesty was bad. Wherefore defendant says that said publication of February 20, 1897, did not materially injure plaintiff's reputation, as claimed in said amended petition."

There was a verdict and judgment below in favor of the plaintiff in the sum of \$12,500, to reverse which the present writ of error was brought by the defendant company.

Wash Adams, William H. Wallace, and C. O. Tichenor, for plaintiff in error.

Sanford B. Ladd and Charles E. Small (John C. Gage, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The assignments of error are very numerous, and embrace principally exceptions to the admission and exclusion of testimony. We shall consider them mainly in the order that they were discussed by counsel, so far as it is deemed necessary to consider them.

At the beginning of the trial, after reading the libelous article complained of, of date February 20, 1897, and the two other articles of date February 21, 1897, and March 7, 1897, which are set out above in the defendant's plea in mitigation, the plaintiff below offered in evidence a duly-certified copy of the record of a case entitled, "The People of the State of Colorado v. W. E. Gordon and H. Carlisle," theretofore pending in the district court of Mesa county, state of Colorado, which is the case above mentioned in the defendant's plea of justification. Attached to and forming a part of said record, as the same was made up and certified by the clerk of said district court

of Mesa county, Colo., was a statement under oath, signed by the district attorney of said county, which was made in support of an application to said court for permission to dismiss the prosecution against Gordon and Carlisle, and on the strength of which said action was dismissed on March 6, 1897, and the defendants at that time discharged. The statement so made by the district attorney is too lengthy to be set out in full. It will suffice to say generally that the district attorney by said statement represented, in substance, to the district court of Mesa county that he had carefully gone over all the evidence in the possession of the defendants Gordon and Carlisle upon which they intended to rely for the purpose of establishing their innocence of the charge of receiving stolen cattle, knowing the same to be stolen; that, as the result of such examination, and as the result of an examination of the evidence which could be produced by the state to substantiate the charge of receiving stolen property, he had become satisfied that the defendants were innocent, that a jury would so find, and that a trial of the case would be a useless expense, although the defendants were ready for a trial, and were anxious for an acquittal by a jury. When this record was offered by the plaintiff as an entirety, counsel for the defendant objected to the statement of the district attorney which was incorporated therein, and to the admission of this part of the record an exception was reserved. Before disposing of the exception, it is deemed advisable to state certain facts which, in our opinion, have an important bearing upon the question whether the admission by the trial court of the entire record was a material error: One of the defendant's attorneys, in his opening statement to the jury, which seems to have preceded the introduction of any evidence by either party, said to the jury, in substance, and with reference to the dismissal of the criminal proceedings in the state of Colorado, that Gordon and Carlisle went out there and turned state's evidence, and that then White, who had stolen the cattle, pleaded guilty, and "in consideration of that the prosecuting attorney dismissed the case as to Gordon and Carlisle." In the article which the defendant caused to be published in its paper on March 7, 1897, and which was pleaded by it in mitigation of damages, it was said, after stating the fact that the proceedings against Carlisle had been dismissed at the request of the district attorney, "he [Carlisle] was able to convince the prosecutor that the charges were false"; no mention being made of the circumstance, which was disclosed by the record of the Colorado court, that the action was dismissed by the district attorney notwithstanding the fact that the defendants were at the time anxious for a trial and an acquittal by a jury. The defendant's plea of justification also contained the statement that "after the plaintiff was taken to Colorado for trial the criminal information against him and Gordon was dismissed, and the same was never tried on the merits." It furthermore appears from the bill of exceptions that, long before the defendant filed its plea justifying the libelous publication, it was well advised of all the proceedings that had taken place in the Colorado court, including the sworn statement that had been made and filed therein by the district attorney, and that it was also well aware, through depositions which had previously been taken,

that S. P. Chipman, at whose instance the criminal proceedings in the state of Colorado had been instituted, and upon whose affidavit the criminal information against Carlisle and Gordon had been drawn, had himself testified, under oath, and in substance, that, at the time of making said affidavit to procure Carlisle's arrest, he "knew that Carlisle did not steal the cattle," that he "never supposed that Carlisle knew that they were stolen cattle," and that the criminal proceeding was set on foot in Mesa county merely to get him back to Colorado as a witness, so as to ascertain from whom he had purchased certain cattle which turned out to be stolen property. It will be conceded that the statements made by the district attorney of Mesa county, Colo., in support of his motion for leave to dismiss the criminal proceeding against Carlisle, were incompetent to show that he was not guilty of the crime of receiving stolen cattle. It goes without saying that upon that issue the statements were in the main hearsay or mere expressions of opinion; and if they had been admitted by the trial court to establish Carlisle's innocence, and the jury had been instructed on that theory, the error would have been fatal. The entire record of the Colorado court, including therein the sworn statement of the district attorney, was not admitted, however, upon any such theory as the one last suggested. When the entire record was received, the learned trial judge stated to the jury that the record was not admitted "as showing that Carlisle was not guilty of the charge, but as evidence of what was done in court," and as the court further remarked, in substance, to refute the inference which might be drawn from the opening statement of counsel, which has been heretofore mentioned. In the final charge to the jury allusion was again made to the statement of the district attorney, and the jury were again advised that they should "not regard any recitation of facts therein made as evidence of the innocence or guilt of Carlisle or Gordon of the offense of which they were charged" in the criminal information. The court further remarked in that connection that the statement was originally admitted in view of the suggestion of the defendant's counsel that the dismissal of the criminal proceedings had been brought about by some questionable means or influence. It is clear, therefore, that the jury were not left at liberty to attach any weight to the statements of the district attorney as bearing upon Carlisle's guilt or innocence, and, if they did so, their action was in plain disregard of the instructions of the trial court. Such action on the part of the jury will not be presumed.

It is claimed, however, that the statement in question was irrelevant to any issue in the case, and that, being irrelevant and immaterial, it must be presumed to have been prejudicial to the defendant company. We are not able to adopt that view of the evidence. The defendant had set forth the criminal proceedings in the Colorado court both in its plea of justification and in its plea in mitigation of damages. Having done so, it was bound to give a fair account of the proceedings, or at least not to give an account of the same which might lead to false inferences. Now, in its plea of justification the statement was made (and, as it seems to us, unnecessarily) that the criminal information against Carlisle "was never tried on the merits,"

which might be thought to imply that if it had been tried on its merits the result would have been different; also in its plea in mitigation of damages, wherein it copied the article of March 7, 1897, the defendant contented itself with the general statement that Carlisle "was able to convince the prosecutor that the charges were false," without stating the further circumstance that the district attorney had filed a sworn statement wherein he had represented to the court, in his official capacity, that the further prosecution of the case on the evidence in his possession would be "absurd and ridiculous" and "a useless expense," and that he prayed leave to dismiss the accusation, although the defendants had earnestly requested him to permit the case to be tried, in order that they might obtain an acquittal before a jury. An article containing these statements, in substance, and stating what had actually occurred in the district court of Mesa county, Colo., would have had far more weight in remedying the wrong which, as the plaintiff claimed, had been done to him by reason of the libelous publication, than an article which merely stated that the information had been dismissed, and that the accused was able to convince the prosecutor that the charge against him was false. Moreover, we find no testimony in the record which tends to sustain the assertion of one of the defendant's attorneys, in his opening address to the jury, to the effect that the criminal proceeding in Colorado was dismissed in consideration of Carlisle's turning state's evidence and White's pleading guilty. In view of the false color which the several circumstances last mentioned tended to give to the proceedings in the Colorado court, we are of opinion that the entire record of that court was properly admitted in evidence. The jury were entitled to know all of the circumstances attending the dismissal of that proceeding, so far as the record of the court would disclose, to the end that they might determine, in the light of all the proceedings in that court, by what means the dismissal of the information had been secured, and what reasons had induced the district attorney to abandon the prosecution. Counsel for the defendant confessedly made a statement to the jury relative to the reasons or the considerations that had induced the prosecuting officer to dismiss the information against Carlisle and Gordon, which statement is contradicted by the entire record of the Colorado court; and, having made such a statement, whether through inadvertence, or by reason of false information, we do not perceive that the defendant is in a position to complain of the action of the learned trial judge in admitting the entire record, especially when its admission was accompanied with an admonition to the jury that it was only admitted to show all that occurred in the Colorado court, and that it could not be regarded as having any bearing on the question of Carlisle's guilt or innocence.

There is yet another ground on which the admissibility of the entire record in the Colorado case may be sustained. One of the issues which arose on the trial, and was hotly contested, and eventually submitted to the jury, was whether the defendant filed its plea of justification in good faith (that is to say, believing, and having reasonable grounds for believing, that Carlisle was guilty of the crime

imputed to him in the libelous publication), or whether it filed the plea for some ulterior and wrongful purpose. It was contended in behalf of the plaintiff that the plea in question was not filed in good faith, and in support of that contention it appears to have been urged in the trial court that the plea was filed, not because the defendant believed, or had reasonable ground to believe, that the plaintiff was guilty, but in pursuance of a business policy which the defendant had adopted of upholding all of its published statements, irrespective of the consequences either to itself or to others. If this was the true explanation of the defendant's conduct in justifying the libel, and the jury were convinced of that fact, then, within the authorities, there can be no doubt that the defendant was actuated by a wrongful motive in filing the plea; and the filing thereof, as the trial court ruled, should be regarded as a wanton repetition of the libel, which tended to show malice, and entitled the jury, if they were so inclined, to assess punitive damages. *Browning v. Powers* (Mo.) 38 S. W. 943, 946; *Distin v. Rose*, 69 N. Y. 122, 127, 128; *Upton v. Hume*, 24 Or. 420, 33 Pac. 810, 21 L. R. A. 493; *Cruikshank v. Gordon*, 118 N. Y. 178, 185, 23 N. E. 457; *Association v. Schenck*, 40 C. C. A. 163, 98 Fed. 925, 929. In view of the facts to which we have already adverted, namely, that the statement which had been made by the district attorney of Mesa county was well known to the defendant company, and that it was also aware that the person who had set the prosecution on foot had testified to his belief in Carlisle's innocence, long before the defendant's plea of justification was filed, we are constrained to hold that the entire record in the Colorado case, including therein the sworn statement of the district attorney, was relevant to the issue last above mentioned, respecting the motive which had inspired the defendant to justify the libelous publication. As bearing upon the motive which had actuated the defendant, a jury, as we think, might well attach considerable importance to the fact that the defendant had reiterated the libel, and had taken upon itself the burden of a public prosecutor, and had spent much time and money in hunting up evidence against the plaintiff, with a view of justifying its statement that he was a thief, after the public authorities of Mesa county, as it well knew, had abandoned all efforts in that direction, and after both the public prosecutor and the prosecuting witness had placed on record their sworn statements to the effect that the charge against the plaintiff was, in their opinion, false. Such conduct on the part of the defendant, being out of the usual course, and not in harmony with the ordinary actions of men under similar circumstances, might have induced the jury to infer that the defendant, in reaffirming the truth of the libel, and in endeavoring to produce evidence to that effect, was actuated by some motive other than an honest belief that the plaintiff was a cattle thief, and a desire to promote the public welfare by proving that fact. But, whether it would or would not have induced such a finding, we are of opinion that the entire record in the Colorado case was competent evidence, and that the jury were entitled to consider it for the purpose of determining, in the light of all of the proceedings in that case, and the other facts and circumstances in evidence, whether the defendant company had filed its

plea of justification in pursuance of an honest belief, based upon reasonable grounds, that the libelous statement was true.

The next assignment to be noticed relates to the admitted and excluded testimony of a witness by the name of Becker, who was the reporter by whom the libelous article of February 20, 1897, was composed, and who was principally responsible for its publication. After the present action was brought, and before the plea of justification was interposed, Becker was commissioned by the defendant company to go to Colorado and investigate all the circumstances attending the prosecution of Carlisle for receiving stolen cattle, with a view of preparing its defense. He left Kansas City on this mission in September, 1899, and was absent, as it seems, about two months, during which period he visited various places in Colorado, Utah, and New Mexico, and talked with numerous persons concerning Carlisle and Gordon, the depositions of which persons were subsequently taken in behalf of the defendant. Becker was present at the taking of some of the depositions, and nearly all of the witnesses who were produced by the defendant appear to have been discovered by him. He was also sworn as a witness on behalf of his employer, but on his direct examination his testimony was confined strictly to the circumstances that had originally led to the publication of the libelous article. The facts to which he testified in this respect were substantially the same as those which are detailed above in the plea of mitigation. Suffice it to say that Becker claimed to have derived all the information on which the article was based from conversations with the sheriff of Mesa county when the latter came to Kansas City and arrested Carlisle. He furthermore claimed to have composed the article as an ordinary item of news, in good faith and without malice. On Becker's cross-examination by the plaintiff's attorney he was required to disclose, over an objection that was interposed by the defendant, all the efforts which he had made to obtain evidence against Carlisle during his trip to Colorado, Utah, and New Mexico in the fall of 1899, and to describe the various places that he had visited, and to give the number of persons whom he had met and consulted, with a view of accomplishing the object of his mission. On his redirect examination the defendant company offered to show that while Becker was on the aforesaid mission he had talked with some eight or ten persons whose depositions had been taken by the defendant and had already been read in evidence, and what statements had been made to him by such persons with reference to Carlisle which had been communicated to the defendant before its plea of justification was filed. This offer of proof was excluded; the court ruling, in substance, that it must be presumed that all the facts relevant to the issue of Carlisle's guilt or innocence which Becker had ascertained were contained in the depositions of the persons aforesaid that had already been read, and that it would only permit counsel for the defendant to ask the witness the general questions whether he had reported to his principal all the facts which he had gathered while on the aforesaid trip, and whether he had made such report in good faith before the plea of justification was filed. To each of the aforesaid rulings an exception was taken. In states like Missouri, where the old rule applicable to actions of

slander and libel has been modified by statute (Rev. St. Mo. 1899, § 636) so as to permit a plea in mitigation of damages to be filed in connection with a plea of justification, and so as to permit evidence of mitigating circumstances to be introduced, although the plea justifying the libel is not sustained, the doctrine has become well established that the failure of the defendant to maintain the latter plea is not, in and of itself, evidence of such express malice as will warrant a jury in awarding the plaintiff more than his actual damages. Whether the repetition of the libel in a plea of justification shall be regarded as evidence of actual malice, and as an aggravation of the damages, depends upon the further inquiry whether such plea was interposed in good faith, under an honest belief in its truth, or in pursuance of some ulterior and wrongful motive. And this latter issue must be determined by the jury in the light of all the facts and circumstances in evidence, and particularly in the light of all the facts and circumstances that were known to the defendant, or that ought to have been known to him, at the time he reiterated the slander. *Bush v. Prosser*, 11 N. Y. 347; *Hawver v. Hawver*, 78 Ill. 412; *Browning v. Powers* (Mo. Sup.) 38 S. W. 943, 946; *Upton v. Hume*, 24 Or. 420, 33 Pac. 810, 21 L. R. A. 493; and other cases heretofore cited. It is evident, therefore, that the issue respecting the motive or the good faith of the defendant inheres in every action for slander or libel where a plea of justification is filed and is not sustained by the proof, although the issue is not formally raised by the pleadings, inasmuch as the jury, when they come to assess the damages, are entitled to determine what motive prompted the defendant to file the plea and to repeat the libelous charge. In view of this fact, we think that the trial court properly permitted the witness Becker to be asked on his cross-examination where he went, with how many persons he conversed, and how much time he spent in hunting up evidence against Carlisle after the criminal proceeding against him was known to have been dismissed under the circumstance heretofore stated. It will be conceded that the defendant had an undoubted right to seek evidence to support any defense to the present action which it was entitled under the law to make. The evidence elicited from Becker on his cross-examination was admissible, therefore, not because the defendant's conduct in seeking evidence against Carlisle was in any respect wrongful, but because it showed the knowledge which the defendant had acquired, or ought to have acquired, of the facts and circumstances which tended to establish the guilt or innocence of Carlisle, and what pains, if any, it had taken to ascertain the truth of the charge which it had made against the plaintiff before it reiterated the same. We are persuaded that the evidence in question had a direct bearing on the issue of good faith above stated, to which a jury might, and probably would, attach some importance.

A more serious question is whether the trial court properly denied the defendant's request to show by Becker, on his redirect examination, and as bearing on this same issue of good faith, certain facts which he had learned respecting Carlisle on his trip through Colorado and Utah prior to the filing of the plea of justification. The court ruled, as before stated, that whatever he may have heard which had

any legal tendency to establish the plea of justification was presumptively contained in the depositions that had already been read, and that the witness could not be permitted to testify further on that subject. It so happens, however, that important parts of the depositions had been excluded by the trial judge when they were read, upon the ground that the excluded testimony was incompetent to establish the two offenses of receiving stolen cattle, knowing the same to have been stolen, which were alleged in the plea of justification, and were the only offenses that were specifically charged in the plea. The testimony so excluded was that of some seven or eight witnesses who testified, in effect, that Carlisle and Gordon had been in the habit of employing men at their ranch in the Blue Mountain country in Southwestern Colorado, or the eastern border of Utah, who were "cattle rustlers" or thieves; that in that country Carlisle had the reputation of having men in his employ "who stole cattle"; that in consequence of that practice the reputation of the Carlisle outfit or camp "was bad"; and that Carlisle's general reputation in Southwestern Colorado was also bad. Now, assuming for present purposes that evidence of this sort was not receivable in support of the specific charge contained in the plea that Carlisle had received two lots of stolen cattle, knowing them to have been stolen, and that it was properly excluded when offered by the defendant for that purpose, yet a different question was presented when it was offered under the circumstances above detailed, not to show that the charge against Carlisle was true, or that the statements themselves were true, but that such statements had in fact been made to Becker, and had been communicated by him to the defendant before it filed its plea of justification. Bearing in mind that the jury had to determine what was the belief respecting the guilt or innocence of Carlisle which the defendant entertained when it filed its plea, and upon what information that belief was founded, and bearing in mind that the plaintiff had himself undertaken to cast suspicion upon the defendant's motives by showing the efforts which it had made to obtain evidence against him, and what it ought to have learned, we feel constrained to hold that Becker should have been allowed to testify on his redirect examination that the information above stated, in substance, had been communicated to him, and that it was believed by him to be trustworthy, and that the information so obtained was communicated to his employer before it filed its plea of justification. The admission of this evidence should have been accompanied, as a matter of course, with an admonition to the jury to the effect that the testimony was admitted for the purpose of enabling them to determine intelligently whether the defendant had acted in good faith in justifying the libel, and that it should only be considered by them in so far as it might be deemed important in resolving that issue.

In actions of malicious prosecution, where the issue as to the existence or nonexistence of probable cause is involved, it is always held to be competent to prove any statement made or information communicated to the defendant which would have any tendency to induce a person of ordinary prudence to believe or entertain a strong suspicion that the plaintiff was guilty of the offense for which he was pros-

ecuted. The important inquiries in such cases are: What did the prosecutor believe when the prosecution was instituted? Upon what information did that belief rest? And was it such information as would naturally influence an ordinary person to form an opinion respecting the plaintiff's guilt or innocence? *Bacon v. Towne*, 4 Cush. 217, 239. We conceive that a somewhat similar rule should be applied in actions of libel and slander, where a plea in justification of the libel is interposed and is not sustained, in consequence of which fact a subsidiary issue arises, as to the motive which prompted the defendant to file the plea. If a libelous statement is false, no amount of good faith in publishing the same will absolve the defendant from liability for the actual injury which is inflicted. But, on the other hand, punitive damages ought not to be assessed against a defendant for filing a plea of justification which was interposed in reliance upon information communicated to him which led him to believe that the plea was true, provided the information upon which he acted was of such a nature as would naturally inspire such a belief in the mind of an ordinarily prudent person. A defendant ought not to be mulcted in punitive damages for a mere mistake, unless in making the mistake he was so grossly negligent or utterly reckless of the rights of others as to warrant an inference that his motives were bad. Nor should facts be withheld from a jury when the issue involved is whether a given act was done with a malicious intent, if the facts are of such a nature as would ordinarily influence the judgments of men in forming an opinion upon that issue. We are of opinion, therefore, that, as bearing upon the issue of good faith or motive in a case like the one at bar, evidence should not be rejected which, taken in connection with other facts and circumstances already proven, has a tendency to show that when the defendant reiterated the false statement he believed that it was true, and supposed that the truth of the statement could be established. As was remarked in *Bush v. Prosser*, 11 N. Y. 347, 351, "a plaintiff will not, in the hands of an enlightened court and jury, be very likely to suffer injustice from evidence which goes merely to give character to and explain the conduct of the defendant." In the case at bar it was an admitted fact that many cattle had been stolen in the neighborhood of the Carlisle and Gordon ranch; that about 50 head of the stolen cattle were cut out of a herd belonging to Carlisle, or to Carlisle and Gordon, when they were on the road to market; and that one of the thieves was assisting in driving the herd when the stolen animals were discovered. In view of these facts, we think that such information as Becker obtained and communicated to his principal, namely, that Gordon and Carlisle had made a practice of having cattle thieves in their service, and that their camp or ranch had a bad reputation in the community where it was located, as being the resort of cattle thieves, would naturally have some influence with any person of ordinary caution in making up his mind whether Carlisle bought the cattle innocently, or was aware that they had been stolen. It goes without saying that, notwithstanding all the facts and circumstances last mentioned, Carlisle may have been entirely innocent of any offense, as the district attorney of Mesa County declared, and we would not be understood as intimat-

ing a contrary view. Nevertheless, as bearing upon his right to recover something more than compensatory damages, we think that Becker should have been allowed to disclose the information aforesaid on his redirect examination, when the plaintiff's attorneys opened the door and made such evidence on his part pertinent by the course pursued on the cross-examination. It is true that the information in question which Becker obtained and would have testified to was not pleaded specially in mitigation of damages; but it has been held (and the rule seems to us to be eminently fair and reasonable) that when the plaintiff in an action of libel or slander introduces in evidence facts not pleaded by him to create an inference of express malice and to lay a foundation for punitive damages, the defendant may, in turn, rebut such inference by proof of facts not pleaded which have a tendency to rebut it. *Reiley v. Timme*, 53 Wis. 63, 10 N. W. 5. It follows, therefore, that as Becker was cross-examined with reference to his efforts to obtain evidence against Carlisle, with a view of showing express malice on the part of the defendant and exaggerating the damages, the defendant was entitled to show on his redirect examination certain facts which he had discovered, or supposed that he had discovered, which tended to rebut the inference of malice which the plaintiff evidently intended that the jury should draw, although such facts had not been specially pleaded in mitigation. The amount of the verdict below renders it highly probable that the jury assessed punitive damages upon the theory that the plea justifying the libelous publication was not interposed in good faith, but for some ulterior and wrongful purpose. The presumption is, therefore, that the exclusion of the testimony heretofore considered was a prejudicial error, because of its tendency, if it had been admitted, to show that the plea was filed in good faith.

As the case must accordingly be sent back for a new trial, we do not deem it necessary to consider many other assignments presenting, as they do, questions which probably will not arise again, but shall content ourselves with a brief statement of our views respecting those questions that may be controverted on a retrial of the case.

We concur in the view which seems to have prevailed in the trial court, that the only facts which were sufficiently pleaded in the defendant's answer to justify the direct charge contained in the libelous publication, "that Carlisle was a member of a gang of cattle thieves which had been operating extensively in the western part of the state of Colorado, and that he acted as agent for the thieves in disposing of their stolen stock," are the allegations found therein to the effect that two men, Young and White, in the year 1896 stole 8 head of neat cattle, which cattle Carlisle and Gordon subsequently bought and received, knowing the same to have been stolen, and that in the same year they also feloniously bought and received 30 other head of neat cattle in San Juan county, Utah, which had theretofore been stolen, with knowledge of that fact. These were the only facts mentioned in the answer which were so pleaded as to amount to a justification of the libelous publication, and for that reason the trial court properly confined the evidence in support of the plea of justifi-

cation to those specific charges. Moreover, as the libelous article did not contain the statement that the general reputation of the Carlisle camp and outfit in the Blue Mountain country was bad, and as no complaint was made of any such statement, we do not perceive that proof to establish such bad reputation of the camp and outfit was admissible in support of the plea of justification; nor do we perceive that the defendant has any reason to complain of the exclusion of proof tending to show specific acts of thievery, or other offenses which had not been specifically alleged in the answer. It is clear that Carlisle could not be convicted of the crime of receiving stolen cattle by evidence that his camp had a bad name, as being the resort of persons who had an evil reputation; and it is equally certain that when one is charged with being a member of a gang of cattle thieves and an agent of cattle thieves, which is the substance of the libelous publication, and a plea justifying such a charge is filed, the pleader must allege specific instances of the theft of cattle committed by the plaintiff, or by him in concert with others, or specific instances of the receipt of stolen stock, knowing the same to have been stolen. We think that the trial court committed no error in trying the case along the lines last indicated.

An exception was taken at the trial because the court permitted Carlisle and another witness, by the name of Mostyn, to testify to what occurred between them at or near Ridgeway, Colo., when a number of the cattle which Carlisle was alleged to have received, knowing them to have been stolen, were discovered and cut out of a herd which belonged to Carlisle, as they were on their way to market. A complaint, as it seems, had been made to the sheriff of Mesa county, Colo., that certain cattle had disappeared and were supposed to have been stolen, in consequence of which complaint the sheriff deputed Mostyn, who was going to Ridgeway with a view of buying some of the Carlisle cattle, to examine the herd and ascertain if it contained any of the lost or stolen cattle. Both Mostyn and Carlisle were allowed, over an objection interposed by the defendant, to testify as to what occurred and what was said and done when Mostyn made his mission known, and discovered certain of the stolen cattle in the Carlisle herd. The statements made at that time were objected to by the defendant as self-serving declarations. We think, however, that this testimony was properly admitted. The charge against Carlisle being that he had received certain cattle, knowing them to have been stolen, it was his right and his duty to explain how the stolen stock had come into his possession when he was first advised that certain cattle in his herd had been stolen; and he was at liberty, as we think, to show what explanation was given at that time to the person who was deputed to examine the herd, and all that occurred on that occasion in his presence, either by his own testimony, or that of the witness Mostyn. The objection interposed to this evidence was properly overruled.

The defendant, on its part, offered to prove the substance of a conversation between White, who had stolen the cattle, and Gordon, which took place near Ridgeway on the occasion last aforesaid, but not in the presence or hearing of Carlisle, and such evidence was

excluded. This evidence, if it had been admitted, would have had a tendency to show that Carlisle, as well as Gordon, knew that certain cattle in the herd had been stolen, and that Gordon reported to White, but not in the presence of Carlisle, that Carlisle had said he "thought he would be able to dispose of them, all right." It is obvious that this conversation between White and Gordon, not in the presence of Carlisle, was only admissible upon the theory that at the time it was offered there was already sufficient evidence before the jury to establish a conspiracy between Carlisle, Gordon, and others to steal cattle, which made the declarations of any conspirator admissible against his fellow conspirators; and with reference to that contention it is sufficient to say that we agree with the trial court that the proof of the existence of such a conspiracy was altogether too intangible and uncertain to warrant it in permitting White, a convicted thief, to detail incriminating conversations which he pretended to have had with Gordon, but not in the presence or hearing of Carlisle. The trial judge wisely exercised his discretion in rejecting the proffered evidence. *Wiborg v. U. S.*, 163 U. S. 632, 658, 16 Sup. Ct. 1127, 1197, 41 L. Ed. 289.

Without going more into detail, as the matters are comparatively unimportant, we shall content ourselves with the statement that no material error was committed by the trial court in excluding evidence of the general reputation of Carlisle at Concordia, Kan., a place where he did not reside; nor in excluding the petition in the suit which he caused to be brought against Wilson in the state of Kansas; nor in excluding certain affidavits which Carlisle had made with a view of obtaining changes of venue in certain actions which had been brought against him before certain justices of the peace. Nor was any error committed in permitting the plaintiff to show that the defendant company had made no mention in its paper, as an item of daily news, of the fact that Carlisle had brought suits against certain Kansas City newspapers for publishing libelous articles, similar to the one that it had itself published, relative to his arrest under the information lodged against him in Mesa county, Colo., for receiving stolen cattle. The action of the trial court in excluding some of this testimony was, in any event, largely discretionary; and the matters complained of, if any of the exceptions were well founded, would hardly justify this court in disturbing the verdict. We do not feel called upon to notice specially any of the exceptions which were taken to the charge of the trial court, further than we have already done, incidentally, in discussing other features of the case. The charge, in our judgment, was in the main correct, and embraced substantially all of the instructions which were tendered in behalf of the defendant. The judgment below is reversed, and the case is remanded for a new trial.

SANBORN, Circuit Judge. I concur in the result in this case, for other reasons than those stated in the opinion of the majority. The difference between us is radical, and conditions the theory of the trial of the case; and as it may eventually result in a review by the supreme court, on certificate or on writ of certiorari, of the next trial,

it seems to me proper to state my views, to the end that the parties may, if they desire to do so, avoid the question which divides us. It is the true answer to this question concerning which we differ: In an action for libel, in which the defendant interposes pleas of justification and of mitigation of the damages for the publication, may evidence which is not competent upon either of the issues thus raised be introduced to prove the good or bad faith, the good or evil purpose, with which the defendant filed the plea of justification? The opinion of the majority is that this question should be answered in the affirmative, while it seems to me that it should receive a negative answer. My understanding of the law is that the bad faith or evil purpose of a defendant in filing a plea of justification which will warrant a jury in finding malice and in awarding punitive damages is an inference from the plea, and from the competent evidence, or from the lack of competent evidence, in support of it, and that the existence or nonexistence of bad faith and evil purpose is not an independent issue, upon which evidence not competent upon the issues of justification and mitigation of damages for the publication can be lawfully received. There is a strange dearth of authority upon this question, attributable probably to the facts that few attorneys have supposed that evidence incompetent upon the issues pleaded could be introduced to try an issue which is not pleaded, and to the almost universal concession of the authorities that the law upon this subject is properly stated in the text-books in these words: "Pleading a justification on the record is not of itself evidence of malice on the part of the defendant, but it may aggravate the damages if the defendant either abandons the plea at the trial, or fails to prove it." Odgers, *Lib. & Sland.* (2d Ed.) 136; Starkie, *Sland. & Lib.* (5th Ed.) 498; Townsh. *Sland. & Lib.* (4th Ed.) § 400; 13 *Am. & Eng. Enc. Law*, 401; *Browning v. Powers* (Mo. Sup.) 38 S. W. 943, 946; *Distin v. Rose*, 69 N. Y. 122, 127, 128; *Cruikshank v. Gordon*, 118 N. Y. 178, 185, 23 N. E. 457; *Hawver v. Hawver*, 78 Ill. 412; *Upton v. Hume*, 24 Or. 420, 430, 33 Pac. 810, 21 L. R. A. 493; *Association v. Schenck*, 98 Fed. 925, 929, 40 C. C. A. 163, 167. All the cases cited in the opinion of the majority rest upon a lack of competent evidence to support the plea of justification, and in only one of them was any evidence admitted which was not competent either upon that plea or the plea of mitigation of damages for the publication; and in that single case (98 Fed. 929, 40 C. C. A. 167), the evidence was made admissible by the introduction by the opposite party of immaterial evidence which it was competent to rebut. The old rule was that upon a plea of justification no evidence was admissible which was not relevant to that issue, and that a failure to establish the plea was evidence that it was filed for an improper purpose, which the jury might consider in aggravation of damages. Under this rule no evidence could be introduced either in mitigation of damages for the publication of the libel, or in mitigation of damages for the filing of the plea. The statute of Missouri carved out of this rule an exception. It permitted the defendant to plead facts in mitigation of damages for the publication of the libel, and, after making this plea, to introduce evidence in mitigation of those damages. But it did not authorize either the plea

or the proof of facts in mitigation of the damages for filing a plea of justification. If a statutory amendment was indispensable to permit a plea and proof of mitigation of damages for the publication of a libel, why is it not equally indispensable to the allowance of a plea and proof of mitigation of damages for the filing of a plea of justification? The logical result of the rule and the statute is that all of the rule except that part destroyed by the exception remains, and that the defendant cannot lawfully introduce evidence otherwise incompetent in mitigation of the damages for filing, with a wrongful purpose and an evil intent, a plea of justification which he is unable to prove; and for the same reason the plaintiff cannot be permitted to introduce evidence otherwise incompetent to enhance damages of this nature. The converse of this rule permits the trial of an issue not pleaded, and is in its operation unjust, impracticable, and dangerous to both of the parties to an action for libel. It is perilous to the rights of the plaintiff, because it opens the door upon every plea of justification to the actual trial of that issue upon hearsay testimony easily manufactured by the defendant. For if, whenever justification is pleaded, the issue is presented whether or not this plea was filed in bad faith, with evil purpose, and if evidence competent on the latter issue and inadmissible on others may be introduced, everything which influenced the mind of the defendant in filing the plea,—every false and malicious saying about the charge in the libel, or similar charges about the reputation or character of the plaintiff, about his conduct and business,—becomes admissible to show the defendant's good faith, when coupled with his testimony that he heard and believed the statement, and the trial necessarily degenerates into a mere story factory. The judge may caution and charge the jury that these stories—that this mass of hearsay—is not evidence of the truth of the libel; but no human being can prevent such testimony from having great and probably controlling influence upon their minds in determining that issue, and thus in reality the truth of the charge in a libel will be decided, not by the facts, but by the stories which the defendant has heard. Nor is this rule less dangerous to the defendant. He has the right under the law to interpose his defense of justification, and to search for all facts and evidence to support it. *Ormsby v. Douglass*, 37 N. Y. 477; *Doe v. Roe*, 32 Hun, 628, 632; *Willard v. Publishing Co.*, 65 N. Y. Supp. 75; *Distin v. Rose*, 69 N. Y. 122; *Bisbey v. Shaw*, 12 N. Y. 67. And yet if his good faith in exercising these rights is in issue the moment he avails himself of them, and if evidence not competent upon the issues of justification and of mitigation of the damages for the publication is admissible to assail his purpose, intent, and motive in defending himself, then whatever the plaintiff, his emissaries, or strangers have told the defendant or his attorneys before he files his answer regarding the falsity of the charge in the libel, the high character, good reputation, and commendable acts of the plaintiff becomes competent evidence in the case, and the trial of this unpleaded issue upon this hearsay evidence overshadows the true issues in the case and the actual facts, and practically deprives the defendant of a fair trial of the real issues. For the reasons which have now been briefly stated, this emphatic protest is entered against the adoption of such a prac-

tice, and it is insisted that the true rule is that, under pleas of justification and of mitigation of damages for the publication of a libel, no evidence is admissible which is not competent, relevant, and material to those issues, and that the good or bad faith and the right or wrong purpose of the defendant in filing the plea of justification must be determined from that evidence, or from the lack of it, and from these alone. Of course, if either party violates this rule and introduces incompetent evidence, the other party ought to be permitted to rebut it with evidence of the same class. *Salt Lake City v. Smith* (C. C. A.) 104 Fed. 457, 470. And, for this reason, when the court below had erroneously permitted the introduction of the testimony found in the cross-examination of Becker relative to his search for evidence to sustain the defense, it should have held an even hand, and have permitted the defendant to introduce the evidence of the same character offered upon his redirect examination.

But it was, in my opinion, error to permit the introduction of the statement of the district attorney in the case of the *State v. Gordon and Carlisle*, the testimony of Becker on his cross-examination relative to his search for evidence to sustain the defense, and all other evidence that was not competent upon the issues of justification and of mitigation of damages for the publication; and for this reason the judgment below is properly reversed. The statement of the district attorney was not made in an action to which the defendant was a party. It was not an admission of the defendant against interest. It was not made in a proceeding in which the defendant had an opportunity to appear or to cross-examine the witness. It was merely that which the district attorney wrote in a proceeding between strangers to the defendant, and as against it the statement was mere hearsay, and proved nothing that was found in it. It was incompetent to establish any fact in issue under the pleadings, because it was hearsay; and, for the reasons already stated, it was inadmissible upon the issue of the bad faith of the defendant, which was not pleaded. The matters referred to in the opinion of the majority as justifying its introduction were not in evidence when it was offered, and it was not proper to introduce any evidence to rebut statements in pleadings or remarks of counsel which were not relevant to any issue raised by the pleadings; and, if it had been, the writing of the district attorney was incompetent to rebut them, because it was hearsay and *res inter alios acta*.

The cross-examination of Becker relative to his search for evidence for the defense, in addition to its irrelevancy to any issue raised by the pleadings, was a flagrant violation of a basic rule of practice which is indispensable to the orderly conduct of a trial. The search made, facts discovered, and evidence gathered by Becker had not been mentioned or referred to in his direct examination. A witness is not subject to cross-examination upon any subject concerning which he has not been interrogated on his direct examination. If the plaintiff desired to examine this witness upon the matters referred to in this cross-examination, he could have made him his own witness, and then he might, in the discretion of the court, have been permitted to ask him leading questions; but he had no right to intro-

duce his testimony upon these matters, when the defendant had asked him no questions concerning them. Of this rule this court has lately said, through Judge Caldwell, "Without the observance of the fundamental rule on this subject, the trial of a cause would speedily degenerate into inextricable confusion and disorder." *Mine & Smelter Co. v. Parke & Lacy Co.*, 107 Fed. 881; 1 Greenl. Ev. § 445; *Hopkinson v. Leeds*, 78 Pa. 396; *Fulton v. Bank*, 92 Pa. 112, 115. The judgment below is properly reversed, but, in my opinion, the next trial should be conducted in accordance with the rules of evidence to which attention has been called.

KENT v. SILVER.

(Circuit Court of Appeals, Third Circuit. April 29, 1901.)

No. 32.

1. ACTION ON GUARANTY—AFFIDAVIT OF DEFENSE.

A guaranty stated that it was attached to a note in suit. The statement of claim averred "that at the time the money was loaned and said note was given, and as an inducement therefor, said defendants guarantied" the payment of the note, and executed a certain written undertaking. The affidavit of defense alleged that one of the plaintiffs was not present when the paper was executed, and that he did not request one of the guarantors to execute the same. *Held* not to sufficiently traverse the averments of the statement.

2. SAME—ACCEPTANCE.

The written guaranty, being attached to the note and delivered with it, was an absolute, and not a conditional, obligation, requiring notice of acceptance.

3. SAME—VARYING WRITTEN CONTRACT.

Where a written guaranty was conditioned to collect certain claims, and to pay the full amount due on a note attached, an affidavit of defense averring that the obligors were not able to collect, and substituting for an absolute agreement to pay on a day certain one to pay only in case they collected, was insufficient, as varying the terms of the written instrument.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

H. B. Gill, for plaintiff in error.

C. W. Conard, for defendant in error.

Before ACHESON and GRAY, Circuit Judges, and BUFFINGTON, District Judge.

BUFFINGTON, District Judge. In the court below, judgment for want of a sufficient affidavit of defense was entered in favor of Michael T. Silver against Samuel Kent. 105 Fed. 840. The entry of such judgment is here assigned for error. The Columbia River Navigation & Trading Company borrowed from Michael T. Silver \$5,000, giving therefor its note at nine months, dated December 13, 1897. The note was not paid, and this suit on the following paper was brought against Kent and others to collect the amount thereof:

"As security for the attached note of the Columbia Navigation and Trading Company, dated December 13th, 1897, and due September 13th, 1898, for the

sum of \$5,000, the undersigned hold claims for labor, materials, supplies, etc., against the steamer City of Columbia amounting to more than the amount of said notes. For the sum of one dollar to us in hand paid, the receipt of which is hereby acknowledged, and for other valuable consideration, we, the undersigned, agree, undertake, and bind ourselves, if the above-described note is not paid at maturity by the Columbia Navigation and Trading Company, to collect said claim and pay the full amount due on the attached and above-described note on or before December 13th, 1898, to the holder thereof, without any deduction or charge whatever. In witness whereof, we have hereunto attached our seals and affixed our signatures this 13th day of December, 1897.

"[Signed]

Max Levy.

"[Signed]

Samuel L. Kent.

"[Signed]

Harrington Emerson.

"Witness to all three signatures: G. P. Armstrong."

The paper states it was attached to the note; and the express averments of the statement of claim that "at the time the money was loaned and said note was given, and as inducement therefor, the said defendants, and each of them, guarantied to the plaintiff the payment of the said note, and executed therefor a certain written undertaking, of which the following is a copy," are not traversed. The allegations of the affidavit that Silver was not present when the paper was executed by Kent, that he did not request Kent to sign it, and that it was not delivered by him to Silver, do not traverse such averments. Being attached to and delivered with the note, it was an absolute obligation, and not a conditional one which required notice of acceptance. *Davis v. Wells*, 104 U. S. 164, 26 L. Ed. 686. It was accepted with the note. Its execution and delivery import an intent to bind the obligors, and its terms impose two obligations in case the note was not paid at its maturity, September 13, 1898. One was to collect certain claims; the other, "to pay the full amount due on the attached and above-described note on or before December 13th, 1898, to the holder thereof, without any deduction or charge whatever." This is the plain import of the language used, and, to give it any other, additional words must be inserted. Neither of these obligations has been complied with. The affidavit of defense simply avers the obligors were not able to collect because a bottomry bond subsequently became a prior lien, and absorbed all the money realized from a judicial sale of the vessel. Instead of their absolute engagement to collect, as the agreement reads, they would insert a conditional engagement to collect only upon condition. Moreover, for their absolute agreement to pay on a day certain, without any deduction, they would substitute one to pay only in case they collected. Such construction would vary the terms of the written instrument in which the parties embodied their undertaking. The court committed no error in construing the writing as an absolute engagement according to its terms, and entering judgment accordingly.

In re WELCH.

(District Court, S. D. New York. April 24, 1901.)

1. **FIXTURES—LANDLORD AND TENANT—MACHINERY PLACED ON LEASED PREMISES.**

Where ground was leased as a site for a factory building, which was subject to the right of removal by the tenant at the end of the term, machinery placed in such building by the tenant does not become a part of the realty.

2. **SAME—MORTGAGOR AND MORTGAGEE.**

Under the laws of New York, a mortgage of a factory built by a lessee on leased ground carries with it, as fixtures, all machinery which is firmly attached to the building, and which is necessary to its character and use as a factory, but not portable articles or machines not attached to the building, nor belting which may be removed without disturbing the building, or the machinery or shafting attached to it.

In Bankruptcy.

George E. Weller and Arthur Knox, for mortgagee.

W. H. Janes, for trustee.

BROWN, District Judge. During 1895, 1896 and 1897, three leases were made to the bankrupt, all expiring in May, 1903, of a plot of land in 138th street, this city, upon which the bankrupt designed to build a factory building for the manufacture of wooden mouldings, trim and other kinds of interior woodwork. An engine, boiler, machinery, shafting, belting and many other articles were furnished, and the building completed and thereafter used as a factory by the bankrupt until the petition in involuntary proceedings was filed against the bankrupt in June, 1900. The building was built and equipped in July, 1897, and on the 17th of the same month, the bankrupt executed a mortgage to J. Sergeant Cram for \$6,500, covering the lease and all his interest therein, and the appurtenances and the building thereon. Nothing was said in the mortgage as respects the machinery, the fixtures or the business. The trustee in bankruptcy having been unable after long effort to find any purchaser of the lease or of the bankrupt's equity in the building, dispossession proceedings were allowed and taken, and the question is now presented to what extent the machinery, fixtures and other implements pertaining to the business are bound by the mortgage, and what if any are free from the mortgage and removable by the trustee in bankruptcy.

1. I am of the opinion that none of the machinery became a part of the freehold or the realty, for the reason that by the terms of the lease the building itself was not intended to become such, since the building was subject to the tenant's right of removal at the end of the term.

2. The mortgage, however, expressly covers the building, and whatever as between mortgagor and mortgagee is to be deemed part of the building, is, therefore, subject to the mortgage.

Under the law of this state I think that all machinery and other articles which are firmly affixed to the building and which were so affixed to it as to constitute a part of its design and a part of its

character as a building having respect to its intended and actual use, must be deemed a part of the building. *McRea v. Bank*, 66 N. Y. 489; *Insurance Co. v. Allison* (C. C. A.; Feb. 27, 1901) 107 Fed. 179. This building was built, designed and used as a factory. The machinery was put in it as a part of the construction and for use as a factory, and the building was evidently mortgaged as a factory, and I think the mortgagee, therefore, is entitled to whatever is firmly affixed to the building. This includes engine, boiler, machinery or shafting firmly secured to the building by cement, bolts or screws, and other articles of this nature. It does not include portable articles whether machines, implements, tables or what not, that are in no way affixed or secured to the building; nor should it include I think, such articles as belting, which may be removed from machinery by unloosening without in any way disturbing the building, or anything affixed to the building.

I find in the testimony considerable difference between the two experts as to a number of articles, whether they are affixed to the building or not. I think what has been said above will enable the parties to distinguish most, if not all of the articles which I deem covered by the mortgage, and those not covered. Should there be any remaining articles upon which the parties cannot agree, I think an expert should be appointed as agreed upon by both parties, under whose personal inspection the separation of the remaining articles may be made according to the rule above laid down. If this should not be sufficient, further application may be made to the court.

In re ROSENTHAL.

(District Court, S. D. New York. April 10, 1901.)

BANKRUPTCY—STAY OF ATTACHMENT SUIT—VACATION AFTER BANKRUPT'S DISCHARGE.

A stay order restraining the prosecution of an action against a bankrupt, entered under Bankr. Act 1898, § 11a, is in its nature temporary only, and should ordinarily be vacated as a matter of course, on application of the creditor, after the bankrupt has been discharged. The fact that the bankrupt had given a bond in the action to release an attachment prior to his bankruptcy, and the effect of the discharge on the liability of the sureties under the state statute, are matters which cannot be taken into consideration by the court on a motion to vacate such stay; but both parties alike should be remitted to their rights, remedies, and defenses under the law in the court in which the action is pending.

In Bankruptcy. On motion to vacate stay.

E. N. Hill, for creditors.

Arthur Furber, for bankrupt.

BROWN, District Judge. A motion is made in behalf of Alexis Menage, a creditor, to vacate an order granted by this court on March 24, 1900, restraining the creditor from prosecuting his suit in Massachusetts against the bankrupt, Max Rosenthal, "until further order of the court." The bankrupt was adjudicated on his own

petition on December 4, 1899. No assets appearing, no trustee was appointed at the first meeting of creditors. Subsequently, by proceedings which appear to be regular, the bankrupt was discharged on April 18, 1900. The restraining order was issued in accordance with the ordinary course of proceeding under section 11. Such a stay is merely a temporary one, for the purpose of enabling the bankrupt to plead his discharge when obtained. When the discharge has been granted, the stay should ordinarily be vacated as a matter of course on application of the creditor, in order that the validity of the discharge as against the creditor's debt, may be duly tested, in case the creditor should wish to litigate its application to his debt. The restraining order in the present case not being expressly limited to the provisions of section 11, the motion to vacate it, now that the discharge has been granted, is proper; and the contention that the court has no longer jurisdiction, even *pro hac vice*, or so far as to vacate its own previous order, cannot be sustained.

It is urged for the defendant that the equities of his sureties in the Massachusetts suit are such that the stay ought not to be dissolved, and that by doing so he would be deprived practically of the benefit of his discharge. The facts in that regard are briefly as follows:

The suit was commenced against the bankrupt in the city of Boston on February 5, 1897, by trustee process, to collect an alleged indebtedness of \$1,270. On March 12, 1897, Rosenthal caused a bond with sureties to be given to dissolve the attachment, pursuant to the statutes of Massachusetts, and the attachment was thereupon dissolved. Subsequently upon a trial before a jury, a verdict was found for the defendant. On exceptions and appeal to the supreme court, a new trial was ordered on March 2, 1900, about three months after the petition in bankruptcy was filed in this court. The original schedules did not mention the debt to Menage, but it was inserted in the amended schedules filed March 21, 1900, three days before the order of this court was made, restraining the further prosecution of the suit.

The bond executed to release the attachment was conditioned for the payment of "any final judgment" that might be obtained in the action. Had this been the only condition of the bond, inasmuch as no judgment was obtained prior to the defendant's discharge, and none could afterwards be lawfully obtained in case the discharge was operative upon the claim of Menage, the sureties would be practically released from the bond, since the condition of the bond could not be fulfilled by the recovery of any "final judgment" against the bankrupt. *Wolf v. Stix*, 99 U. S. 1, 8, 9, 25 L. Ed. 309; *Carpenter v. Turrell*, 100 Mass. 450; *Hamilton v. Bryant*, 114 Mass. 543.

By the Public Statutes of Massachusetts, however,—chapter 171, § 23 (passed in 1882),—it is enacted as follows:

"When a plaintiff is entitled to judgment except for the bankruptcy or insolvency of a defendant who has dissolved an attachment by giving a bond, the court may at any time upon motion enter a special judgment for such plaintiff, to enable him to proceed against the sureties on such bond; and such special judgment shall be deemed a sufficient judgment, within the meaning of

chapter 161, to enable such plaintiff to maintain an action against the sureties on said bond provided that such attachment was not made within four months," etc.

By chapter 161, § 122, of the Public Statutes of Massachusetts, it is further provided that an attachment may be dissolved by giving a bond to pay the plaintiff the amount, if any, that he may recover within 30 days after the final judgment in said action, and also pay to the plaintiff within 30 days after the entry of any special judgment, in accordance with chapter 171, the sum, if any, for which such special judgment shall be entered.

The bond given by the debtor and his sureties to release the attachment in this case, embodied the above provisions; so that it will doubtless follow that if the creditor is authorized to enter a "special judgment" under the above provisions in the Massachusetts court, the sureties will be bound to pay the amount of that special judgment, because that condition of the bond will be fulfilled. Section 16 of the present bankrupt act would then have full effect, which provides that "the liability of a person who is * * * in any manner a surety for a bankrupt shall not be altered by the discharge of such bankrupt."

There is nothing before me by which it appears whether the creditor upon the discharge of the restraining order of this court, would be entitled to enter a special judgment. On the facts above stated, presumptively he would not be; since upon the first trial a verdict was found for the defendant. It is possible, however, that the rulings upon appeal may have virtually determined the liability of the defendant, though not in form so adjudged; since a new trial was ordered. It would seem, therefore, that a further trial in the state court is necessary in order to determine whether the plaintiff, in the language of chapter 171, § 23, "is entitled to judgment except for the bankruptcy of the defendant"; and it is not until that question is determined that any "special judgment" can be entered.

I think, however, that such questions as pertain to the effect of the discharge, the force of the sureties' bond, the construction of the Massachusetts statutes of 1882 and 1888 and whether they apply to a discharge under the United States bankrupt act subsequently passed, are not to be considered or determined by me upon this motion, but only in the pending suit in Massachusetts, where there will be full opportunity for the parties to be heard. It is sufficient that the restraining order was in its nature a temporary one only and that the discharge of the bankrupt has been granted, so that it becomes the duty of the court to vacate its previous stay and remit both parties alike to their rights, remedies and defenses under the law.

Motion granted.

In re NEELY.

(District Court, S. D. New York. April 30, 1901.)

1. BANKRUPTCY—STAY OF EXECUTION AGAINST TRUSTEE.

The assets of a bankrupt in the custody of a court of bankruptcy are distributable under its order alone, and are not subject to levy by a sheriff to satisfy a judgment against the trustee, who is entitled to an order restraining such a threatened levy.

2. SAME—REPLEVIN AGAINST TRUSTEE—DAMAGES AND COSTS.

Costs awarded by a state court against the trustees of a bankrupt, as substituted defendants in an action of replevin pending at the time of the bankruptcy, should be allowed and paid in full from the bankrupt estate; but a judgment for damages for detention of the property is entitled to no preference over other claims against the bankrupt, where the trustees never had possession of the property, and were not responsible for its detention, but after their appointment did all that could reasonably be demanded of them, consistent with the protection of their rights, to assist the plaintiffs in obtaining possession of it.

In Bankruptcy.

Edwards & Bryan, for trustees.

Strong & Cadwalader, for judgment creditors.

BROWN, District Judge. The assets of the bankrupt are in the custody of this court and distributable under its order alone. Bankr. Act 1898, § 2 (3, 7, 8). They are therefore not subject to levy by the sheriff, and the restraining order asked for should so far be allowed. Payment of claims, however, should be directed by this court in accordance with the legal rights of the parties, under the bankruptcy act.

The case arising under the judgment in the state court against the trustees has given me some embarrassment as respects the proper directions to be given as to the costs and damages for detention obtained in the replevin suit, amounting altogether to \$1,727.21, for which the estate has received no benefit whatever. Of this sum \$1,080 was for the unlawful detention of the goods. But the trustees never had possession of the goods and never detained them. The property claimed was of considerable value, and the case was such as to justify the trustees in requiring the plaintiffs in the replevin suit to show their title.

The action was commenced and process served before the bankruptcy proceedings. The detention was the act of the bankrupt. The goods were in a storage warehouse, from which under Act N. Y. 1895, c. 633, they could not be removed, except by consent or by the order of the court after proof of title. Except for that act, the goods would have been delivered to the plaintiffs at the time of the commencement of the action upon the plaintiffs' undertaking in the sum of \$13,000 to answer therefor executed at that time. The trustees offered to consent to the delivery of the goods to the plaintiffs upon their execution of a proper bond to respondent for their value if the title were determined against them. This the plaintiffs refused. The trustees also offered to proceed at once to a trial of the title before a referee in bankruptcy, where the title could have been speed-

ily and inexpensively determined, as hundreds of other similar claims have been and are constantly determined. But the plaintiffs refused their necessary consent, and in return asked the trustees to consent to a delivery of the property to the plaintiffs without any security at all—an unreasonable request. I do not say that the plaintiffs have actually stepped beyond the line of their strict legal rights, but they have pertinaciously insisted upon their extreme legal rights, and pursued a course most embarrassing to the trustees, and one tending to the utmost possible costs and damages. In no fair or proper sense was the detention of the goods the act of the trustees. The trustees as I have said have never had possession of the goods. The detention was originally by the bankrupt; and after the action was commenced, further detention was caused by the warehouse act of 1895, which prevented the plaintiffs from obtaining possession at the outset of the suit, and this was still further prolonged by the plaintiffs' unreasonable refusal to acquiesce in the trustees' efforts to facilitate the proceedings as well as to turn over the possession to the plaintiffs on proper terms. The intervention by the trustees in the suit was not for the detention of the goods, but only for the proper purpose of requiring the plaintiffs' title to be properly proved; and the judgment as respects damages for detention, is no different from what it would have been had the suit been continued in the bankrupt's name.

The bankrupt act gives no preference for claims for damages for detention like the present. Section 64. The case of *Norton v. Switzer*, 93 U. S. 355, 363, 23 L. Ed. 903, as it seems to me, holds that a judgment against the substituted trustee is to be paid only pro rata upon proof of it with other claims, and that will be followed here.

The authorities seem to require that the costs should be paid in full. An order in conformity with the above may be presented for settlement on two days' notice with a stay of execution.

In re SCULLY.

(District Court, E. D. Pennsylvania. May 2, 1901.)

No. 968.

BANKRUPTCY—ELECTION OF TRUSTEE—AUTHORITY OF ATTORNEY TO VOTE.

The mere relation of attorney at law for creditors of a bankrupt does not authorize such attorney to vote in behalf of his clients at the election of trustee.

In Bankruptcy. On petition to set aside election of trustee.

Michael J. Ryan, for creditor.

J. Quincy Hunsicker, for bankrupt.

J. B. McPHERSON, District Judge. I think the learned referee was right in deciding that the mere relation of attorney at law did not authorize Mr. Hunsicker to vote in behalf of his clients at the election of the trustee (*In re Blankfein* [D. C.] 97 Fed. 191; *In re Eagles* [D. C.] 99 Fed. 695; *In re Richards* [D. C.] 103 Fed. 849);

and, since it clearly appeared by the testimony taken at that meeting that the bankrupt was insolvent when Catharine Lenahan's execution issued, I agree also in the conclusion that the lien of her levy was avoided by clause "f" of section 67, and therefore that she was not disqualified to take part in the election. The petition is refused.

In re JOHNSON.

(District Court, D. Vermont. April 25, 1901.)

BANKRUPTCY—AVOIDANCE OF LIENS—ATTACHMENTS.

V. S. § 1791, provides that "personal property attached on mesne process shall be held to respond to the judgment rendered thereon 30 days from the time it is rendered; and unless the plaintiff within 30 days from the rendition of final judgment takes such property in execution it shall be discharged from such process." The decisions of the supreme court of the state treat such attachment as an inchoate lien, which must be perfected by the creditor by obtaining judgment and taking out execution within 30 days. *Held*, that where such an attachment was made of property of a bankrupt more than four months prior to the filing of the petition in bankruptcy, but judgment was obtained and execution issued within the four months, such judgment and execution were void, so far as related to the attached property, and the property affected was discharged, under Bankr. Act 1898, § 67f.

In Bankruptcy. Proceeding by trustee to restrain sale of property of the bankrupt under attachment.

Roland E. Stevens, trustee, pro se.

William Batchelder, for attaching creditor.

WHEELER, District Judge. The statutes of Vermont provide:

"Sec. 1791. Personal property attached on mesne process shall be held to respond to the judgment rendered thereon thirty days from the time it is rendered; and unless the plaintiff within thirty days from the rendition of final judgment takes such property in execution it shall be discharged from such process."

The bankrupt act provides:

"Sec. 67f. That all levies, judgments, attachments or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him shall be deemed null and void in case he is adjudged a bankrupt," etc.

Personal property of the bankrupt was attached on mesne process August 1, 1900, by copy in the town clerk's office. Judgment was obtained in the suit January 1, 1901. The defendant therein was adjudged bankrupt January 17th. The trustee succeeded to the possession of the bankrupt. The creditor took out execution and delivered it to the officer within the 30 days, who has advertised the property for sale on the execution. This proceeding is brought by the trustee to restrain the sale on the ground that, although the attachment was more than four months old at the time of the filing of the petition in bankruptcy, the lien would not become perfect till the time of the judgment, and of the placing of the execution in the officer's hands within the 30 days. In *Wilder v. Weatherhead*,

32 Vt. 765, as well as elsewhere, such an attachment is spoken of as an "inchoate lien"; and in *Dewey v. Fay*, 34 Vt. 140, the court, by Aldis, J., said:

"By our system of attachment of personal property, the creditor must perfect his lien by obtaining judgment, taking out execution within thirty days, and delivering it to the officer who made the attachment, or demanding of him the property."

The lien does not become perfect as a charge upon the property until the recovery of the judgment and the taking in execution. The judgment, and the levy of execution under it, are proceedings that the bankrupt act, as quoted from, expressly declares shall be deemed null and void. Without them the attaching creditor had no perfect lien. When obtained, they are absolutely null and void. In that condition they are wholly inoperative to perfect what was before an imperfect lien. It has sometimes been thought that judgments might be taken to hold the property attached, as was done under the act of 1867 in jurisdictions where such attachments on mesne process prevailed; but that act did not have such provisions as these in respect to judgments and levies, by which they are expressly cut off. This conclusion appears to be the same as that reached by Judge Brown upon similar statutes and proceedings under them in Connecticut. In *re Lesser*, 5 Am. Bankr. R. 326, 108 Fed. 201. Stay granted.

In re **BOLINGER**.

(District Court, W. D. Pennsylvania. January 14, 1901.)

1. BANKRUPTCY—EXEMPTIONS.

Where, after bankrupt had duly made claim for exemption of certain specified personal property, the property was sold by the receiver, with other property of the bankrupt's estate, by order of the court, but without prejudice to the rights of the bankrupt to apply for the proceeds of the sale of such property claimed as exempt, the court will surrender the money into which it had converted such property in the same manner it would have surrendered the property if it had not been converted.

2. SAME—INVALID LEVY—WAIVER.

Certain creditors, a few days before an adjudication in bankruptcy, levied on the property of the bankrupt on an execution on a judgment on a note waiving the benefit of the exemption law. The execution was enjoined as an illegal preference, and the property passed to the receiver. *Held* that, as the preference created by the execution was illegal, the waiver of the exemption as against the enforcement of the debt on valid lawful process fell with the enjoined unlawful preference execution.

3. SAME—ESTOPPEL.

An execution of a judgment creditor on a judgment waiving exemptions was set aside as an unlawful preference under the bankrupt law. The creditor thereafter filed his claim waiving any lien he might have acquired under said execution. *Held*, that he was estopped from afterwards claiming a preference against the exempt property.

S. P. Emery, John S. Wendt, and W. H. Falls, for petitioner.

BUFFINGTON, District Judge. In this case the bankrupt duly made claim for the exemption of certain specified personal property,

as provided by the state statute. Thereafter the property so claimed was sold by the receiver, with other property of the bankrupt estate, under an order of this court which provided:

"The sale not to prejudice the right of the bankrupt to hereafter apply for the proceeds of the sale of the articles of personal property claimed by him in his petition as exempt, if in law he is entitled to such exemption. The proceeds of the sale are to remain in the hands of the receiver, subject to the order of the court."

The claimed property and its proceeds, viz. \$165.95, were kept separate, and are included in the present account. While exempt property is no part of the bankrupt estate, still, the claim being a personal right, it would seem, if it is not asserted and maintained, the property which might have been covered by it would form part of the bankrupt estate. See authorities collected *In re Black*, 3 Nat. Bankr. N. 47, 104 Fed. 289. The claim of the bankrupt in this case as against the general estate is clearly good. That the claim was made in due time and proper form is conceded. The order of the court substitutes money for property, and transferred rights existing against specified property to its money substitute. Having a valid claim against the property, the court will surrender the money into which it has converted the property in the same manner it would have surrendered the property had it not been converted. *In re Black*, supra; *In re Brown*, 1 Nat. Bankr. N. 230. The fund, however, is claimed by the Schlather Brewing Company. That company levied on the personal property of the bankrupt a few days before the adjudication. In the note on which judgment was entered the bankrupt waived the benefit of the state exemption law. This execution was enjoined as an illegal preference under the bankruptcy law, and the entire property levied upon thereunder passed to the receiver. The preference created by the execution being illegal, the incident of such execution preference, to wit, the waiver of the exemption as against the enforcement of the debt on valid lawful process, must be deemed to have fallen with the enjoined unlawful preference execution. Not only is this so, but subsequently the Schlather Company, in order to participate in the present distribution, filed a release of any lien "of our said judgment from any and all property owned by the said Charles L. Bolinger at the time of the entry of said judgment, and also release any lien which we now have, or could have, on the personal property of said Charles L. Bolinger by virtue of our having issued an execution on said judgment at No. 19, June term, 1899, so that the preference which we have received by virtue of our said judgment and execution shall be surrendered, and that our claim, as evidenced by said judgment and execution, may participate pro rata in the distribution of said bankrupt's estate with proper proven claims against said Charles L. Bolinger's estate." The creditor, having participated in this distribution by reason of said release, is estopped from now claiming a preference, which, if it exists, exists by virtue of the released preference and as an incident thereto. If the releasing creditor were awarded a fund which it would credit on its indebtedness, it would seem such fund should inure to the benefit of all the creditors. But, as we have seen, as against the general creditors, the bankrupt is

entitled to the exemption by virtue of a duly-made claim, and the saving order of the court when the property was converted into money. The creditor cannot with one hand take, by virtue of the release, as a general creditor, and with the other take, at variance with the release, as a preferred one. The result reached by the referee will not be disturbed.

UNITED STATES v. WONG CHOW.

(Circuit Court of Appeals, Fifth Circuit. April 16, 1901.)

No. 1,014.

CHINESE EXCLUSION ACT—FINALITY OF ACTION OF EXECUTIVE OFFICERS—POWER OF COURTS TO REVIEW.

Under the Chinese exclusion act of August 18, 1894 (28 Stat. 390), where an immigration officer has made an order for the deportation of a Chinese person as belonging to a class not entitled to remain in this country, which has not been appealed from, a court has no jurisdiction to review the legality of such order in habeas corpus proceedings.

Appeal from the Circuit Court of the United States for the Western District of Texas.

Henry Terrell, A. G. Foster, and W. W. Howe, for the United States.

T. J. Beall, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. This case is stated by counsel for the appellant, with substantial accuracy, as follows:

"Wong Chow, the appellee, filed in the circuit court of the United States for the Western district of Texas on April 16, 1900, his petition, duly verified, for a writ of habeas corpus, wherein he alleged he was illegally deprived of his liberty by the marshal of the Western district of Texas by virtue of an order of deportation, but that petitioner is a Chinese merchant resident and doing business in the United States, and was at the time of his arrest and confinement, and not liable to deportation under the existing laws and treaties. On the same day, Hon. Aleck Boorman, judge, sitting as United States circuit judge for the Western district of Texas, at El Paso, issued a writ of habeas corpus to the marshal, commanding that he produce the body of the petitioner before him in open court on the following day, and show cause for such custody. On April 17th the marshal produced the petitioner, and showed that he was held by virtue of an order of deportation directed to the marshal, and issued by the commissioner at El Paso on March 30, 1900, a copy of which was attached, and which set out, in substance, that upon a trial had before the commissioner the defendant had announced that he was ready for trial, whereupon, after reviewing his plea, and having heard the testimony of all the witnesses offered by each party, the commissioner was of opinion: First, that the defendant was on the 27th day of December, 1899, and is now, unlawfully in, and not entitled to remain in, the United States; second, that he is now, and was on December 27, 1899, a subject of the empire of China,—and thereupon ordered that the defendant be remanded to the custody of the marshal, who shall take him to San Francisco, California, and deliver him to the collector of that port, who shall deport him to China, and in the meantime the marshal shall safely keep the defendant in his custody. On April 17, 1900, the district attorney filed an intervention on behalf of the United States, alleging that the petitioner was legally held by the marshal by virtue of a valid order of deportation directed to him by the commissioner, and that

the order of deportation had not been superseded nor appealed from, but was in full force and effect, wherefore the writ should be dismissed and the petitioner remanded to the custody of the marshal. By way of traverse the petitioner on April 21, 1900, replied that he was and is a merchant in Los Angeles, Cal., coming from China in 1875; that on April 25, 1894, a certificate of residence as a Chinese merchant was issued to him by the collector of internal revenue; that while in El Paso on business, and while at the train attempting to return to Los Angeles, he was arrested by the Chinese inspector, who took his certificate of residence, which was admittedly genuine; that after the cause was instituted the petitioner employed counsel to represent him; that on March 25, 1900, trial was had in the absence of counsel, and the order of deportation attached to the marshal's return was made; that the petitioner is not familiar with the English language and court procedure, and was not informed by interpreter of his right of appeal; that he did not learn of his right until employment of his present counsel, who informed him that the time for appeal had expired; that the order of deportation is illegal and void, in this: that being a Chinese merchant, and in the rightful possession of a genuine certificate of residence, the judgment is in violation of his rights secured by the constitution of the United States and the treaty with China. On April 26, 1900, the intervener moved to quash the writ of habeas corpus, which was overruled by the court. Thereafter the court heard evidence in support of petition, and, the intervener not having had sufficient time to produce evidence, the court granted leave to produce and file the same prior to May 18, 1900; and, not considering the same material, the court ordered upon May 3, 1900, the discharge of the petitioner from custody, conditioned that pending appeal he enter into bond in the sum of \$200. Thereupon the intervener excepted to the order, and in open court gave notice of appeal to the United States circuit court of appeals for the Fifth circuit, which was duly allowed. The appellee entered into bond as required pending appeal. The intervener had the time extended within which to file her bills of exception, and her bills of exception were duly filed September 1, 1900. On October 10, 1900, the appellant filed her assignments of error. Citation on appeal was issued October 16, 1900, and service of the same was acknowledged on the same day."

There are two errors assigned. They present the contention (1) that the circuit court was without jurisdiction to hear and determine this cause, because the petition for the writ, the marshal's return, and the petitioner's traverse show that the petitioner was held by a valid order of deportation, in full force, and from which no appeal was taken; and (2) that the court should have quashed the writ of habeas corpus, for the reason that the record showed that the petitioner was not illegally restrained of his liberty, but was held by virtue of a valid order of deportation issued out of a court having jurisdiction both of the subject-matter and of the person, and not superseded or appealed from, but retaining full force and effect.

It is not necessary for us to follow counsel in their interesting discussion of first principles, and their exhaustive citations and review of the numerous reported decisions of circuit courts, and a few decisions of some of the circuit court of appeals. The result of the decisions by the supreme court is shown in the opinion in the case of *Lem Moon Sing v. U. S.*, 158 U. S. 538, 15 Sup. Ct. 967, 39 L. Ed. 1082, and is thus expressed in the headnote:

"The power of congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that respect enforced exclusively through executive officers, without judicial intervention, having been settled by previous adjudications, it is now decided that a statute passed in execution

of that power is applicable to an alien who has acquired a commercial domicile within the United States, but who, having voluntarily left the country, although for a temporary purpose, claims the right under some law or treaty to re-enter it."

We make the following quotation from the opinion:

"The contention is that while, generally speaking, immigration officers have jurisdiction, under the statute, to exclude an alien who is not entitled under some statute or treaty to come into the United States, yet if the alien is entitled, of right, by some law or treaty, to enter this country, but is nevertheless excluded by such officers, the latter exceed their jurisdiction; and their illegal action, if it results in restraining the alien of his liberty, presents a judicial question, for the decision of which the courts may intervene upon a writ of habeas corpus. That view, if sustained, would bring into the courts every case of an alien who claimed the right to come into the United States under some law or treaty, but was prevented from doing so by the executive branch of the government. This would defeat the manifest purpose of congress in committing to subordinate immigration officers and to the secretary of the treasury exclusive authority to determine whether a particular alien seeking admission into this country belongs to the class entitled by some law or treaty to come into the country, or to a class forbidden to enter the United States. Under that interpretation of the act of 1894, the provision that the decision of the appropriate immigration or customs officers should be final, unless reversed on appeal to the secretary of the treasury, would be of no practical value."

The language of the statute just referred to is in these words:

"In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or custom officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the secretary of the treasury." Act Aug. 18, 1894 (28 Stat. 390).

In the most recent case,—*Li Sing v. U. S.* (decided March 18, 1901, not yet officially reported) 21 Sup. Ct. 449,—the concluding paragraph in the opinion is instructive. It reads:

"We cannot, however, yield to the earnest contention made in behalf of inoffensive Chinese persons who seek to come within the limits of the United States and submit themselves to their jurisdiction, by modifying or relaxing, by judicial construction, the severity of the statutes under consideration. We can but repeat what was said to similar appeals in the case of *Fong Yue Ting v. U. S.*, 149 U. S. 698-729, 13 Sup. Ct. 1016, 37 L. Ed. 905: 'The question whether, and upon what conditions, these aliens shall be permitted to remain within the United States, being one to be determined by the political departments of the government, the judicial department cannot properly express an opinion upon the wisdom, the policy, or the justice of the measures enacted by congress in the exercise of the powers confided to it by the constitution over this subject.'"

It is therefore clear that it was the duty of the circuit court to dismiss the writ of habeas corpus, and leave the petitioner in the custody of the marshal, to be disposed of by him in accordance with the order for deportation. The judgment of the circuit court is reversed, and the cause remanded to that court, with direction to remand the appellee to the custody of the marshal.

ANDERSON FOUNDRY & MACHINE WORKS v. POTTS et al.

(Circuit Court of Appeals, Seventh Circuit. April 9, 1901.)

No. 750.

1. PATENTS—CONSTRUCTION OF CLAIMS—REFERENCE TO SPECIFICATION.

While the use in a claim of a patent of the words "substantially as specified," or equivalent words, import into the claim so much of the specification as is necessary to describe in particular an element embraced in it, such words cannot be given effect to read into the claim an element described in the specification, and included in other claims, but not mentioned in such claim, for the purpose of giving identity to claims which in terms are intelligibly different.

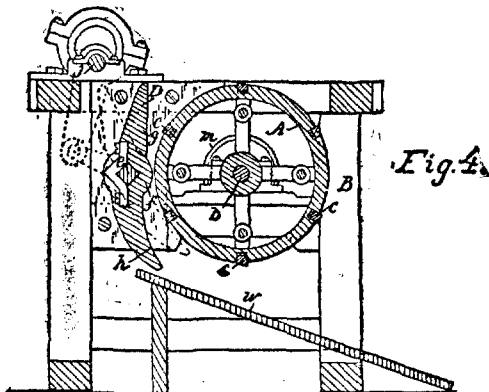
2. SAME—INFRINGEMENT—CLAY DISINTEGRATOR.

The Potts patent, No. 322,393, for a clay disintegrator, claim 3, which covers broadly in a clay disintegrator "a cylinder arranged to revolve, and having scraping bars attached to its periphery, and an inclined plate * * * forming opposite sides of a trough for the reception of clay," if valid, is so limited by the prior art that it is not infringed by a machine in which a plain revolving cylinder is substituted for the inclined plate.

Appeal from the Circuit Court of the United States for the District of Indiana.

This appeal is from a decree adjudging the validity, and infringement by the appellant, of claim 3 of letters patent of the United States No. 322,393, issued on July 14, 1885, to C. and A. Potts for a clay disintegrator. The specification, in so far as it need be quoted, Fig. 4, which shows a vertical section, and the claims of the patent are as follows:

"Our invention relates to an improved machine for finely dividing and tempering clay. The object of our improvement is to disintegrate the clay by means of a revolving cylinder, which shall remove successive portions from a mass of clay which is automatically pressed against the cylinder, as herein-after fully described. The accompanying drawings illustrate our invention:



"* * * The opposed sides of cylinder A and the upper and central portions of plate D form, together with sheet-metal end plates, s, s, which are secured to the frame, a trough, one side of which approaches and recedes from the other at intervals, and which has at the bottom a narrowing opening, t, of constant width. The operation of our machine is as follows: Plate D being swung back to the position shown in dotted lines Fig. 4, the moist, untempered clay is thrown into the trough above mentioned. Cylinder A revolving rapidly, successive portions are removed from the mass of clay, and car-

ried through the opening, *t*, by the scraping bars, *c*. At the same time the upper portion of the plate *D* moves slowly towards the cylinder, thus keeping the mass of clay in close contact with the cylinder as successive portions are removed. The force with which plate *D* is moved towards the cylinder is regulated by drawing the intermediate friction wheel, *p*, more or less closely in contact with the wheels *n* and *o*, by means of the screw nut, *u*, thus lengthening or shortening the frame, *r*, the purpose being to cause enough friction between the wheels to move plate *D* sufficiently to keep the clay in contact with the cylinder, and also to slip when necessary to prevent undue pressure against the cylinder. The finely divided clay, after passing through the opening, *t*, falls upon the lower curved portion of plate *D*, and from thence to the incline, *w*. If the clay is quite moist, some of it will adhere to the curved portion of the plate, and will again be brought in contact with the cylinder as the upper portion of the plate recedes to receive a new supply of clay, and will thus be removed. It is desirable at times, in disintegrating dry or nearly dry clay, or other like substance, to feed the mass to the cylinder without great pressure. For this purpose we disconnect the yoke, *k*, and arm, *l*, and throw the wheel *p* out of engagement with the wheel *o*. By turning wheel *o* by hand, plate *D* may now be set at a suitable angle, as that shown in dotted lines, Fig. 4, or any intermediate angle between that and the position shown in full lines, so that the mass is fed to the cylinder by force of gravitation alone.

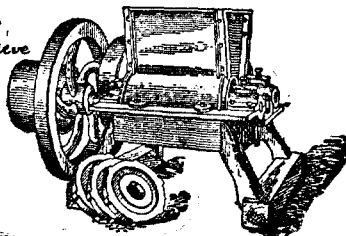
"We claim as our invention: (1) In a clay disintegrator, a supporting frame, a cylinder arranged to revolve, and a swinging plate, both mounted in said frame, and forming opposite sides of a trough for the reception of clay, and means for swinging said plate alternately towards and from said cylinder; all combined substantially as specified. (2) In a clay disintegrator, a supporting frame, a cylinder arranged to revolve, and having scraping bars attached to its periphery, and a swinging plate, both mounted in said frame, and forming opposite sides of a trough for the reception of clay, and means for swinging said plate alternately towards and from said cylinder; all combined substantially as specified. (3) In a clay disintegrator, a supporting frame, a cylinder arranged to revolve, and having scraping bars attached to its periphery, and an inclined plate, both mounted in said frame, and forming opposite sides of a trough for the reception of clay; all combined substantially as specified. (4) In a clay disintegrator, the combination, with the revolving cylinder of the swinging plate, consisting of a central cylindrical portion, an upper straight portion, and a lower curved portion; all substantially as specified. (5) The combination, with the supporting frame, the revolving cylinder, and the swinging plate, of the shaft, *j*, eccentric, *i*, yoke, *k*, arm, *l*, and wheels, *n*, *o*, and *p*, substantially as and for the purpose specified. (6) In a clay disintegrator, the combination, with cylinder *A*, having a series of longitudinal grooves, of the scraping bars, *c*, adjustably secured in said grooves, for the purpose specified."

The sixth claim of the patent has been in litigation in the Sixth circuit, and has been declared valid by the Supreme Court and by the United States circuit court of appeals for that circuit, each reversing a decree of the circuit court. *Potts & Co. v. Creager*, 155 U. S. 597, 15 Sup. Ct. 194, 39 L. Ed. 275; *Id.* (C. C.) 44 Fed. 680; *In re Potts*, 166 U. S. 263, 17 Sup. Ct. 520, 41 L. Ed. 994; *C. & A. Potts & Co. v. Creager*, 71 Fed. 574; *Potts & Co. v. Creager*, 38 C. C. A. 47, 97 Fed. 78; *Id.* (C. C.) 77 Fed. 454. In the case that was before the Supreme Court the following patents and publications were in evidence as anticipatory: No. 33,119, to J. R. Whittemore; 49,714, to R. Butterworth; 52,472, to T. J. Wells; 53,598, to C. T. Frost; 57,280, to John Blackie; 61,932, to Warren Gale; 92,997, to G. H. Peabody; 110,927, to I. and W. D. Mayfield; 116,039, to M. R. Fletcher; 125,159, to A. Alexander; 160,618, to D. Rudy; 207,717, to J. Creager; 225,976, to G. H. Ennis; 231,512, to A. Voelk; 242,387, to J. W. Smith; 291,654, to G. Van Name; 297,764, to J. M. Case; 320,905, to Alsip & Drake; English patent No. 1,671, to Cooke, Bombroffe, and Baker, dated May 11, 1874; two extracts from Knight's Mechanical Dictionary, known as "No. 1" and "No. 2;" and a certain old device known as the "Creager Wood-Polishing Machine." In this case the following were pleaded and put in evidence as anticipatory: No. 17,505, to Hersey and Van Ripper;

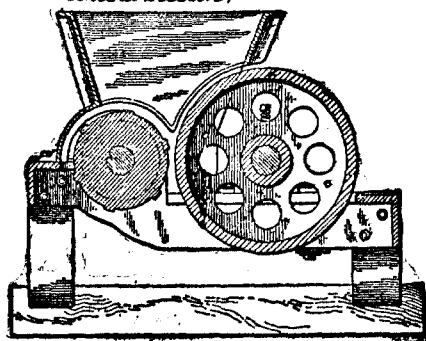
66,488, to Isaac Gregg; 116,039, to M. B. Fletcher; 159,334, to A. Kumpf; 196,082, to P. W. Gates; 203,364, to D. C. Newell; 203,794, to S. Stutz; 211,316, to L. J. Bennett; 214,384, to W. L. Gregg; 246,992, to J. C. Anderson; 271,589, to J. C. Anderson; 289,025, to J. W. Penfield; 293,001, to L. D. Ferguson; English patent No. 1,671, of 1874, to Cooke, Bombroffe, and Baker. And the following, not pleaded, were put in evidence: No. 66,536, to W. H. Thomas; 139,804, to Mills & Mills; 202,940, to P. W. Gates; 274,574, to S. Dodson; 286,520, to W. Andrus; 284,613, to H. Cockell; 251,660, to W. W. Wallace; 312,667, to J. S. Smith; 384,278, to George Potts. On the strength of testimony which was not before the Supreme Court, it is now insisted that the Newell patent, No. 203,364, and the Cooke English patent anticipated the Potts machine as a disintegrator of clay.

The following cuts represent a machine manufactured by the appellants:

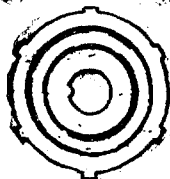
*Fig. 1.-
Perspective*



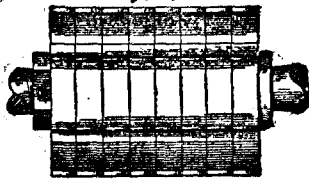
*Fig. 2.-
Central Section.*



*Fig. 3.-
Elevation of single
Cylinder, Back View.*



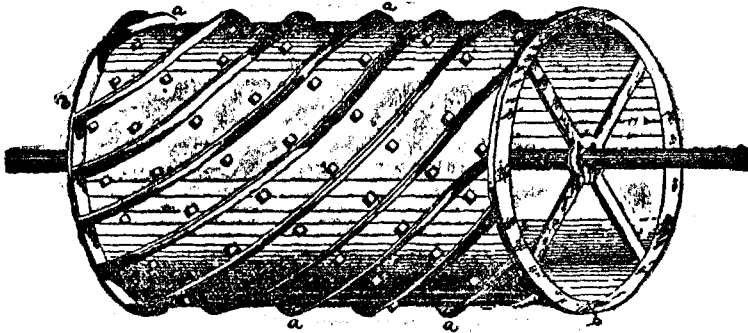
*Fig. 4.-
Side Elevation of
Cylinder*



And the following is a drawing of a spiral ribbed roll manufactured by the appellants, which they now use instead of the form of roll illustrated above:



The following is a copy of the drawing of English letters patent No. 1,671, issued to Cooke, Bombroffe, and Baker:



"This invention consists," says the patent, "in adapting to the ordinary plain or cylindrical rollers, employed in pulverizing, grinding, or reducing clay or other substance, any suitable number of iron, steel, or other metal ribs fixed on the rollers so as to take a spiral or Archimedean course, and secured at each end with metal rings, screw bolts, or their equivalents, so that the scraper usually employed cleans all at the same time; or the rollers and ribs may be made in one casting, and a number of steel or iron studs or spikes are employed, fixed at or cast with the rollers, and projecting from the outer surface thereof between the ribs; the object of such arrangement being to more completely disintegrate, pulverize, and reduce the material, and thus produce a fine clay, with the advantage of using up waste, and with an economy in steam, horse, or manual power. One or more of these rollers are employed in a mill, and, although specially applicable to pulverizing clay, they may be advantageously employed for the reduction of other substances. * * * Although the drawing represents the ribs as connected by metal rings to the roller, we do not confine ourselves to this method, as has been previously stated. The ribs may be connected to the roller by screw bolts or other efficient means, or they may be cast in one piece with the roller. Having thus described our invention, what we claim is the combination with the ordinary cylindrical or plain rollers of the spiral ribs, *a*, fixed to the roller by the rings, *b*, or by other suitable means, and in conjunction with the metal studs or spikes arranged between each rib in the manner and for the purposes substantially as hereinbefore described."

E. E. Wood and Wm. R. Wood, for appellant.
Chester Bradford, for appellee.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

The decision of the supreme court in *Potts & Co. v. Creager* is not technically determinative of this case, because the parties are different, and because the claims in issue now and then are not the same. Only the sixth claim of the patent was adjudged valid in that case. The third, only, is now in question. So far as found applicable, the opinion of the Supreme Court will, of course, be followed. The claims of the patent have all been set out in the statement of the case because of their bearing upon the construction of the one in suit. Each, as will be seen, differs in some important particular from each of the

others. In the first the special feature of the combination is the swinging plate. No mention is made of the scraping bars, and the revolving cylinder therefore may be plain or smooth. The second embraces all that is shown in the specification and drawings, except that nothing is said of the "central cylindrical portion" of the swinging plate, and nothing of the scraping bars being longitudinal or adjustable. The third, now in suit, includes a revolving cylinder, having scraping bars and an inclined plate, both mounted in a frame, and forming opposite sides of a trough for the reception of clay; but the plate is not characterized as swinging; no mention is made of means for swinging it, or of its having a central cylindrical portion; and nothing is said of the scraping bars being longitudinal or adjustable. In the fourth, as in the first, the cylinder may be without scraping bars, but the plate, in conformity to the specification, must be swinging, and must have a central cylindrical portion, an upper straight portion, and a lower curved portion. In the fifth, again, the revolving cylinder may be without bars, but the swinging plate and the means of swinging are included. In the sixth the elements of the combination are the cylinder having a series of longitudinal grooves and the scraping bars adjustably secured in the grooves. In effect, the last claim is simply for the cylinder with scraping bars adjustably secured in longitudinal grooves when found "in a clay disintegrator." What the other elements or features of the disintegrator should be is manifestly immaterial. The supreme court said of it:

"The only feature of the first patent material to be considered is the cylinder described in the sixth claim as a cylinder having a series of longitudinal grooves, of the scraping bars, c, adjustably secured in said grooves, for the purpose specified."

That could not have been said if any other than the sixth claim of the patent had been in issue.

In *Westinghouse v. Brake Co.*, 170 U. S. 537, 358, 18 Sup. Ct. 707, 717, 42 L. Ed. 1136, 1144, referring to the words "substantially as set forth," the supreme court said, "These words have been uniformly held by us to import into the claim the particulars of the specification;" but this, as we conceive, does not justify the contention of the counsel for the appellee that, the shredding cylinder being claimed as a part of a clay disintegrator, "the specification and drawing should be referred to to determine what elements were required to constitute such a machine." The very fact that the other elements mentioned in the specification, while expressly embraced in the other claims, were not mentioned in the sixth claim, demonstrates an intention to cover by that claim any and all forms of disintegrators in the construction of which that cylinder should be used. Two rollers in combination, it was well known, had been used before for the purpose of grinding clay, as shown in the patent of 1872 to Alexander. In order, therefore, to protect whatever of invention there was in the cylinder with adjustable longitudinal scraping bars, a claim which should cover it in a disintegrator of any construction, with or without a plate or swinging plate, was clearly requisite; and to import a plate into the sixth claim by inference from the specification and drawings would be to deprive the claim, upon the face of the patent,

of the scope of which the Supreme Court declared it to be possessed. The true rule seems to be, as stated in *McCarty v. Railroad Co.*, 160 U. S. 110, 116, 16 Sup. Ct. 240, 242, 40 L. Ed. 358, 361, that, while reference may be made to the specification and drawings of a patent "with a view of showing the connection in which a device is used, and proving that it is an operative device," it is not permissible "to read into a claim an element which is not present for the purpose of making out a case of novelty or infringement." This is not inconsistent with the expression quoted from the *Westinghouse Case*, which means only that, when it is necessary to look beyond a claim for the "particulars" of an element embraced in it, which, for example, may be designated only by a letter of the alphabet, the description given in the specification, so far as necessary to support the claim, may be read into it. Clearly, however, it is not allowable in that way to give identity to claims which in terms are intelligibly different.

Claim three in terms includes an "inclined plate," but not a swinging plate, nor the means for swinging, nor the central cylindrical portion, and only in the absence of these features, one or all, is it distinguishable from the first, second, fourth, and fifth claims respectively. It is, therefore, simply a claim for the combination in a clay disintegrator (necessarily having a supporting frame) of a revolving cylinder having scraping bars attached, and an inclined plate, so mounted as to form opposite sides of a trough for the reception of clay. In view of the prior art it is difficult to perceive invention in this construction. If it be there, it is because of the scraping bars upon the cylinder. But these, it is to be observed, are not required to be of any particular form, and, unless the description of the specification is to be read into the claim, need not be adjustable, and, instead of being located in longitudinal grooves, may be spiral, as in the English patent to Cooke and others. If they are to be according to the specification, the novelty and patentability of the combination would be established by the opinion of the Supreme Court, if the evidence before us were the same in substance as that in the record before that court; but upon the claim as it reads that opinion seems to have little or no bearing. It is insisted, too, that in important respects the evidence now adduced is different. Particular stress is laid upon the patent to Newell, No. 203,364, the English patent, and the proof adduced to show that they are operative and successful machines, doing what is claimed for the Potts device. The Newell patent was not before the Supreme Court, and the proof here seems to show that, as claimed for it, it delivers the clay, not in compact sheets, but in a "disintegrated pulpy condition, which readily takes water, and renders further tempering an easy matter." The specification says of the device that, "instead of making the teeth in the periphery of a series of interlocking ridges or angular rings on the cylindrical surfaces of the rollers, the present invention consists in making shallow teeth in angular sides of the rings, of sufficient depth to effect a hold on the material to be ground, without allowing any of it to pass unground." The structure of the Newell device is so far different from that of the Potts patent that it could hardly be deemed to be an anticipation, but it does seem to establish that the

Potts machine was not the first "to disintegrate and pulverize," as distinguished from crushing, the clay.

The English patent and the conflicting testimony of experts concerning it were in the case of Potts & Co. v. Creager, and presumably were considered, but no direct mention of the patent is to be found in the opinion. The testimony in this case shows it to be a practical device, and that the ribbed roll, which the appellant commenced in August, 1899, to manufacture and use instead of the cylinder with longitudinal bars, is preferable, because it runs without the jar caused by the impact of the straight bars, and delivers the clay in as good or better condition; the centrifugal force produced by the rapid revolution of the roll preventing the spaces between the spiral ribs from being filled up so as to make, as the experts for the appellee declared probable or inevitable, an evenly surfaced cylinder. If that testimony be accepted as true,—and it does not seem to be controverted,—it is difficult to see how patentable novelty can be conceded to the Potts cylinder and bars. The difference is only in the substitution of longitudinal and adjustable for spiral scraping bars, and in the third claim that difference seems to be eliminated. To say the least, the ribbed roll made in conformity to the English patent cannot be regarded as an infringing equivalent of the revolving cylinder with adjustable scraping bars fixed in longitudinal grooves upon its periphery.

In view of the prior art, and, indeed, upon the face of the patent, it seems entirely probable that the swinging plate was supposed to be the principal feature of the invention, and that the adjustable bars on the cylinder must have been adopted only as substitutes for the bars, spiral or straight, and for the spikes, knives, grooves, ridges, and teeth already in well-known use in machines designed for the treatment of clay. While the second claim embraces approximately all that is in the specification, and the first, fourth, and fifth each omit one or more features either of the plate or cylinder, the third and sixth are each made as broad as possible by the introduction of the fewest possible elements consistent with a differentiation of one from the other; the sixth being confined to a cylinder (clearly intended to revolve) equipped with adjustable longitudinal bars, and the third to a revolving cylinder with scraping bars on its periphery, and an inclined plate, of the simplest form, so mounted with the cylinder as to form between them a trough for the reception of clay. Whether the third claim is valid need not be decided. If so, it must be restricted to narrow lines, which make it impossible to say that the substitution of a plain revolving cylinder for the inclined plate is an infringement. It is true that two parallel and confronting cylinders necessarily have between them a space somewhat resembling a trough; but there was nothing new in that, and to so place cylinders for the purpose of making a trough between them could not possibly have been made the subject of a patent monopoly. Besides, a trough for the reception of clay intended to be passed between cylinders was never attempted to be formed in that way, and that it could be done with practical success it is impossible to believe. There must be, and in the Potts machine, when made with two cylinders, there always has been, a hopper, from which the clay descends to the line, or nearly to the

line, of passage between the cylinders. There was propriety in saying that the cylinder and inclined plate of the third claim formed the opposite sides of a trough, but to call the space between opposing cylinders a trough is fanciful and impractical. To put into a disintegrator an inclined plate, and especially a swinging plate, was an advance—at least an attempt at advance—upon the prior art, but to change the swinging plate to an inclined plate, and then to reject that, and put in its place a revolving cylinder, was simply a return pro tanto to the old art. If, as contended, the inclined plate of the claim is to be regarded as the swinging plate of the specification having a cylindrical central portion, it becomes only the more evident that, instead of appropriating the invention, the appellant, by using two opposing cylinders, simply returned to the prior art. The cylinder, substituted for the plate, does not constitute one side of a trough for the reception of clay; and, in so far as it performs the office of the cylindrical central portion of the plate, besides doing it better, it does it by a different method.

The decree below is reversed, with instruction to dismiss the bill.

POWELL et al. v. LEICESTER MILLS CO. et al.

(Circuit Court of Appeals, Third Circuit. April 24, 1901.)

No. 25.

1. PATENTS—INFRINGEMENT—KNITTING MACHINES.

The Powell patent, No. 510,934, for a web-holder actuating mechanism for automatic knitting machines, embodies an invention of high merit, which resulted in making a substantial advance in the art, and as such is entitled to favorable regard. Claims 1 and 2 construed, and held infringed by the Leicester Mills machine, which employs different, but mechanically equivalent, mechanism to accomplish the same result in substantially the same way.

2. SAME.

Infringement is not avoided by adding a new function to an element of a combination which does not affect its performance of the function of the patent.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

For former reports, see 92 Fed. 115, 103 Fed. 476.

Charles Howson, for appellants.

H. T. Fenton, for appellees.

Before ACHESON and DALLAS, Circuit Judges, and BUFFINGTON, District Judge.

BUFFINGTON, District Judge. This case concerns automatic straight knitting machines. In the court below John G. Powell and Edward Powell charged infringement of the two claims of patent No. 510,934, granted to them December 19, 1893, for a web-holder actuating device for such machine. That court, finding there was no infringement, dismissed the bill. Its action in so doing is here assigned for error.

The operative parts of a straight knitting machine are rows of opposing needles, which carry the yarn through successively formed loops; accompanying web sinkers, which hold down the fabric, and serve to doff or withdraw the loops from the hook as they are successively formed; and carriages, which carry the cam mechanism to operate the needles and web sinkers. A straight knitting machine is shaped like an ordinary barn roof, and the knitting is done in an opening corresponding to the roof ridge. The needles are arranged in two straight, opposing rows; are supported and guided on such sloping roof, also styled a "needle bed"; and are adapted to work in the direction of the rafters of a roof towards the ridge opening. The needles are moved forward and backward by reciprocating cams, one for each row of needles; and as fast as the knitting is done at the ridge opening it is drawn down through the center of the machine. The needles have a hook to catch the yarn, and a latch, pivoted on the needle stem just below the hook, adapted to close the hook opening, and allow the hook and its yarn strand to be drawn through a loop as it is lowered, and as it is raised the latch opens and permits the newly-formed loop of yarn to go down to the needle shank, where it forms a loop itself. In this way mechanical knitting is possible, since knitting is simply the interlacing of yarn in a series of connected loops. Between the needles are placed web sinkers, which, as their names indicate, serve to hold down the fabric and draw the loops from the needle hook as they are formed. In the knitting of a stocking on these machines there are three operations: First. "Setting up," in which the needles of both rows are simultaneously actuated to seize the yarn, and hold it within their hooks in zigzag fashion. In this operation the needles of one row are thrust forward to occupy the space between the needles of the opposite row. The second operation is "to and fro" knitting. This serves to knit the pocket constituting the heel and toe by a respective narrowing and widening process, which need not be here described. This operation is done exclusively by the needles of one side and their accompanying web sinkers, the knitting being "to and fro" in both directions. In this operation it will be observed one line of needles and its web sinkers are working, but the entire set opposite, and its corresponding web sinkers, are idle. The third is styled "regular" knitting. This is the regular tubular process, which knits the foot and the leg. In this operation one set of needles knits forward, one on one side, and the other knits backward on the other, so that the sets of needles and their accompanying web sinkers are alternately working and idle, while the other sets are, at corresponding times, alternately idle and working. A machine, as thus described, successfully knit stockings before the patent in suit. In these machines, however, the mechanism was such that the web holders operated continuously, and it was impossible to set them directly opposite the needles of the opposing head. To prevent the web sinkers and needles opposite striking, it was necessary to leave space enough between each two contiguous needles for a web holder of the same row and for a needle and web holder of the opposite row; otherwise, the raising

of the web holders of one row would bring them in contact with the advancing needles of the row facing. As a result of this construction, the machines could only knit coarse-gauge goods. This difficulty the complainants wholly overcame by the patent in suit, and produced a machine which was commercially adapted to knit fine-gauge fabrics. The invention was of high merit, resulted in a very substantial advance in the art, and as such is entitled to very favorable regard, unless its relative importance is minimized by another patent,—No. 523,867,—applied for by the same patentee a few months earlier. This prior patent to Powell, while aiming at the same general object as the one in suit, to wit, fine-gauge knitting, was along wholly different lines. It retained the stationary web-sinker cam of the old art with the complexity of mechanism incident to the old style of construction, and did not embody the simple and novel element of a shifting web-sinker cam, first shown in the patent in suit. Very few machines embodying its principles were built, its methods were abandoned, and it has filled no working place in the art. Its disclosures were not such as to forestall Powell's later device, or derogate from the marked and substantial advance disclosed by him in the branch of fine-gauge knitting. It will be noted that in all machines prior to Powell's patent the web sinkers were raised by cams, which, when the machine was operated, occupied a fixed relation to them, and this fixed position of the web-sinker cam was the obstacle that precluded fine-gauge mechanism and knitting. The fixed position of the web-sinker cam, and its consequent fixed relation to the needle cams, was such that, when the needles were vibrated, both sets of web sinkers had also to vibrate. This difficulty Powell overcame by devising means in which the web-sinker actuating mechanism became wholly independent of the needle sets. So radical was this change that in knitting they could, independently of the needles, take three different positions in relation to said needles. In "setting up," where they were not functionally needed, the web sinkers on both sides could be made inactive while both sets of needles were at work. In "to and fro" knitting the row of web sinkers on the active side could be functionally operated both in the forward and backward movement of the carriage, and the web sinkers on the other side made inactive. In "regular" knitting they could be alternately active and inactive during the knitting of each half of the tube. The mechanism devised by Powell caused the web sinkers to move only when functionally needed. At all other times they were idle. This result Powell accomplished by means of a shifting or movable web-sinker cam, the use of which as a web-sinker actuating device he first disclosed. The claims here in question are the first and second, which are:

"(1) In a machine having two opposite sets of needles working alternately for the production of tubular web, and movable web holders for each set of needles, the combination of said needles and web holders, with cams for operating the latter, and with means for throwing said cams into and out of operative position, whereby each set of web holders may be caused to functionally work only when its own set of needles is in action, substantially as specified. (2) In a machine having two opposite sets of needles working alternately for the production of tubular web, and simultaneously for the pro-

duction of a 'setting up' course, and movable web holders for each set of needles, the combination of said needles and web holders with cams actuating the latter, and means for throwing one set of cams into action during one movement of the head, and the other set into action during the opposite movement of the head, and means for throwing both sets of cams out of action simultaneously during the one movement of the head devoted to the formation of the 'setting up' course, substantially as specified."

There is nothing in these claims to limit them to specific constructions, and we find nothing in the prior art to impose such limitations. In this connection we note Bennor's prior patent, No. 483,317, which, when all is said, was only for a coarse-gauge machine. In it we find a longitudinally slotted T head, physically somewhat resembling, but in functional power and use totally unlike, the T head afterwards employed by Powell. The slot therein was evidently for set-screw adjustment of the cam from and towards the sinker butts, to make up for wear. Such adjustment and use of the slot were made only when the machine was idle. When the machine was operated the cam was immovably fixed, as in the old style, and by reason of such fixed relation its product was limited to coarse-gauge fabrics. In Powell's patent in suit we find that in one head or side of the knitting machine the web sinker cam bar has two movable cams mounted on a crossbar carried on a slide guided in the head, and provided with a cam slot, which engages with a pin on a crossbar, which latter is adapted to be operated by stops on the machine frame, and is wholly independent of the needle-actuating mechanism. So long as these movable cams remain in the recess of the cam bar, they clear the sinker butts, and are inoperative. When, however, the bar engages with the stop, they are projected, the cam strikes the sinker butts, and the web sinkers are vibrated. On the other head the same kind of sliding T head is used, with but one movable cam. On this head one cam suffices, since the web sinkers are only actuated when the carriage travels in one direction, while on the other two are necessary, since the web sinkers must co-act with the needles in both forward and backward carriage movement for "to and fro" knitting. It will, of course, be apparent that, as both web sinkers and needles are simultaneously operative and simultaneously inoperative in the different stages of both "regular" and "to and fro" knitting, and since they both move transversely on the same plane, they could be connected rigidly, and actuated by a single slide bar and a single stop, instead of by two separate slide bars acting simultaneously upon two separate stops. For functional purposes during these operations two independent slide bars working simultaneously and one actuating both sets of cams are substantially the same. When, however, the third relation is desired, to wit, "setting up," where the needles are active and web sinkers inoperative, then the web sinkers must be actuated by a different mechanism, and a third element is required. To accomplish this, the slide bar on the side with the double cam has an enlargement with a lug adapted to engage a special stop. This releases the cams before starting the "setting up" course. They are thrown into action after this course, and remain in action continuously during "to and fro" knitting and alternately during tubular work. The alleged infringing device is

different in form, but an analysis of its mechanism and functional operation shows that it uses the same elements, operating in substantially the same way, as the combination of Powell's claims. Respondent journaled its carriage at the lower edge of the needle roof, instead of the upper, as Powell did. Upon the same journal, and between the arms of the carriage body, so as to respond to every movement of the carriage, and to constitute a part thereof, was placed a swinging arm carrying both the needle cams and the web-sinker cams. As these two sets of cams bore a fixed relative relation to each other when both were operative, and also when both were inoperative, it is clear that they could both be simultaneously made operative and also made inoperative by a single slide bar, which causes the rocker arm to swing upward or allowed it to swing downward. Such construction we find adopted in the respondents' machine. Instead of the cams being forced outward and inward, and at right angles with the journal, as in Powell, we find them in respondents' machine swung upward and downward, so as to respectively clear or engage the butts of the sinkers and the needles. This difference is one of form, not substance. In both we have cams for operating the web holders, we have means for throwing the cams into and out of operative position, and the result is that each set of web holders works only when its own set of needles is in operation. In Powell the cam is by a stop and slide bar shifted forward and backward so that it will clear or engage the sinker butts; in the respondents' structure the cam is shifted up or down so that it will clear or engage the sinker butts. It will thus be seen that in tubular knitting, to which the first claim applies, where the needles and sinkers are both in operation and both out of operation together, these changes can be made by either one slide bar actuating both sets of cams conjointly, or by two slide bars actuating each set simultaneously. True, the slide bar which shifts the sinker cam in Powell shifts it alone, while in respondents' it not only shifts the sinker cam, but the needle cam as well. But this added burden of needle-cam shift, which in no way affects its web-sinker shifting function, will not relieve it from infringement. *Massey v. Palm* (C. C.) 51 Fed. 825. It is therefore clear the first claim is infringed. The second claim covers "setting up," where, as we have seen, both sets of needles and neither set of sinkers are in operation,—a different relation of needles and web sinkers from those in both "regular" or "to and fro" knitting. It was noted of respondents' machine that, as the needle and sinker cams bore a fixed relative relation to each other, so far as the swinging of the arm was concerned, therefore, when the slide bar swung the needle cams into operative relation, it swung the sinker cams also into operative relation as well. Obviously, this would not avail in "setting up." To obviate this difficulty, the respondents place both needle cams and web-sinker cams upon a slide in the swing arm, which is actuated by a second slide bar. The effect of this second slide bar is such as to shift or slide the cams to a point where they travel in a different arc, or a circle, and strike the needle butts and sinker butts in a different way than when swung in regular knitting. The result of

this slightly-changed angle of impact is to put the needles in an intermediate relation of action sufficient for "setting up," and to put the web sinkers in a position where, while they are slightly vibrated, they are functionally powerless, and do not interfere with the opposing needles. Now, while this is true that in Powell's device the slide bar which shifts the web-sinker cam in "setting up" shifts it alone, and that respondents make it shift not alone their sinker cams, but their needle cams as well, yet this additional duty does not make it any the less an infringement. The device of Powell and the claims in question are, as noted, for a web-holder actuating mechanism. Such web-holder mechanism the respondents have avoided in form, but appropriated in substance. In springs we find the equivalent of a cam bar, and in other respects they use the mechanical equivalents of Powell's device. They secure the same result, and secure it in substantially the same way, as the patented device. We are of opinion infringement of both claims is shown. The decree of the court below will be reversed, and the record remitted, with instructions to enter a decree in favor of the complainants.

BRANSON et al. v. KUTZ et al.

(Circuit Court of Appeals, Third Circuit. April 26, 1901.)

No. 30.

PATENTS—INFRINGEMENT—KNITTING MACHINES.

The Branson patent, No. 333,102, relating to devices for mechanically shifting the needles of circular knitting machines, in order to knit stocking heels and toes, is entitled only to a restricted construction, in view of the prior art, and of the fact that the device shown is of doubtful utility, and has never gone into practical use. As so construed, *held* not infringed.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

Joshua Pusey and Edmund Wetmore, for appellants.

Joseph C. Fraley and Frederick P. Fish, for appellees.

Before ACHESON and GRAY, Circuit Judges, and BUFFINGTON, District Judge.

BUFFINGTON, District Judge. The appellants filed a bill in the court below, charging respondents with infringing the first, fourth, fifth, and sixth claims of patent No. 333,102, granted December 29, 1885, to Edwin R. Branson for a knitting machine. The action of that court in dismissing the bill (105 Fed. 974) on the ground of non-infringement is here assigned in error. After due consideration, we are of opinion there was no error, and the decree below should be affirmed. The patent concerns devices for mechanically shifting the needles of circular knitting machines in order to knit stocking heels and toes. Circular knitting machines have long been known in the art, and it was old to accomplish by hand the work sought by this patent to be done by mechanism. Such result had also been attained by automatic mechanical devices prior to the patent in suit, but not by

the particular means or in the mode suggested by Branson's. In circular knitting machines the needles are arranged in longitudinal exterior grooves of a metal cylinder. Each needle has near its lower end a lateral butt, which projects beyond the groove, and is adapted to engage with a cam. The upper end of the needle forms a round-top hook. Just below the throat of the hook is pivoted a thin metallic strip, called a "latch." When turned upward, the latch overlaps the point of the hook. Knitting consists in sliding the needles, one after another, up and down their grooves, and carrying a thread past them in position to be hooked when the needle is up. As the needle descends carrying the thread, the latch is forced up by contact with a loop previously formed around the needle shank, and allows the hook to pass through the loop and shed it. As the needle rises, the hooked thread passes down from the hook to the shank, and in turn becomes a loop. Repetition of these operations results in knitting a tubular fabric consisting of continuous spiral rows of loops, each loop being drawn through the one next to it. The needles are actuated by cams projecting inwardly from the walls of a cam cylinder which surrounds the needle cylinder. These cams are shaped so as to engage the needle butts when rotated in either direction. Knitting can therefore be done continuously by rotary, or to and fro by reciprocated, motion. In the former operation a tubular fabric is knit; in the latter, the cams are carried past a certain number of needles only, and but a part of a tube is knit, the edges being formed by the loops upon the extreme needles actuated. If a needle is pushed so far up or so far down in its groove that its butt is above or below the belt of cam engagement, such needle will remain stationary, simply holding on its shank the loop formed thereon. This position is called the "idle level." The needles within the belt of cam engagement will, however, continue knitting. The leg having been knit, knitting of the heel is effected by raising half the needles to the idle level. The cam cylinder is then reciprocated so as to actuate the half circle of needles which remains on the working level. The needles at the outer ends of this circle are raised one by one to the idle level, so that each successive row of loops is shorter. This gradually narrows the fabric towards the apex of the heel. When this point is reached the process is reversed, and one needle at each end of those on the idle level is dropped to the working level at each oscillation, until the entire half circle of needles has again resumed knitting. When this is done the heel is formed, and, the needles of the idle half circle being simultaneously dropped to the working level, the rotary motion is resumed, and knitting in the regular tubular process goes on. Raising needles from the working to the idle level, and dropping from the idle to the working level, was done by hand. In this state of the art, patent No. 183,167 was on October 10, 1876, issued to one Hollen. This patent was the first to show a pivoted lever with a notched end, adapted to engage the butt of the first needle of an advancing row, and shift such needle to the idle level. In this device upon the outside of a horizontal cam cylinder a lever is mounted having two notches and an intermediate V-shaped projection. The needle butts extend beyond the outer sur-

face of the cam cylinder, and are adapted to engage with the pivoted lever when the latter is thrown into operative position. When in such position the butt of the first needle of the advancing row engages the notch on one side of the projection. As the needle cylinder rotates, the butt turns the lever over, but is itself raised to the idle level by the advance of the lever. The remaining needles of the row advance in order, push the lever forward, and leave it set in a position where, on the return of the row, it lifts the first needle to the idle level by a similar return process. The model from the patent office brought into court showed that Hollen, in a circular knitting machine, effected mechanical shifting of the needles to the idle level in order to narrow. In this state of the art, Branson applied for the patent in suit. His object was, in a vertical machine, to mechanically lift the needles from the working to the idle level to narrow, and to mechanically drop them from the idle to the working level to widen. The mechanism proposed consisted of two notched raising levers, one at each end of the cam and below its level, and two notched dropping levers, one at each end of the cam and above its level. These levers all operated in the way pointed out by Hollen, viz. the first needle of the row engaged the lever notch, carried the lever forward, and was by the lever shifted from the working level, while the needles following remained on such working level. Branson's claims for a lifter were rejected on the Hollen patent. This rejection, acquiesced in by Branson, shows that in the judgment of the office there was no patentable novelty in using two lifting levers instead of one, and in adapting them to a vertical instead of a horizontal machine. The use of such generic levers to serve as droppers mechanically involved providing for the effect of gravity. In view of Hollen's patent, and of the fact noted above that there had existed other devices for accomplishing by automatic devices the result attributed to the patent in suit, by automatically shifting needles from the upper idle to the working level, there may be serious question whether this patent involved patentability; but conceding, for present purposes, its validity, it is quite clear that the novelty of Branson's device must lie in minor details of construction and arrangement. Moreover, it is strongly contended that the patent did not disclose an operative device. This question largely turns on whether the needle-lifting lever, when set, is depressed and raised by virtue of a torsional tension exerted through the spring. m. In the patent, the lifting lever rests on a stop pin, l, which projects through a slot in the cam cylinder. This stop pin is carried on an arm pivoted on the outside of the cam cylinder, and adapted to allow the stop pin to be moved from the lower to the upper end of the slot. The arm is a circular shaped flat spring, and has a retaining pin on it adapted to engage with two openings on the outer side of the cam cylinder, one above the other. This spring presses the retaining pin in the upper or lower opening, respectively, and thus holds the stop pin and the lever resting upon it at the upper end of the slot when it is in operative relation, or at the lower end when it is in inoperative relation. In this operative position the lever would be engaged by the butt of the first needle of the advancing row, and that needle would

be lifted to the idle level; but when it was returned to that position by needle engagement, at the next reciprocating movement of the cylinder, it is quite evident that if it rested without yielding on the pin, l, and the needles were forced up by its rigid fixed position to such level as to clear it while going in that direction, they would not re-engage it when returning in the opposite one.

It is contended by the complainant that the spring of the patent is so constructed and adjusted that the lifting lever, resting on the pin, l, is depressed by the returning needles, and they pass over it at this depressed level, and remain on such a level themselves that when they return they are in line to engage the lever, which has been lifted to its normal operative level by the torsional capacity of the spring. No mention is made in the patent of a spring of such torsional capacity, or of an adjustment of parts to effect such torsional effect, and in the detailed description of the working of the machine no such operation is shown. Not only is there an absence of all reference to any yielding of the pin, l, but the statements of the patent seem to point to the maintenance of the lifting lever in a fixed position. Thus the pin is styled a "stop pin." In describing the adjustment of the lever, but two positions are suggested, "higher or lower in the slot." In these two positions they are "adjusted so as to stand," and such adjustment is stated to be made, not by the torsion of a spring, but "by means of a secondary pin or point," already described, and, for aught the patent states, the only function of the spring is to keep the adjusting pins in engagement with the cylinder holes. Moreover, the arrangements of these adjusting pins are such "that, when engaged with the upper one, the pin, l, will hold the free end of the lifter, i, elevated or above the plane of the shoulder or flange, a, and when engaged with the lower opening the pin, l, will allow the end of the lifter to drop below the plane of the shoulder or flange, a, and out of use." The express mention of holding the lifter above the plane, and the omission of any drop below the plane, save when the pin, l, is lowered, is strongly suggestive that no such yielding adjustment was contemplated. It is also indicative of the patentee's understanding, when he applied for the patent, that he then pointed out as an alternative form of construction one where the lifting lever was maintained in a fixed operative position by a rigid pin. Thus, in his application, as originally filed, he says:

"Other means than the pin, l, and arm or spring, m, could be used for raising and lowering the end of the lifter, i. A simple pin could be used, suitable openings being provided in the cam cylinders through which the pin could be passed to maintain the end of the lifter in proper position; * * * or any form of device adapted to hold the end of the lifter above the ledge or shoulder, a, or allow it to drop below such ledge or shoulder, could be used."

Not only is no such torsional spring action mentioned in the patent, but it is suggestive that in the machine constructed as late as 1890, which is exhibited as evidence of the possible successful commercial adaptation of the patented device, no spring is used to aid the lifter. The contention that the torsional function of the spring was an afterthought is strengthened by the fact that the

patentee, although aided by an ample capital, failed for several years to produce an operative machine. The testimony of Shirmer is that, four years after the application for the patent, Branson, who was in the employ of the witness, was not able to make his machine work, although assisted by competent mechanics with ample shop facilities. Boyle, an experienced manufacturer, had Branson try it at his works four years later. It proved a failure there. In the next year (1891) a lot of machines were built by the James Smith Woolen Company for Messrs. Emerson & Talcott after a model furnished by them and Mr. Branson. The machine built proved inoperative. That they were properly constructed, and followed the lines of the model, is evidenced by the fact that they were paid for in full by Emerson & Talcott. Indeed, that Branson's machine was only a paper ideal, and that so late as 1886 it was only in an experimental stage, is shown by the fact an agreement then made between Branson and Emerson & Talcott contemplated the employment of Branson in experimental work upon it, and the expenditure of money in building machines only in case the experimental work should prove satisfactory. The result of this experimental work, after four years, was the construction of the model after which the unsuccessful machines were built by the James Smith Woolen Company. On the whole, we coincide with the opinion of the court below that the machine of Branson's patent "was, at best, of doubtful utility, and never went into practical use"; and we are further of the opinion that a torsional spring was not disclosed in the patent, and that without it the lifting lever was inoperative. In the patented device the lifter is placed inside the cam, and it therefore works across the arc of a circle. The respondents place it outside of the cam cylinder, with an inwardly projecting end adapted to engage the needle butt. The result is that respondents' lifter works externally in a direction tangential to the curve of the cam cylinder, instead of internally, in the chord of an arc. This difference results in better mechanical engagement with the needles, it avoids striking the butts on a dead center, it gives more room for parts, and permits such lever length that the lever throws the needle without turning over past its own center, and therefore does not require to be reset by direct needle action. In pivoting the lifting lever on the outside of the cam cylinder, respondents follow the lines of Hollen, and not complainants' method. It is also to be noted that the construction and relation of parts of respondents' device is such that the lifters are placed upon and in among the knitting cams, instead of at the side of, and "located below, said cams," as specified in the first claim of the patent. Branson's droppers are also located within the cam cylinder. That this was the important feature in his device, and an earmark thereof, is shown by the statement of the specification that "these droppers may be of the form shown, or of any other form adapted to be located between the needle and cam cylinders, and above the needle cams." The depressing levers are pivoted within the cam cylinder so as to overhang the needle butts. The chord of the arc in which the lever swings is necessarily short; otherwise, the lever would strike the

needle cylinder. In the respondents' machine the dropper is mounted outside the cam cylinder, and is opposite the needle cams, instead of being "located above and at one side of the needle operating cams," as specified in the fourth claim. It is not necessary to detail the substantial differences in operation caused by exterior and interior shifter pivoting. In view of the restricted construction which must be given the patent in suit, we are of opinion that its claims cannot be construed to cover the respondents' machine. Its principles and modes of operation are, owing to exterior pivoting, not to mention the means by which shifting is obtained, wholly different from those found in the interior pivoted device of the complainants. The court below rightfully dismissed this bill, and its decree is affirmed.

E. & H. T. ANTHONY CO. v. GENNERT.

(Circuit Court of Appeals, Third Circuit. April 24, 1901.)

No. 2.

PATENTS—INFRINGEMENT—PHOTOGRAPHIC SHUTTERS.

The Green patent, No. 362,211, for a photographic shutter, consisting of two pairs of wings, construed, and *held* limited to such an attachment of the wings that, when opened, the members of each pair fold back into the case side by side, and, as so limited, *held* not infringed.

Appeal from the Circuit Court of the United States for the District of New Jersey.

Edmund Wetmore, for appellants.

S. L. Moody, for appellee.

Before ACHESON and DALLAS, Circuit Judges, and BUFFINGTON, District Judge.

BUFFINGTON, District Judge. In this case the circuit court for the district of New Jersey, finding noninfringement, dismissed a bill brought by the appellants against Gottlieb Gennert, charging infringement of the first claim of patent No. 362,211, granted May 3, 1887, to George F. Green, for a photographic shutter. 99 Fed. 95. Such action is here assigned for error. The patent in suit was for an improvement upon a shutter shown in Green's prior patent, No. 342,693. In the earlier patent, two sectional wings, large enough to overlap each other's edges, were pivoted at the lower side of the frame. By certain pneumatic mechanism, connections, locks, and counterweights, not necessary to here specify, the two sectional shutters were drawn towards each other, locked to prevent recoil, and overlapped each other, and the edge of the lens opening as well, so as to exclude light. In such device each sectional shutter was wider than half the lens opening, and a correspondingly wide space for side storage, clear of the lens opening, was provided at each side. It will thus be seen the width required for storage was greater than that for lens opening. The patent in suit provided means for lessening the side storage space required, and permitted use of a large lens. This

was done by subdividing each sectional shutter into two parts, and storing the two subdivisions side by side. Thus the patentee says:

"In my patent of May 26, 1886, there were two wings pivoted to the frame. Necessarily, said wings were each more than half the diameter of the lens, and the whole width required for the shutter was more than twice the diameter of the lens opening. By dividing each wing—that is to say, by making four wings instead of two—I am enabled to reduce the whole width required to considerably less than double the diameter of said opening."

Such being the case, the patentable novelty would seem to lie in the means employed to adapt the four parts, rather than in the subdivision of a two-part shutter into four parts. Accordingly we find in the claim, which is for "a photographic shutter provided with four wings, A, A, B, B, overlapping each other, and having different ranges of movement, whereby they are enabled to fold back into the case side by side, substantially as set forth," a designation of four specified wings limited to certain specified mechanical operations. The "four wings, A, A, B, B," are specific elements of the claims. The patent specifically describes them, viz.: "A, A, are the outer, or short-stroke, wings, * * * pivoted * * * one on each side of the median line. * * * B, B, are the inner, or long-stroke, wings, * * * pivoted on the median line of the aperture, and midway between the pins" on which A, A, are pivoted. The claims describe the wings as "overlapping" each other, and the specification shows that this is an overlapping to exclude light, and takes place when the shutter is closed. Thus, referring to wings A, A, the specification says, "The outer or back edge of said wing is curved, but with a larger radius than the aperture, so that, when closed, said wing will lap over and past the edge of the aperture." So, also referring to wings B, B, and manifestly from the context and language used, in the closed position "they overlap the wings A, A, at their back edges, and overlap each other at their middle or inner edges." The wings are further described as "having different ranges of motion." Of these ranges one is specifically described; the other is implied. Those specified are the short and long stroke of the wings, caused by their respective median and nonmedian pivoting. Thus the specification says: "The wings A, A, are pivoted one on each side of the median line. By this means the outer wings, A, A, only a little more than half close the aperture, and therefore do not require a movement much in excess of one-fourth the aperture." The pivot for the long-stroke wings, B, B, as we have seen, is on the median line. "The center of motion for the larger or outer wing, A, is placed at one side, because said wing has a less distance to move than wing B." That the wings have different ranges or motion, in that they travel on different vertical planes, is not explicitly, but impliedly, expressed in the statement that, when closed, the wings overlap each other, and "when the shutter opens the wings B, B, close back in the same space occupied by the wings A, A." These different ranges of movement, caused by median and nonmedian pivoting, and by the different vertical planes of travel, are such, in the limitation of the claim, "whereby they [the wings] are enabled to fold back into the case side by side." The mode of operation thus described by the

patentee is caused by three elements: First, the wings are all pivoted on one side of the lens opening; second, they have different centers of motion, arising from median and nonmedian pivoting; third, the wings co-act, by means of pins and slots, with each other, to effect long and short strokes. It will thus be seen that the only device disclosed by the patent is one where the means and relations suggested result in the functional limitation that the wings "are enabled to fold back into the case side by side." In the respondent's device we find four sectional wings, but in different relations to each other from those of the patent in suit. One set of wings is pivoted at the upper and one at the under side of the lens opening. Both sets have nonmedian centers of motion. The wings do not move by engaging each other, and effect the functional result incident to every sectional shutter, viz. exclusion of light; but when they open to admit light they do it in a wholly different way from the patented device. The sets of wings, instead of folding back into the case side by side, withdraw from each other to the four corners. Both pivoting and relation of parts are such that the wings cannot fold back into the case side by side, and effect the expressed purpose of the patent, viz. "when the shutter opens, the wings B, B, close back in the same space occupied by the wings A, A." To ignore the express functional limitation of the claim, viz. "whereby they are enabled to fold back into the case side by side," would be to create a new claim; not interpret the one granted. The court below rightly held there was no infringement. The decree is therefore affirmed.

UNION WELTING CO. v. McCARTER.

(Circuit Court of Appeals, First Circuit. May 16, 1901.)

No. 365.

PATENTS—INVENTION—DESIGN FOR SEAM-WELTING STRIP.

The Merrick design patent, No. 29,914, for a seam-welting strip, *held void on demurrer for lack of invention manifest on its face.*

Appeal from the Circuit Court of the United States for the District of Massachusetts.

The following is the opinion of the circuit court (LOWELL, District Judge):

This is a bill in equity for the infringement of design patent No. 29,914, for a seam-welting strip. The defendant has demurred to the bill for want of invention in the patent. That the question of invention, though purely an issue of fact, may sometimes be raised by a demurrer to a bill in equity, is now settled. *Patent Button Co. v. Consolidated Fastener Co.* (C. C.) 84 Fed. 189, and cases therein cited. Even in *New York Belting & Packing Co. v. New Jersey Car Spring & Rubber Co.*, 137 U. S. 445, 449, 11 Sup. Ct. 193, 195, 34 L. Ed. 741, 743, in which the supreme court reversed the decree of the circuit court sustaining a demurrer to the bill, Mr. Justice Bradley said: "We think that the judge was right in holding that the first claim of the patent is altogether too broad to be sustained, and for the reasons stated in the opinion." But this court, though it must now recognize that abnormal practice, which, in the absence of decisions by the supreme court, might be deemed contrary to the general principles of law, must always be mindful of the

considerations forcibly stated by Judge Putnam in the Patent Button Co Case, above cited. A demurrer for want of invention can be sustained "only in an unusual case, and under such circumstances that the court could see clearly that under no state of proofs which could possibly be suggested could patentability be shown." This can be affirmed, I think, of the patent in suit. Upon its face, and irrespective of any proof, probable or possible, it appears to me manifestly to lack invention. Indeed, there is difficulty in discovering in the specifications or in the drawings any design whatsoever, patentable or otherwise; and, even if there be such design in the welting strip taken by itself, yet in the applied samples exhibited by way of illustration that design is effectually concealed. In *Buckingham v. Iron Co.* (C. C.) 51 Fed. 236, the court held void on demurrer a patent for a plow beam having an upper and lower flange and a concavity between them. This was a patent for machinery, but in a design patent the cutting away a part of the sides of a strip appears to me to require no more invention than in a patent concerned with mechanical structure. To require or to permit the complainant to introduce proofs would, I think, put both parties to an expense manifestly needless. While a judge should be diffident to declare without proofs, and with no knowledge of the art, that a so-called "design" discloses no patentable invention, yet I must think that, if a design patent be ever open to demurrer, it is in this case. Demurrer sustained.

William A. Macleod, for appellant.

Odin B. Roberts (Robert Cushman, on the brief), for appellee.

Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

PER CURIAM. This appeal relates to a patent for a design. The case, in the circuit court, was disposed of against the complainant on the demurrer of the respondent. The learned judge who sat in that court, referring to the patent, among other things, said: "Upon its face, and irrespective of any proof, probable or possible, it appears to me manifestly to lack invention." We agree entirely with this observation, and that, therefore, the case was a suitable one for final disposition on a demurrer. The decree of the circuit court is affirmed, and the appellee will recover his costs of appeal.

MILLARD et al. v. CHASE.

(Circuit Court of Appeals, First Circuit. April 24, 1901.)

No. 367.

1. PATENTS—PATENTABILITY—ISSUES.

The rule applied that, with reference to questions of patentability, and of the range of the claims in a patent issued to an inventor, in a suit on such patent, the court will not allow parties to frame their issues in such way as to take from it the scrutiny of such questions.

2. SAME—CONSTRUCTION OF CLAIMS—LIMITATION BY PROCEEDINGS IN PATENT OFFICE.

Where the invention of a patentee is of a narrow and doubtful character, necessarily to be carefully limited, and substantial objections to his claims were made by the patent office, to which he yielded, he must be held to the result of the proceedings on his application, and be restricted thereby.

3. SAME—INVENTION—SHOE UPPERS.

The Chase patent, No. 620,278, for a shoe upper, claim 3, is void for lack of patentable invention.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

Benjamin Phillips, for appellants.

George H. Maxwell, for appellee.

Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

PUTNAM, Circuit Judge. This appeal arises on patent No. 620,278, issued to George W. Chase on February 28, 1899, on an application filed on February 24, 1896. The general statement of the invention in the specification is that it relates to that class of shoes wherein the upper is made without a heel seam, and that it has for its object "the production of a shoe without a heel seam, formed from a blank cut with the minimum of waste and labor, and obviating the removal of portions of material from the upper to properly shape the heel line of the ankle portion when completed; the said heel line being reinforced by an integral stay portion of the upper." The patent contains three claims. The first and second claims are not now in issue, but it is necessary to state them, in order that the relation of the third claim to the case may be properly understood. The claims are as follows:

"(1) A unitary shoe upper, comprising a toe portion, continuous heel portion, and ankle or instep portions, the back of the upper above the heel portion having two symmetrically located, upright slits therein, outwardly curved at their middle portions and inwardly curved between such middle portions and their out-turned upper and lower ends, to form a strip between them having its edges correspondingly curved and integral with the upper at top and bottom, substantially as described.

"(2) A shoe upper provided in the vicinity of the heel with two vertical cuts having irregular edges, forming a heel stay integrally attached at its opposite ends to said upper, the irregular edges of said upper at said cuts being joined or seamed together beneath the stay in a single straight line to crimp or mold the shoe upper to fit the foot, and the stay thereafter stitched down upon and to conceal the said single line joint or seam, the adjacent ends of the said cuts being directed outwardly or made divergent to smoothly blend the crimped and stayed portions of the upper into the material of the said upper at the ends of the stay, and thereby avoid a sharp point or pucker at said stay ends, substantially as described.

"(3) A shoe made from a blank or pattern provided at the back of the upper with incisions or slits having a reinforcing stay strip between them, said stay strip being integral with the upper adjacent the counter line, the slitted upper being sewed together at the rear beneath said stay strip to form a seam, said stay strip extending over the sewed seam and being stitched to the upper at the opposite sides of the said seam by rows of stitches close to the edges of said stay strip, said rows of stitches extending from adjacent the counter line uninterruptedly throughout the entire length of the stay strip on each side thereof, as and for the purpose described."

The circuit court found the first and second claims were not infringed, but it sustained the third claim, and held that the respondents below infringed it. One defense in the circuit court was based on a patent to John S. Powell for improvements in back pads, used beneath harness saddles, being patent No. 539,300, issued on May 14, 1895, on an application filed on January 12, 1895, and thus, on the

face of the record, anticipating the patent in suit. The opinion of the learned judge who heard this case in the circuit court said that this patent was too remote as an anticipation. On the arguments before us, the respondents, now the appellants, rested their case entirely on this patent to Powell; but it is a thoroughly settled rule that, as to patentability and the range of the claims in a patent, inasmuch as these matters concern the public at large, the court will not allow parties to frame their issues in such way as to take from it the scrutiny of all the questions which may be involved. This rule applies to this case, and the court declines to rest it where the respondents offered to rest it. Fortunately, notwithstanding the position taken by the respondents, the line of discussion when the appeal was heard branched out to cover the propositions which we will consider, so that we will not pass through them without a guide.

In addition to the patent by Powell, two patents to Alfred Bélaire become of substantial interest in the case, and will be referred to again. One is No. 554,229, issued on an application filed on November 22, 1895, and the other is No. 613,958, issued on an application filed on August 27, 1896. With reference to the later patent to Bélaire, it was adjudicated on an interference proceeding in the patent office that he has priority over Chase. Chase now claims priority of invention with reference to all three patents,—that is, the one to Powell and the two to Bélaire; but, with regard to the later patent to Bélaire, the issue, as we have said, was fully determined against Chase on the interference proceeding. Chase did not appeal, but narrowed his claims to meet the adjudication. As to the other two patents, the evidence is so clearly of the character which was rejected by this court on the issue of priority in *Brooks v. Sacks*, 26 C. C. A. 456, 81 Fed. 403, that, without attempting any explanation of particulars, we decline to award Chase priority. Thus it follows that the three patents enumerated were parts of the state of the art at the time of Chase's invention, even if not strictly anticipatory.

Before coming to the merits of the case, it is necessary to observe on the proceedings in the "file wrapper," so called,—that is to say, in the patent office,—with reference to the application for the patent in issue. The topic was fully discussed by us, and carefully explained, in *Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co.*, 10 C. C. A. 194, 61 Fed. 958, and, so far as the rules of law are concerned, we add nothing to what we there said. All which we have occasion to do is to apply them to the particular circumstances of this case. As we have seen, Chase's application was pending in the patent office four days over three years. It was very extensively agitated, and the claim now an issue, as originally drawn, was twice rejected. The position of the office was thoroughly discussed, and was fully understood by the applicant. It cannot be questioned that the issues made by it were substantial, and not incidental, while the invention is of a narrow and doubtful character, and necessarily to be carefully limited; so that the

patentee must be held to the results of the proceedings on his application, and be restricted thereby. In this respect the case is altogether different from what it would have been if the invention had been of a fundamental character, and the inventor was sought to be deprived of substantial rights by reason of incidental action on the part of the examiners.

Coming, now, more particularly to the facts of the case before us: The specification of the patent in issue refers to the necessity of obtaining "the desired crimped or molded formation to the sides of the upper," so that there will be "no sharp pucker, or point, where the ends of the stay strip blend into the integral material of the shoe upper or blank." It provides for "symmetrically disposed slits," so cut as "to leave an intermediate stay strip of material integral at the top and bottom with the blank or upper." It directs that the edges of the blank or upper, along the line of the slits, shall be stitched together under the stay strip which is left by the slits, and that then the stay strip shall be "laid and stitched over and upon, and to conceal, the seam" thus made between the edges of the upper, in order to get "the desired crimped or molded formation" already referred to. It also says:

"The curves of the slits, or the outer walls or boundaries thereof, are such that the adjacent ends of the two slits are made divergent, or to spread outwardly; the divergence at the lower ends of the stay strip being preferably wider, or more open, than at the top thereof."

The drawings annexed to the specification are referred to as showing this peculiar form of the slits. The feature of retaining the material integral with the blank at the top and bottom, and the feature of divergence, as shown in the citations which we have made, are insisted on throughout the specification and all the drawings attached thereto; and both are expressly carried into the first and second claims. Neither of them, however, appears in the third claim. In the respondents' shoe, the slits omit this feature of divergence, and are substantially cut on the lines of a crescent, the ends approaching each other, instead of diverging. In this respect the slits are formed in the manner shown in the specification of the patent to Powell, already referred to. This states that the object of the invention was to produce "a back pad with a concave top, to enable the saddle to fit nicely upon it, and, further, to produce this concavity in a cheap and simple manner, and in a way to enable the pad to be finished very neatly and without expense." It shows that two crescent-shaped slits are cut on opposite sides of the center, leaving a strip nearly elliptical in form.

The application as originally filed by Chase in the patent office contained, and insisted on, all the same particulars of a strip integral at the top and bottom of the blank, and on the peculiar form of the slits shown in the patent as issued. In the latter particular, and in the less important particular of stitching, instead of rivets, and also in the suggestion of making use of the strip as a stay, and in the fact that Chase was shaping the ankle of a shoe, which is exposed to observation, and needs to be done with great neatness.

while Powell was dealing with a pad, which is covered from sight by the saddle, and in these particulars alone, Chase differed from Powell. It is true that in some of the claims as originally made by Chase he did not in terms refer to the precise form of curvature of the slits stated in his specification; but, in view of the exact description of the form of the slits insisted on in his specification and shown by his drawings, and, further, in view of the necessarily narrow nature of inventions of this class, the particulars thus shown by him indicate the nature of his conception, and limit it accordingly. The first and second claims of his patent, as we have said, embody these details; and it is quite probable that, with these details kept in mind, and in view of the principles announced by us in *Watson v. Stevens*, 2 C. C. A. 500, 51 Fed. 757, as to the support given by the fact of success where others have failed, and also in view of the rules restated by us in *Heap v. Suffolk Mills*, 27 C. C. A. 316, 82 Fed. 449, with reference to the question of invention as applied to analogous uses, these claims may be sustained, although they relate to the art of fitting and strengthening common articles of wear, as to which there is ordinarily no patentability, and although Powell's device concerns an art which is in one sense the same as that to which the patent in issue appertains.

Respondents' device does not have the diverging edges insisted on by Chase's specification, but it forms the slits with converging ends. Therefore, if covered at all, it is covered only by the third claim. This claim omits the feature of a stay strip of material integral at each end, and also, what is more important, the feature of divergence, or outward spreading, of the ends of the slits. Therefore, it was a departure from Chase's invention, and is void. The history of the claim emphasizes this fact. It was first introduced into the case as the result of a suggestion by the examiner, made in August, 1897. As first drawn, it was filed on September 3, 1897, as follows:

"(3) A shoe made from a blank or pattern having at the back of the upper incisions or slits forming a reinforcing stay piece, the lower portion of the incisions extending in divergent lines, and sewed together at the rear to form a seam, said stay piece extending over the sewed seam and stitched to the upper at opposite sides of the said seam, as and for the purpose described."

As thus drawn, it went into the interference to which we have already referred, and was rejected as anticipated by Bélaire. Indeed, in that form, it was anticipated by both of Bélaire's patents, each of which showed a stay strip cut out of the blank of the upper as a tongue; that is to say, integral only at the lower end, the first with slits cut on compound curves, and the other on "curved lines," without other restrictions. His construction, in all respects except so far as the form of the slits is concerned, and except that Bélaire's stay strip was integral only at the lower end, was the same as that of the patents in suit, fully accomplishing the reinforcement which Chase made one of the objects of his invention. In other words, each of Bélaire's patents had everything found in claim 3 as first presented.

The claim was afterwards amended on October 18, 1898, to read as follows:

"(3) A shoe made from a blank or pattern having at the back of the upper incisions or slits forming a reinforcing stay piece, and sewed together at the rear to form a seam, said stay piece extending over the sewed seam and being stitched to the upper at the opposite sides of the said seam, as and for the purpose described."

This was rejected on the patent to Powell, and this rejection was acquiesced in. The claim was thereupon again amended by inserting the words now found in it, as follows: "Said stay strip being integral with the upper adjacent the counter line," and "by rows of stitches close to the edges of said stay strip, said rows of stitches extending from adjacent the counter line uninterruptedly throughout the entire length of the stay strip on each side thereof." As we have already shown, in view of the course of this patent in the patent office, and the necessarily narrow character of an invention of this nature, it must be held that Chase acquiesced in its rulings with reference to the third claim, and, therefore, that he accepted the proposition that it represented no patentable invention, except with the addition of the words which he inserted, as we have said. If there was no patentability in the claim without the insertion of these words, they could add nothing in that direction, as they represent nothing which involves any invention, or of which the patent law could take any notice. Therefore, both because the third claim, in that it omits the feature of a stay strip integral at both ends, and the more important feature of slits with diverging curves at their extremities, departs from Chase's invention, if he made one, and also because Chase's acquiescence in the rulings of the patent office left nothing in this claim of a patentable character, we are compelled to hold that it is void. As the first and second claims were not infringed, and the third claim is void, the bill should have been dismissed.

This appeal comes to us on an injunction issued, with a decree for an accounting, after a hearing on bill, answer, and proofs. Therefore, in accordance with the settled practice, the merits of the case are fully before us, and we are enabled to dispose of it finally.

The decree of the circuit court is reversed, and the case is remanded to that court, with directions to dismiss the bill, with costs; and the appellants will recover the costs of appeal.

HOSKINS v. MATTES.

(Circuit Court of Appeals, Seventh Circuit. April 9, 1901.)

No. 742.

PATENTS—INVENTION—ARTIFICIAL BILLIARD-CHALK.

The Hoskins and Spinks patent, No. 578,514, for an artificial billiard-chalk, which claims as the only patentable feature of such chalk the employment as a base of pulverized silica in its natural or commercial state, is void for lack of invention, in view of the prior art.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

The action in the Circuit Court was to restrain the infringement of Letters Patent No. 578,514, issued to William Hoskins and William A. Spinks, March 9, 1897, for a substitute for billiard-chalk. The material portion of the patent, together with the claims sued upon, is as follows:

"Our invention relates to an improved substitute for billiard-chalk. Heretofore it has been the universal practice, so far as we know, to apply to the tip-leather of a billiard-cue chalk or carbonate of lime for the purpose of preventing the tip from slipping off the ivory ball when impact is produced. The chalk is usually formed into cubes and applied by a gentle grinding upon the surface of the tip, the characteristics of the material being such as to cause it to adhere more or less temporarily to the leather, and by reason of being slightly harder than the ivory and considerably harder and more abrasive than the leather surface to grip or bind upon the ivory under impact. We have found that superior results in many respects are obtained where, instead of chalk or other form of carbonate, pulverulent and compacted silica or an equivalent therefor is employed. While many silicates having a frictional property and capable of being pulverized and compacted are capable of use in carrying out our invention and are included therein, whether used alone or in combination with other substances or even in association with carbonates, we prefer to employ a commercially-pure silica associated only with a small percentage of binding material, such as glue, and in some instances associated with a small percentage of corundum or other gritty material, an example of which is found in emery-powder.

"Our invention, broadly stated, therefore consists in a substitute for billiard-chalk comprising compacted pulverulent silica or an equivalent therefor having frictional property and compacted in the form adapting it for application to the tip of a billiard-cue in the same manner that chalk is applied. The silica or its equivalent may be otherwise than powdered preliminary to forming it into a cake or block, but it is essential that the silica or its equivalent employed shall be one capable of ready reduction to a powder after being formed into a cake or block.

"Our invention further consists in a substitute for billiard-chalk in the form of a composition of a pulverulent silica or an equivalent therefor having frictional property, together with a small percentage of binding substances, such as glue, the mass being compacted into a cake or block.

"Our invention further consists in a composition affording a substitute for billiard-chalk composed of pulverulent silica or an equivalent therefor with a binding material, such as glue, and a roughening material, such as corundum.

"Our invention consists, further, of a composition affording a substitute for billiard-chalk composed of pulverulent silica or an equivalent therefor, a coloring substance, such as chrome-green, with or without corundum, and with a binding material, such as glue.

"Our invention consists, finally, in a substitute for billiard-chalk comprising compacted pulverulent silica or its equivalent with a binding material in the form of a cake or block.

"To carry out our invention, we prefer to employ commercially-pure silica, which can be easily obtained in large quantities and in a pulverulent or readily-pulverized form. While the purity of the substance necessarily varies, it will ordinarily approximate from eighty to eighty-five per cent. of pure silica, although a greater percentage of impurities will not render the substance much less useful for our purpose. The silica thus obtained is sifted and ground to a fine powder, mixed with a small percentage of liquid glue and a small percentage of corundum, (emery-powder being usually the most available form,) and a small percentage of coloring agent, chrome-green being more commonly selected, although this may be changed or omitted according to the election of the manufacturer, and the mass, thoroughly stirred, is thereupon placed in molds and firmly compacted. When dry it is at once ready for use. It is found that the substitute for billiard-chalk thus produced has superior advantages over the carbonate of lime or magnesia. It adheres

more tenaciously to the leather of a tip, so that when freed, as the necessary result of impact upon the ball, a very much smaller percentage of the dry coating leaves the cue-tip, and, on the other hand, owing perhaps to the peculiar nature of the silica or its equivalent in this connection, it seems to attack the ivory of the ball with greater firmness with the result that the ball may be struck much nearer to the side without danger of the cue slipping than is the case with the chalk for which this affords a substitute. It is possible, as with the case of ordinary chalk, so to color the substitute that no mark will be left upon the cloth as it falls from the cue-tip, but we prefer to give to the substitute a color which may render its presence on the cloth of the table to be readily observed, as it may thus be more readily removed.

"The percentage of binding material where, as preferred, it is used is dependent upon the amount of hardness which it is desired that the substitute for chalk shall possess. For obvious reasons we deem it more desirable to employ as little binding material as possible. The corundum, when used, is employed solely for the purpose of roughening the tip of the billiard-cue and may be dispensed with when the leather employed is such as to make roughening unnecessary or where roughening is for other reasons not desired.

"What we claim as new, and desire to secure by Letters Patent, is—

"1. A substitute for billiard-chalk composed of pulverized silica or its equivalent, and a binding agent compacted into blocks or cakes, substantially as described.

"2. A substitute for billiard-chalk composed of normally white pulverized silica, a binding agent and a coloring agent, compacted into blocks or cakes, substantially as described."

The following is an analysis of appellant's chalk, as made on behalf of appellant:

	B 1.	Deft.
Silica	trace
Ferric Oxide33
Alumina	1.....	1.87
Carbonate of lime	trace
Carbonate of magnesia	trace
Silica (combined)	8.10
Silica (uncombined)	81.50
Ferric Oxide Fe_2O_3	trace
Alumina— Al_2O_3	2.57
Lime— CaO	trace
Magnesia— MgO	trace
Potash— K_2O	2.....	1.70
Soda— Na_2O
Sulphate of Barium— $BaSO_4$
Loss at 100° C40
Loss on Ignition	2.50
Less loss at 100° C
Lead Chromate	none
Prussian Blue	none

1. Soluble in Hydrochloric acid.

2. Insoluble in Hydrochloric acid.

B 1. Blue chalk colored with Ultramarine (Hammer).

C. Spinks chalk.

The defense was non-infringement, and that the patent sued upon was invalid.

Among the patents introduced for the defense were Letters Patent No. 315,828, issued April 14, 1885, to A. Peple for a substitute for billiard-cue chalk, the material portion of which is as follows:

"Billiard-cue tips are covered with chalk-dust to prevent them slipping upon the ball when struck upon the same. The chalk comes off the tip and discolors the cloth of the table and the cushions, and such cloth is unnecessarily

worn by brushing the same in the efforts that are made to keep such cloth clean and free from the marks of the chalk.

"My invention relates to a substitute for billiard-cue chalk, consisting of a pigment of a fine granular or silicious character of the color, or nearly so, of the billiard-cloth, so that the same may be used on the billiard-cues for all the purposes of chalk, and so that the cloth will not be marred in its appearance by the small particles that will inevitably fall or rub off the balls upon such cloth; hence the cloth will not require to be brushed so often or so severely in cleaning the same, and it will not be worn out so rapidly; and, for convenience, I compress such pigment into blocks and varnish the surfaces or cover, all but one side, with paper, so that the fingers will not be soiled in the use of this cue-tip material.

"I make use of chrome-green by preference on account of its peculiar roughness or silicious gritty character; but magnesia-green or ultra-marine-green may be used, and the mixture may be rendered of the proper color by the admixture of finely ground silica or other material, such as magnesia or chalk.

"This material or compound is to be in a finely-pulverized condition, and it is mixed with water and molded and pressed into the proper shapes, preferably cubical, and after being dried, or partially dried, the surfaces, all but one, are coated or covered with a protecting material—such as shellac, varnish, or paper—and the article is ready for use or sale. The cue is pressed upon or into this colored pigment in a manner similar to that employed when chalk is made use of."

Other Letters Patent introduced as anticipations were the following:

No. 85,018, dated December 15, 1868, to J. M. Merrick, for Improved Material for the Manufacture of Boxes, Picture Frames, Buttons, Insulators, Ink-stands and other articles.

No. 201,283, dated March 12, 1878, to Charles C. Parsons, for an Improvement in Compositions for Crayons.

No. 269,722, dated December 26, 1882, to B. G. Seebach, for Composition for Cleaning and Polishing Metals.

No. 314,759, dated March 31, 1885, to Charles Walpuski, for Ink Erasing Compounds.

No. 329,349, dated October 27, 1885, to W. H. Wiggins, for Substitute for Billiard-Cue Chalk.

No. 450,560, dated April 14, 1891, to W. W. Dunnett, for Composition of Matter.

No. 552,269, dated December 31, 1895, to William L. Woods, for Plastic Composition and Process of Combining same.

No. 510,874, dated December 12, 1893, to Justin Duprey, for Composition for Producing Artificial Emery Wheels.

German Letters Patent No. 80,146, to Carl Koster, dated February 28, 1894, and issued February 19, 1895, for Composition for the Production of Imitation Marble Veneers.

No. 83,280, to William Grune, dated July 26, 1894, and issued October 10, 1895, for a Plastic Stereotype Mass.

No. 69,973, to C. L. Wurm, dated December 1, 1892, and issued August 30, 1893, for Tip for Billiard-Cues.

A substance known as Italian chalk, sometimes called in the record French chalk, was introduced in evidence. It seems to have been called to the attention of billiard experts at Paris some time previous to the taking out of appellant's patent. It proved to be superior to the common billiard-chalk. Spinks, who was a billiard expert, brought it to Hoskins' office, and requested him to make an analysis of it. In speaking of this analysis, Hoskins says:

A. "Mr. Spinks came to my office and showed me a piece of chalk, and requested me to make an analysis of it. This I did to the point as shown by my notes, a copy of which is a matter of record in this case. Then I asked Mr. Spinks to tell me the necessary qualities for the production of a perfect chalk, or chalk substitute for use in billiards, being myself unfamiliar with the game, telling him at the time, and in substance, that I did not think it at all probable that the French chalk could be duplicated, because the material was not at hand, and I did not know where it could be obtained, but that I

thought if I understood fully the requirements I could produce a preparation which would fill the requirements. I then, at his suggestion, made a number of experiments on pieces of chalk substitute, and Mr. Spinks took them, experimented with them, advised me as to their deficiencies, and I made further preparations and experiments, which finally resulted, after we had carried on these tests for some time, in selecting silica as giving altogether the best results. We then made further experiments, which resulted in the addition of small quantities of corundum to the silica, and finally we decided to color the material to give it a distinctive character.

Q. 64. "You say that the material of the piece of chalk given to you by Mr. Spinks was not at hand. Do you mean that you could not obtain the substances of which it was composed, as revealed by analysis?"

A. "No, but I mean that it was evident, from facts obtained during my analysis, that the material was not a mere mechanical mixture of silica, alumina and water and other substances, but that it was essentially composed of a material which had resulted from a chemical union or combination of these substances, and that this material was probably a natural product, possibly found in the pulverulent state, but at any rate it was a product the result of the forces of nature, and one such as would be exceedingly improbable of reproduction artificially. At any rate I knew of no way to reproduce the substance, and suggested, therefore, that I could do as well or better if I knew the requirements by searching for some other material with the proper qualities."

And in answer to cross-examination he says:

X-Q. 73. "I understand from a reading of your testimony, that silica, in your opinion, possesses a peculiar abrasive or frictional quality as applied. Without that abrasive or frictional quality would your substitute be of any value for the purpose intended?"

A. "Without the properties which make it abrasive or frictional it would not be efficient."

X-Q. 74. "Are the abrasive or frictional properties of silica varied or modified to any considerable extent by the admixture therewith of any or all of the other ingredients mentioned in your patent?"

A. "Undoubtedly modified, depending upon the relative proportions and quantity of all the other constituents."

X-Q. 75. "Neither the coloring agent nor the binding agent add to the frictional or abrasive quality of the silica, do they?"

A. "They do not."

X-Q. 76. "And the corundum only adds to the frictional capacity of the silica, insofar as it roughens the cue-tip and enables it the better to take and hold the powdered material. Is this so?"

A. "That is the purpose for which the corundum is added, but it should be explained that nothing can be taken away from or added to the frictional or abrasive properties of the silica by the mere addition of some other substance. The effect might be one of mere dilution and therefore detrimental, or it might add to the general result and efficiency, depending upon the nature of the addition."

The following analyses of the Italian chalk, made on behalf of appellant, were introduced:

"W. A. Spinks,

Sample Billiard-Chalk.

one gram. fused.

Loss on ignition 20%

SiO ₂	351	35.1
Al ₂ O ₃	418	41.8
		<hr/>
		76.9
		20.
		<hr/>
		96.9'

	B. 2.
*Silica	none
Ferric Oxide	1.09
Alumina	3.31
Carbonate of Lime90
Carbonate of Magnesia	trace
*Silica (combined) }	
Silica (uncombined) }	33.00
Ferric Oxide— Fe_2O_3	trace
Alumina— Al_2O_3	19.40
Lime— CaO50
Magnesia— MgO09
Potash— K_2O	6.04
Soda— Na_2O	3.08
Sulphate of Barium— BaSO_4	
Loss at 100°C	2.50
Loss on ignition	28.30
Less loss at 100°C	
Lead Chromate	none
Prussian Blue	none

*1. Soluble in Hydrochloric Acid.

*2. Insoluble in Hydrochloric Acid.

B. 2. Blue chalk colored with Prussian Blue. (French.)

Loss at 230°Fah. for one hour.....	86%
Loss on ignition	28.12
Aluminum oxide (Al_2O_3)	24.12
Ferric Oxide (Fe_2O_3)	3.6
Free silica, sand, etc.	9.32
Combined silica	14.08
Calcium oxide (CaO)61
Magnesium Oxide (MgO)	trace
Alkaline Oxides	13.31

The argument of the counsel for appellant resolves itself, in the end, to the following proposition: "The result of the efforts of Spinks and Hoskins to produce a substitute, not merely for white chalk, but also for the Italian chalk, was the selection and employment, for the first time in the mechanical arts, of silica, free and uncombined, in its natural or commercial condition, for use under circumstances requiring that it be compacted in blocks, that part of its body should be transferred by rubbing on another surface, and that while thus held to the receiving surface it should interpose a friction-producing agency to exercise its function during the impact of the cue-tip against an easily movable, perfectly smooth sphere."

Douglas Dyrenfath, for appellant.

C. C. Linthicum, for appellee.

Before WOODS, JENKINS, and GROSSCUP, Circuit Judges.

After the foregoing statement of the case, GROSSCUP, Circuit Judge, delivered the opinion of the court, as follows:

The Hoskins and Spinks patent can lay no claim to invention in the conception that there can be an artificial substitute for billiard-chalk, for that was the expressed object of both the Peple and Wiggins patents; nor in the conception of compacting into blocks or cakes the material used, whatever it may have been, for such molding and compressing was described in the Peple patent; nor in the conception of any treatment of the material used, either as to proportions or mode of intermixture, for there can not be found, either

in the claims, or the description, any mention of proportion, or mode of intermixture.

The patent must be sustained, if it be sustained at all, upon the claim that the inventors, for the first time, in the manufacture of artificial billiard-chalk, employed pulverized silica in its natural or commercial condition; and that any use, by another, of pulverized silica, in the composition of billiard-chalk, no matter what may be the proportions, or however mixed, makes such chalk an infringement. The claim, in short, is that the adaptability of pulverulent silica, in connection with binding or coloring matter, to the uses of artificial billiard-chalk, is a patentable discovery. Upon the maintenance of this claim the case seems to stand or fall.

Silica is said to be the commonest of materials. It is found almost universally in nature; in sand stone, free sand, rock quartz and clay. It has been used in many arts; in some of them expressly on account of its gritty quality. It is spoken of in the Peple patent as a desirable ingredient to be mixed with other ingredients in the making of artificial billiard-chalk. Its quality of grittiness seems to have been within common knowledge—so much so, that the adjectives “silicious” and “gritty” are almost synonymous words.

It may be conceded that common knowledge, of this general character, does not, alone, amount to anticipation of the adaptability of silica as a base for billiard-chalk. Silica might be known to be abrasive, but not to the degree, or in the way, that is suitable to this art. It may have needed further information—possibly in the nature of discovery—to select and utilize silica as the base of artificial billiard-chalk.

But, on examination of the whole art, we feel compelled to hold that the gist of such information was already at hand, both in the Peple patent, and in the Italian chalk. The object of Peple was to obtain a chalk that, by reason of its grittiness, would cause the billiard-cue to take hold of the ball, and, on account of its color, save the table from the appearance of chalk marks. His objective was twofold: a quality, that would answer the purpose of the billiard cue, and a color harmonizing with the green of the billiard table. He selected what he calls “chrome-green,” and pointed out that, should the color be non-coincident with that of the billiard cloth—probably an over green—it might be harmonized by the admixture of finely ground silica. The evidence does not satisfactorily show what substance Peple had in mind, in the use of the word “chrome-green,” but in his own words, whatever it was, it had a gritty and silicious quality, and must have readily intermixed with free silica; otherwise free silica would not have been designated as a material to modify the color. The patent does not point out silica as a base for the billiard-chalk, but, unmistakably, it so clearly suggests it, that the next step taken was not a long one.

The next step was the analysis of the Italian chalk by Hoskins, who was a chemist. It was made at the suggestion of Spinks, who had just returned from Paris, where the Italian chalk had been used by expert billiardists. Spinks, like the others, was enamored of it;

but it was rare and expensive, and on that account could not be brought into general use. It occurred to Spinks, however, that that need not stand in the way; for as artificial billiard chalk was already well known, might not the ingredient of this new Italian chalk be ascertained, and made the base for an artificial chalk.

Several analyses were made. Though these did not closely agree, the chalk was found, in each instance, to contain a large percentage of silica. One put the silica at thirty-five, another at thirty-three, and the last (the free silica) at nine per centum. In the first and second it is not clear whether the reference was to free silica, or to silica combined and uncombined, but, in any event, these analyses pointed out, both the presence of silica, and its function in the chalk; for in none of the ingredients, other than silica, is there a suggestion of the grittiness or abrasiveness desired.

It is no answer to say that the analysis previous to the taking out of the patent (the last analysis having been made after the patent was obtained) did not show silica in its free state, and that the presence of combined silica is not a suggestion of free silica as a base for the chalk. The analyses were not the only things known to Hoskins and Spinks. They had, constructively, the Peple patent. They had before them, therefore, within the meaning of the law, grittiness as a desideratum; as well as the knowledge that this quality was possessed by silica, and that there was no other ingredient in the Italian chalk possessing it. It took no invention, from premises so simple, to infer that the presence of silica in the Italian chalk was what gave to it its utility as a billiard-chalk.

It is true, that as far as we know, the Italian chalk had not yet been analyzed by others. But the analysis is what any chemist could have done, and the suggestion that it be analyzed, in view of all that had gone before, is not, in our opinion, an inventive act. It led to no new kind of article; for artificial billiard-chalk was old. It was not, in any just sense, an independent discovery in nature, subsequently utilized in one of the arts; for, in substance, it was nothing but a chemical search into a chalk already in the art, for the ingredients that gave to such chalk its excellence. It was research, but not patentable discovery.

We do not hold that Hoskins and Spinks have not discovered a new artificial chalk. No other chalk, artificial or natural, seems to run so high in silica. But if their chalk is, on that account, patentable, it is not because of the use of pulverized silica, in any proportion, but because of the particular proportions employed. Had the description and claims proceeded upon some designated treatment or process, we might have found a way to sustain their validity. But the patent is ambitious far beyond this. It seeks to exclude the use, by others, of pulverized silica in any proportion. It surveys a field that includes any silicate "having a frictional property and capable of being pulverized and compacted." To sustain this would be to hold that the use of pulverized silica in a billiard-chalk, independently of the proportions employed, was a discovery properly embodied in appellant's patent. This the state of the art will not justify.

The decree of the Circuit Court is, accordingly, affirmed.

KESSLER v. INKS.

(Circuit Court of Appeals, Seventh Circuit. April 9, 1901.)

No. 723.

PATENTS—INVENTION—CIGAR LIGHTERS.

The Gruhlke & Kessler patent, No. 562,395, for a cigar lighter, describes a device which, both in design and in its elements, was adapted from different prior ones invented by others, and is void for lack of invention.

Appeal from the Circuit Court of the United States for the District of Indiana.

R. S. Taylor, for appellant.

Louis K. Gillson, for appellee.

Before WOODS, JENKINS, and GROSSCUP, Circuit Judges.

GROSSCUP, Circuit Judge. The action below was to restrain the infringement of Letters Patent No. 562,395, issued June 23, 1896, to A. C. Gruhlke and W. F. Kessler. The improvement covered by the patent is a cigar lighter, of the suspended order, so arranged that the movement of the handle in the act of lighting the cigar ignites, automatically, through an electrode, the wick, and, by means of a tight chamber, extinguishes the wick, when the handle is released and drops into its place.

The cigar lighter charged as an infringement is practically of the same character, and operates in the same way; but is defended as a permissible adaptation of Letters Patent No. 492,913, issued March 7, 1893, to J. C. Chambers. In this latter patent both ignition and extinguishment of the flame is automatic.

In *Eldred v. Kessler*, 106 Fed. 509, the question was the counterpart of the one now before us, viz., whether a cigar lighter constructed after the patent issued to Kessler was an infringement of the Chambers patent.

Both these patents, together with others illustrating the art, are set out at large in the opinion in that case, and will not be reproduced here.

We held in that case that the prior art disclosed cigar lighters accomplishing the same general result as the Chambers and Kessler patents; and by analogous means, including the use of electricity; that, in at least one instance of the prior art, ignition was automatic; and that the means for extinguishing the flame, though not automatic, were convenient and effective; and we concluded that the invention of Chambers (and the same must be true of Kessler's) was in no sense generic.

It is urged in behalf of Kessler's device—and as differentiating it from the prior art—that extinguishment is effected by the bringing of a lighted wick into a chamber that becomes air-tight, whereby a smothering of the light ensues; that the electrode in the Kessler device is carried in a heavy beak, being itself a heavy piece of metal, and thus resistant against the necessary collisions; and that the device, taken as a whole (and upon this most stress is laid), is more convenient and sightly than any of its predecessors.

None of these features, in our opinion, are available to the appellant. His method of extinguishment is practically the same as that embodied in the Chambers patent. The difference in construction is one of form, rather than of mode of action.

The heavy beak utilized by Kessler is found practically in the Gibson and Best patents, both predecessors of the appellant's. Besides, as a novel feature of the patent in suit, it has been eliminated by the action of the Patent Office.

The argument from convenience and sightliness has no better foundation. Barring the extinguisher, the precise combination is found in the earlier gas lighters. Kessler did not first happen upon, or work out, the design. He simply appropriated it from the previous art. He did not happen upon, or work out, the extinguisher. He appropriated this, also, with a change of form, from the previous art. He thus had at hand, ready made, when he came into the field, lighters of these precise designs, barring the extinguisher; and lighters of slightly different designs, embodying the extinguisher. He did nothing but adapt the old extinguisher to a lighter constructed after the old designs; and this does not, in our opinion, in view of the well trodden previous art, amount to invention.

The decree of dismissal of the bill for want of equity is accordingly affirmed.

THE COYA.

(District Court, S. D. New York. April 15, 1901.)

1. SALVAGE—COMPENSATION—BASIS OF COMPUTATION.

A percentage, merely as a basis of allowance, is not a proper guide in fixing the amount of an award for salvage services, but the true rule is to make such an allowance as is reasonable, having in view all the circumstances of the service, and such as will afford all the encouragement and stimulus to salvage operations necessary to secure the most effective service. The only proper use of a percentage basis is to furnish a convenient mode for the apportionment on ship, freight, and cargo, of the amount which the court otherwise deems reasonable and sufficient.

2. SAME—BURNING WHARF—TOWAGE SERVICES.

The Coya, a steel steamship valued, with her cargo, at \$230,000, was moored in the Erie Basin to a pier, from which she was breasted off about 20 feet by two intervening barges. During the night the shed on the pier was set on fire by a burning steamer, and burned. Some small boats and other articles on the upper deck of the Coya took fire, but it was extinguished by the ship's own fire apparatus, and otherwise she was uninjured. After the shed had been burning for an hour or more, the steamer was towed out of the slip to a place of safety by libellant's tugs, six of which participated, to a greater or less extent, in the service, which required about an hour. *Held* that, considering the fact that the ship was not at the time in present peril, \$3,450 was a reasonable and proper allowance for the salvage services, to be divided between the tugs and their masters and crews, in proportion to the services rendered by each.

In Admiralty. Libels to recover for salvage services.

Wing, Putnam & Burlingham, Carpenter & Park, Mr. Symmere,
and Avery F. Cushman, for libelants.

Black & Kneeland, for claimants.

BROWN, District Judge. In the above libels salvage compensation is demanded for services rendered to the steamship Coya at about 2 o'clock in the morning of January 9, 1901, in towing her from a fire on pier A in the Erie Basin, to a safe place of anchorage outside the basin near Governor's Island. The services were short, being of only about an hour's duration, and rendered under circumstances of much less danger to the steamship than might be at first supposed, and much less than ordinarily exists in cases of salvage from fire.

The fire broke out on the wooden passenger steamer Idlewild, moored at the breakwater on the opposite side of the basin; and that steamer, having broken loose, was blown by the southerly wind across the basin against the end of pier A, where it set fire to the barge Old Glory loaded with jute, from which the fire was communicated to the shed on pier A, and thence rapidly extended along the shed of the pier to the bulkhead. The Coya, a steel steamer about 337 feet long and about 2,000 tons register lay bow in on the westerly side of the pier, breasted off from it about 20 feet by two barges between it and the pier. The fire on the Idlewild broke out at a little after 1 o'clock a. m. and soon afterwards on pier A. Two of the city fire boats not long after arrived on the scene and were employed in playing streams of water upon the various vessels at the end and on each side of the pier. This was sufficient to prevent the fire from attacking the after part of the Coya, although a steamer on the east side of pier A, being hemmed in by the burning barges, was burned and sunk. As soon as the fire had attacked the pier, the master cut loose all his mooring lines except one steel spring line running to the pier aft from a point a little forward of the poop, and began to warp the steamer across the slip towards the pier to the westward of pier A; but some other tugs, coming to the aid of boats in the slips, fouled the Coya's warping hawser and either broke or cut it, so that the Coya had no further means of moving herself away. At 1:40 a. m. some of the Coya's small boats on the upper deck, with ropes, tarpaulins and spars and rigging on the forward part of the ship, which could not be reached by the streams from the fire boats, took fire from the adjoining wharf. The master, however, had his steam fire apparatus in readiness, and it was so effective that all the fire on the steamer was extinguished by him before 2 a. m. by the use of the steamer's own fire pumps, with some aid from the fire boats, except a little smouldering afterwards discovered, which was of no material importance and was very soon put out.

It was not until about 2 o'clock, about three-quarters of an hour after the fire first broke out, and at about the time the fire on the forward part of the steamer had been extinguished by the master, that the first of the salving tugs arrived. They came in the following order:

First, the Mutual, from which a hawser was thrown to the steamer's port quarter, where it was made fast by the steamer's men; soon afterwards, the C. R. Stone, the M. Moran and the Unique, differing but little in their time of arrival, and later the P. Cahill, when the steamer was approaching the exit from the basin. For a brief period she and some of the other tugs put a stream of water on the Coya;

but I regard this as of no importance whatever. The Mutual, the first to arrive, upon pulling upon her hawser when made fast, soon ascertained that the stern moved but a short distance, being held to the dock by the aft spring line. About that time the master of the C. R. Stone arriving and discovering that she was held fast, boarded the steamer, went to her starboard quarter and cut the steel hawser with an ax, thus enabling her to be moved out. In doing this he testifies that he was exposed to some danger, and that his trousers were burned. After the steamer was hauled out somewhat into the slip, a sixth tug, the Unity, pushed for a short period on her starboard quarter, but soon went away as unnecessary for further service. The position of the steamer at pier A was near the exit from the basin, and the turning and handling of the steamer to take her out through the gateway undoubtedly required considerable care and skill. It was accomplished, however, without any injury. The master after extinguishing the fire forward had come aft, soon after the Stone's arrival, approved her master's act in cutting the Coya's hawser, and invited him to the bridge to assist in the management of the steamer in getting out of the basin. She was anchored at a safe distance outside at about 3 a. m.

The most dangerous period for the Coya, namely, when the boats and other inflammable materials on her forward part had caught fire, was already past before any of these salving tugs arrived. Although the fire on the pier lasted for a considerable period, there is no indication from the evidence that the fire at any time became more dangerous to the Coya than before. Her decks were of steel, and as the previous fire forward was extinguished by the ship's own means, and as nothing on board again took fire, although the steamer remained in the same position for at least a half hour before the salving tugs got her away from the pier, it is manifest that the Coya, on the arrival of the tugs, was in no present peril, and that her previous apprehended danger had become very much diminished at the time she was removed. This circumstance distinguishes the present case from all other cases of salvage from fire to which I have been referred.

It was nevertheless very desirable, no doubt, that the vessel should be removed from the vicinity of this fire. The master was anxious that this should be done, and a moderate salvage award should be allowed for the services of the tugs that rendered substantial aid.

The saved values of the steamer, freight and cargo amount in all to \$230,000.

The libelants ask an allowance of 10 per cent. of this sum, and cite in support of their contention an allowance of that percentage on one or more barges lying alongside and to the westward of the Coya and in her lee, which were removed by other tugs prior to the rendering of the services to the Coya. The circumstances leading to the allowance referred to do not appear. A percentage, merely as a basis of allowance, is not a proper guide and has been repeatedly condemned. The *Suliot* (C. C.) 5 Fed. 99; The *Baker* (C. C.) 25 Fed. 771, 774. The only guide is what appears to be a reasonable amount having in view all the circumstances of the service, and such a sum as

will afford all the encouragement and stimulus to salvage operations that can be deemed necessary to secure the most effective service. In the case of *The S. B. Baker* (D. C.) 23 Fed. 109, Id. (C. C.) 25 Fed. 771, an allowance by this court of \$750 for hauling out of her slip a burning loaded cotton barge, worth with cargo \$32,000, was reduced on appeal to \$350. The allowance of a percentage is made in this court merely as a convenient mode for an apportionment on ship, freight and cargo of such an amount as the court otherwise deems reasonable and sufficient. *The St. Paul* (D. C.) 82 Fed. 104, 108, 111.

In the present case, considering also the presence of numerous other tugs competent to render the same service, the sum of \$3,450, being $1\frac{1}{2}$ per cent. upon the values saved, will be in my judgment a liberal and sufficient compensation for the services of these harbor tugs and answer all the purposes for which salvage awards are made. See *Kaiser Wilhelm der Grosse* (D. C.) 106 Fed. 963.

The above amount will be distributed as follows:

To the Mutual	\$ 800 00
To the C. R. Stone	800 00
To the Unique, a large and valuable boat	700 00
To the Michael Moran	700 00
To the P. Cahill	350 00
To the Unity	100 00
	<hr/>
	\$3,450 00

Out of the amounts above awarded to each tug, I allow to the master of the *C. R. Stone* \$100; the master of the *Unity* \$10; and to each of the other masters \$50. Of the balance, I allow one-fourth to the officers and crew, including the master, to be distributed among them pro rata, according to their wages, and the other three-quarters to the owners, respectively, with costs.

FALLS OF KETTIE S. S. CO. v. UNITED STATES & AUSTRALASIA S. S. CO.

(District Court, S. D. New York. April 13, 1901.)

SHIPPING—CONSTRUCTION OF CHARTER—COVENANT FOR DOCKING—DAMAGES FOR DELAY OCCASIONED BY FOUL BOTTOM.

A charter of a steamship for a period of about six months, hire to continue until her redelivery at some designated port, contained a provision that "steamer is to be docked, bottom cleaned, and painted whenever charterers and master think necessary, at least once in every six months, and payment of the hire to be suspended until she is again in proper state for the service." At the expiration of six months the ship was in a South African port, and the charterer desired to bring her to the United States for redelivery. She had not been docked or cleaned during the term of the charter, and the charterer demanded that she be taken to Cape Town and docked. The owner refused, and the ship was delayed on the passage home on account of the foul condition of her bottom. *Held*, that the charter provision was, in legal effect, an absolute engagement on the part of the owner to have her docked and cleaned at least once in six months, or else to allow the charterer his actual loss resulting from the failure, and that such provision continued in force so long as

the hire continued; that neither the fact that the master did not deem the docking necessary nor that she could not be docked at Cape Town released the owner from such engagement.

In Admiralty. Suit to recover charter hire.

Convers & Kirlin, for libellant.

Wing, Putnam & Burlingham, for respondent.

BROWN, District Judge. The parties having agreed upon the amount of charter hire, the only question presented to the court for decision, is as to the amount to be allowed as a counterclaim, if any, on account of the delay in the passage of the steamship Falls of Keltie from Port Elizabeth, South Africa, to Norfolk, Va., in July and August, 1900. The charter was for "a period of about six months with charterer's option of about nine or twelve months between New York and Cape Verde Islands, South African ports, Australian ports, etc., etc. and U. S. ports north of Hatteras. * * * Hire to continue until her delivery at the U. K. * * * or U. S. port north of Hatteras."

The charterer did not exercise his option of continuing the hire of the vessel for the further period of three or six months; but at the expiration of the six months, namely, on June 6, 1900, she was in the hands of a subcharterer at Algoa Bay, also called Port Elizabeth, South Africa, with a cargo consigned to the British government. She arrived there on April 19th, where she occupied a period of 10 weeks in discharging, which extended beyond the 6 months period. The charterer and subcharterer retained her only for the purpose of completing the discharge and returning, and the provision of the charter that hire should continue until redelivery, etc., became applicable, together with the other provisions of the charter, until the return could be properly effected.

Clause 22 of the charter, upon which the counterclaim is based, is as follows:

"That as the steamer may be found from time to time employed in tropical waters during the term of this charter, steamer is to be docked, bottom cleaned and painted whenever charterers and master think necessary, at least once in every six months, and payment of the hire to be suspended until she is again in proper state for the service."

On account of the steamer's foul bottom, the respondent on June 26th, pursuant to this clause, demanded that the steamship should be dry-docked at Cape Town, which was the nearest accessible dry dock, but was distant two days' sail. On July 2d the owners by cable refused to dry-dock at Cape Town, adding, "Captain reports it is not necessary." On July 11th the steamship sailed from Algoa Bay and arrived at Norfolk on August 27th, after a passage of 46 days. The respondent claims that by reason of the foul bottom the time of her homeward passage was increased from 6 to 12 days, and that for that reason the respondent should be allowed a deduction from the charter hire for that period, as well as for the extra coal consumed during that time at the price it cost at Algoa Bay.

For the owners it is urged that dry-docking at Cape Town was practically out of the question and was not obligatory, not only on

account of its distance of two days' sail from Algoa Bay, but because the dry dock there was so occupied that it could not be availed of; and further, that the owners were not bound to dry-dock the vessel for the charterer's benefit after the expiration of the six months period, merely to facilitate her return passage and diminish the charterer's responsibility for charter hire.

On this point I cannot sustain the owners' contention. The agreement in the charter, as I construe it, was an absolute and unqualified agreement that the steamer should be docked "at least once in every six months, and the payment of the hire to be suspended until she was again in proper state for the service."

This provision, as I read it, is altogether independent of what the "master may think necessary." Should the charterer and master think necessary a more frequent cleaning than once in six months, then the prior clause made the more frequent cleaning obligatory; but in any event the steamer was to be dry-docked at least once in every six months. The charter continued, and the charter hire continued, so long as the charterer continued to use the vessel lawfully in accordance with the provisions of the charter. The charterer could not escape paying the hire until redelivery according to the charter; and hence the owner's reciprocal covenant to dock the steamer for the purpose of keeping her bottom clean continued in full force and was obligatory so long as the owner's right to payment continued, and the charterer's obligation to pay. The object of cleaning was to expedite the vessel on all her various passages and to relieve the charterer from the additional charter hire arising from delay through a foul bottom; and I see no reason why the covenant for this purpose should not be applied to the passage home, as much as to any other of the steamer's voyages. Nor is it any defense to this counterclaim for deduction that dry-docking at Cape Town was not practicable. That might be a good answer to a claim for a specific performance, but not to a claim for the actual damage sustained by the respondent from the nonperformance of the owner's express covenant. By this unconditional contract the owner took the risk of his inability to perform the contract. Not being occasioned by the act of God, so termed, any actual loss from nonperformance should be borne by the owner, and not by the charterer; since the charterer was entitled by the contract to the advantage of a performance of that stipulation as a part of the consideration for which he had agreed to pay the charter hire. In legal effect, this clause was an agreement either to dry-dock the steamer at least once every six months, or else to allow the charterer his actual loss from failure to clean her. *The Harriman*, 9 Wall. 161, 172, 19 L. Ed. 629; *Navigation Co. v. Hooper*, 160 U. S. 514, 16 Sup. Ct. 379, 40 L. Ed. 514; *Holyoke v. Depew*, 2 Ben. 334, 340, Fed. Cas. No. 6,652; *The Spartan* (D. C.) 25 Fed. 44, 53.

2. As respects the amount of delay and consequent loss caused by the vessel's foul bottom, the evidence is quite conflicting. There is evidence that after the arrival of the vessel, the secretary and manager of the company in a conversation with the master, claimed that six days would be a fair allowance for the delay; and that while the master attributed his slow passage to currents and the lightness of

the ship, whereby the propeller did not take full hold of the water, he said that he would not interfere with the allowance of six days, and did not know whether that was a fair allowance or not. Other evidence confirms the master's testimony that the extreme lightness of the ship delayed her; and the charterer for its own benefit and to save itself expense of getting rid of the sand ballast, five days before arrival threw overboard 250 tons of sand ballast, which had been taken on board for the purpose of giving greater immersion to the propeller, so as to increase her headway. The result of this was still further to diminish her speed during the last five days. Without going into further particulars, on examination of all the evidence upon this point, I am of opinion that five days is a reasonable deduction to be made in the respondent's favor; and that the coal consumed during five days should also be allowed for at the cost price to the ship. The cost price should be allowed, because the charterer was bound to provide coal in view of the steamer's actual condition and the probable length of her voyage; one item of the loss is, therefore, the extra coal necessarily taken for those five days and the actual price the charterer was obliged to pay in order to obtain it.

A decree may be entered accordingly with costs.

THE HEATHCRAIG.

(District Court, S. D. New York. April 11, 1901.)

FOREIGN SEAMEN—COMPLAINT OF INSUFFICIENT FOOD—JURISDICTION DECLINED.

A number of British seamen who shipped in England on a British vessel for a voyage to the United States and return made repeated complaint of the insufficiency of the food furnished. On arriving at New York a partial examination of the matter was made by the British consul on the oral complaint of the men, and he directed their return to the ship. Upon subsequent complaint he directed that a written complaint be filed, and that a thorough examination be made thereon. The men filed no such complaint, but left the ship, and brought suit in a court of admiralty to recover their wages. *Held*, that in the absence of proof of oppression or gross hardship, or that they would not be accorded a fair and impartial hearing by the consul in accordance with the British shipping act, the court should decline jurisdiction.

In Admiralty. Suit by foreign seamen to recover wages.

Carl L. Schurz, for libelants.

Wheeler & Cortis and Charles L. Haight, for claimant.

BROWN, District Judge. The above libel was filed by seven firemen shipped on board the British steamship Heathcraig at North Shields, England, June 16, 1900, for a voyage to New York and other ports and return, with wages at the rate of £4. 10s. per month. Five of the libelants had an advance of £2. 5s., being their wages to the end of June. The vessel arrived in New York on July 4th, the libelants worked on board until July 9th, and then left the vessel on account of alleged insufficiency of food. Five of the libelants claim pay for 8 days, namely, £1. 4s. each, and two of the libelants for 23

days, or £3. 9s. each. On the second day out complaint was made of insufficient food upon the master's allowance, and five days later the complaint was renewed. The captain thereupon gave them until 4 o'clock of that day to elect whether they would go on with the fare that had been furnished them, which was similar to that of the rest of the crew, who made no complaint, or whether they would elect to take their allowance of raw materials according to the scale provided by the articles to be prepared by the cook. The libelants insisted upon being put upon the scale. This was done, while the rest of the crew continued on the ship's fare as before. After two days three of the firemen returned to the ship's fare; the rest continued upon the scale with louder complaints than before. On arrival at New York a partial examination of the matter was made on the seamen's oral complaint before the British consul, who directed that the seamen return to the vessel. Upon subsequent complaint the consul directed that written complaint be filed and that thereupon a thorough examination would be made. No such complaint was filed, but the seamen applied to this court.

I am satisfied that there is very little merit in the claim of these seamen; that they were quarrelsome from the first and had no disposition to get along peaceably, or to make the best of their situation, either under the master's allowance or under the scale and the law under which they had shipped. The scale provided by the articles is inferior to that provided by the laws of the United States; and the old practice of serving out articles in their raw condition for the men to get cooked as they can, is in these days seldom applied, and has now become demoralizing. It led to further trouble, as under present conditions I believe it cannot fail to do, and whenever the men have not deliberately chosen the alternative of the scale, I should use whatever legal authority I have to give them relief against any abuse or harsh consequences. But in this case the scale was deliberately chosen by the men themselves after the master had advised them against it and endeavored to dissuade them from this choice; and after having elected the scale the seamen abused even their own choice; they practically threw away the flour distributed to them and then complain of insufficiency. For the bitter feeling engendered, the men themselves are chiefly responsible. The evidence is in some respects very contradictory; but it seems to me plainly on the whole a case which does not call for the interposition of this court. The libelants having refused to make the written complaint invited by the British consul, as a preliminary to a full investigation of the whole matter in accordance with the British shipping act, which governs the law of the relations between the ship and crew, I think this court upon the facts above stated should decline to take further jurisdiction of the cause. This objection was taken at the outset of the case; but I deemed it best not to act on the objection at that time, as jurisdiction in such cases is discretionary, but to allow inquiry into the facts sufficiently to enable me to understand whether the charges of oppression, or of gross hardship, beyond the legitimate and just consequences of the seamen's own acts, had any substantial foundation; or whether the circumstances were such that an impar-

tial inquiry was no longer likely to be had at the consulate. As I see no sufficient indication of either, the court must decline to intervene further, and the libel is therefore dismissed.

AMERICAN S. S. CO., Limited, v. INDEMNITY MUT. MARINE INS. CO., Limited.

SAME v. MANNHEIM INS. CO.

(District Court, S. D. New York. April 27, 1901.)

1. MARINE INSURANCE—SEPARATE VALUATIONS OF HULL AND MACHINERY.

Where the hull and machinery of a steamship are separately valued in a policy of marine insurance, the parts thus separated are to be treated as distinct insurances, to be applied to each part as though each were insured by an independent policy.

2. SAME—PARTIAL LOSS—DEDUCTIBLE AVERAGE.

A marine policy on a steamship contained two separate valuations, one including the "hull, tackle, apparel, furniture, stores, outfit, fittings, electric light plant, and dynamo," and the other the "engines, propeller wheel or wheels, boilers, and machinery." It contained clauses providing that, "in the event of particular average, the assurers only to be liable for the excess of one-half per cent. upon the entire value," and "average payable on each valuation as if separately insured, or on the whole." *Held*, that the effect of the latter clause was to entitle the assured to treat the policy as a single policy on the whole, or as two separate policies, for the purpose of computing the deductible average in case of a partial loss, and that in case of a loss by injury to the hull in collision, which did not affect any of the items included in the second class, the half per cent. deductible under the franchise clause should be computed only on the amount of the first valuation; the words "entire value," as used in the first clause, having reference in such case to the class of which the hull formed one item, as the subject of separate insurance.

3. SAME—CONSTRUCTION OF POLICY.

Ambiguities or contradictions in different clauses of a policy, in the absence of any controlling indications of intent, are to be resolved against the insurer.

In Admiralty. Actions on policies of marine insurance.

Wing, Putnam & Burlingham, for libelants.

Butler, Notman, Joline & Mynderse, for respondents.

BROWN, District Judge. The above libels were filed to procure a judicial construction of the so called "franchise" clause in two time policies of marine insurance upon the steamship John W. Gates, providing that "in the event of particular average, the assurers only to be liable for the excess of one-half per cent. upon the entire value."

Each policy contained two separate valuations; one upon the hull, tackle, etc., and another upon the engines, machinery, etc.; and a decision is sought upon the question whether the computation of the deduction of the one-half per cent. should be made upon the entire aggregate of valuations contained in the policy, or only upon the entire separate valuation of the hull, tackle, etc., to which alone the damage happened. The question involved affects, as it is said, a great number of policies issued during the year 1900 in nearly identical terms.

The policies in question ran from April 23, 1900, to April 20, 1901. The amount insured in the Indemnity Company was £3,000; in the Mannheim Company \$10,000. Both were valued policies, in which the hull, tackle, etc., were valued at \$260,000, and the engines, machinery, etc., at \$79,500, or the equivalent of those sums in pounds sterling.

A few weeks after the insurance was effected, the steamer through collision sustained damage to the amount of \$8,730.65 to her hull alone, the engines, etc., not being injured. By the above and other similar policies the steamer was fully insured, and in all the policies the valuations were the same.

In adjusting the whole loss upon all the policies, the adjusters deducted \$1,300 only, that is, one-half of 1 per cent. computed upon the agreed value of the hull, tackle, etc.; to which class alone the damage was done, treating each valuation as if separately insured by an independent policy, pursuant to one of the clauses in the policies. The defendants contend that under another clause in the policies, the one-half per cent. should have been computed at \$1,697.50, that is, upon the entire amount of both valuations, to wit, upon \$339,500.

If the provision for a deduction of "one-half per cent. upon the entire value" were considered without reference to prior adjudications as to the effect of separate valuations of different parts of the subject assured, and without reference to any other clauses in the policy, the half per cent. "franchise" (freedom from liability) might naturally be computed upon the aggregate of all the valuations stated in the policy, as being the "entire value" that was intended by the franchise clause.

The practice of separately valuing different parts of the ship has, however, been long in use in marine policies, and numerous decisions have established the rule that the parts thus separately valued, are to be treated as distinct insurances, and the policy applied to each part as though each were insured by an independent policy. *Emerig*, Ins. c. 17, § 8; *Phil. Ins.* § 1768; *Gow*, Mar. Ins. pp. 206, 207; *Deidericks v. Insurance Co.*, 10 Johns. 234, 235; *Merrill v. Insurance Co.*, 73 N. Y. 453, 463; *Woodward v. Insurance Co.*, 32 Hun, 365, 373.

In *Merchants' S. S. Co. v. Commercial Mut. Ins. Co.*, 19 Jones & S. 444, where there were separate valuations on "hull, tackle," etc., and on "boilers and machinery," it is said:

"The two valuations indicate separate subjects of insurance, and the contract is to be enforced distributively as to the particulars under each valuation considered as a whole."

In *Oppenheim v. Fry*, 3 Best & S. 873, 5 Best & S. 348, where there were similar separate valuations on hull and machinery, *Earl, C. J.*, said that the same principle applies as if the two subjects had been insured in separate instruments, in different offices.

Cockburn, C. J., declared the case to be "the same as if there were two policies, one on the hull and the other on the machinery."

Mr. Justice Blackburn in the same case said:

"The meaning of the contract I understand to be this: The assurance is in one sum upon the whole, but the parties agree that for all purposes of average it shall be considered as if the \$14,000 upon the hull was insured in one policy

and the £8,000 upon the machinery in another policy and by another set of underwriters."

Under this rule of construction, evidently the adjusters' computation would be correct, since upon an insurance by different policies of the two different subjects separately valued, it is manifest that a deduction of "half per cent. on the entire value," would mean on the entire value of the part insured.

The policies contain various clauses which have some bearing on the question presented. In the policy of the Indemnity Company (that of the Mannheim Company being substantially the same) the insurance is declared to be—

"Upon the hull, tackle, apparel, furniture, stores, outfit, fittings, electric light plant including dynamo, and also the engines, boilers and machinery, of the good steamer called the John W. Gates."

"The said ship, etc., for so much as concerns the assured, by agreement between the assured and assurers in this policy, are and shall be valued as follows:

- | | |
|--|---------|
| (a) "Hull, tackle, apparel, furniture, stores, outfit, fittings, electric light plant and dynamo | £53,608 |
| (b) "Engines, propeller wheel or wheels, boilers and machinery.. | 16,392 |

£70,000

(c) "In adjusting and determining any and all losses, damages and amounts under this policy, the valuation stated herein shall be considered the value of the vessel."

(d) "Average payable on each valuation as if separately insured, or on the whole."

(e) "The right of abandonment under this policy as for a constructive total loss shall not exist unless the loss exceeds 75% of the value in this policy."

(f) "Warranted free from particular average under three per cent., unless the ship be stranded, sunk, burnt, on fire, or in collision, or in contact with any substance other than water; and in the event of particular average the assurers only to be liable for the excess of one-half per cent. upon the entire value."

Clause (d) above quoted seems expressly to re-enact, as between the parties to the contract, the rule of construction above quoted, to be availed of by the assured, at his option, as though insured by separate policies; while at the same time the privilege is given to the assured to treat the policy as a single policy "upon the whole," whenever it is for his interest, as it sometimes is in connection with the three per cent. warranty (f), to do so.

A deduction computed upon the whole aggregate values of (a) and (b) would here be incompatible with clause (d), since that provides in effect that at the assured's option the average or loss shall be paid on each valuation as if separately insured; and if the deduction is made upon both valuations when the loss has been incurred upon only one of them, as in this case, it is manifest that the assured will not receive payment of his average as if "each valuation was separately insured"; he will receive a less sum, in violation of this provision.

The defendants on the other hand, invoke clause (c), which declares that in adjusting all losses, damages and amounts under this policy, the valuation stated herein shall be considered the value of the vessel; and the use of the word "valuation," in the singular number, is claimed to indicate that the value of the vessel is to be taken as a

whole in adjusting all amounts and losses payable under the policy. This clause, however, is, I think, too general in its character to outweigh the more precise and specific requirement of clause (d) as respects the loss payable on each valuation. Clause (c), moreover, has a recognized different purpose and application, viz., in estopping both parties from alleging any different values of the ship than the aggregate named, in cases of over or under insurance, general average or undervaluation. See *International Nav. Co. v. Atlantic Mut. Ins. Co.* (D. C.) 100 Fed. 304, 316, and cases there cited.

The defendants further contend that the provision for a deduction of "one-half per cent. upon the entire value" in the event of particular average, is an express provision designed to exclude any possible doubt of the insurers' right to make a deduction upon all the aggregate values in case of particular average; and they claim that the words "entire value" are here equivalent to and include the aggregate or whole values named in the policy. But this is not necessarily so. The clause itself does not state what it is of which the "entire value" is to be taken; whether of the whole ship, or of the class of subjects separately valued and insured. Each of the two classes separately insured, (a) and (b), consist of many different subjects. A loss arising under (a) alone, may be on any one of the nine different subjects included in class (a) without loss on either of the other eight; under class (b) the loss may be on the propeller wheel alone, as in *The Homeric* (D. C.) 106 Fed. 960, without any damage to the other three subjects in class (b); and the deduction upon the "entire value" may thus be properly computed upon the entire value of that class, as distinguished from the value merely of the thing damaged. The words "entire value" may, therefore, be given as appropriate effect by referring them to the value of each class insured, as to the value of both classes; and the moment it is held that the policy must be treated as providing distinct insurances on each class, "as if separately insured," as the authorities and clause (d) require, I think the former of the two constructions must be adopted, because that would necessarily be the result of separate insurances. Had the value of the ship been intended, that language would naturally have been used in the policy, or some other equally explicit and unambiguous expression; especially in view of the long-established and well-known construction given to policies containing separate valuations like this. This view moreover, prevents any contradiction of clause (d); and in the construction of contracts, contradictions are always to be avoided if possible.

Even if the clause in question were deemed incapable of any other construction than including the total value of the vessel, inasmuch as that provision would then become directly opposed to clause (d) and contradictory of it, I see no reason why it should be held to prevail over clause (d); on the contrary, as the policy is in the terms prepared and selected by the assurers, ambiguities or contradictions, in the absence of any controlling indications of intent, are to be resolved against the insurers and in favor of the assured. *First Nat. Bank of Kansas City v. Hartford Fire Ins. Co.*, 95 U. S. 673, 678, 24 L. Ed. 563; *Thompson v. Insurance Co.*, 136 U. S. 287, 297, 10 Sup. Ct. 1019,

34 L. Ed. 408. Had clause (d) been intended to be limited and controlled by clause (f) this qualification should and would naturally have been inserted in clause (d).

The Mannheim's policy contains all the provisions above quoted and several other peculiar provisions; but on consideration I do not think that the latter affect the construction of the clauses above quoted.

The adjustment should therefore be sustained, and decrees ordered for the sums claimed, with interest and costs.

SIMPSON'S PATENT DRY-DOCK CO. v. ATLANTIC & E. S. S. CO.

(Circuit Court of Appeals, First Circuit. April 18, 1901.)

No. 343.

1. NEGLIGENCE—ACTION FOR DAMAGES—EVIDENCE CONSIDERED.

Evidence considered, and *held* to show that a dock company was guilty of negligence in failing to have its dry dock and appliances in suitable condition to receive a large steamer docked for repairs therein, and to render it liable in damages for the injury resulting to the vessel from falling while being docked.

2. APPEAL—FINDINGS BELOW.

The rule applied, with reference to an issue of fact, that the finding of the commissioner of the district court, supported by the district court, will be regarded on appeal as, in effect, "successive and concurrent decisions of two courts in the same case."

3. DEMURRAGE.

Where the damage to a ship, received through the negligence of a person chargeable therefor, is repaired in a dock, and at the same time other work is done on the ship to a very considerable amount, which other work was not required at that particular time, the party chargeable must pay the entire demurrage, notwithstanding the other repairs. *Ruabon S. S. Co. v. London Assurance* [1900] App. Cas. 6, considered.

Appeal from the District Court of the United States for the District of Massachusetts.

Eugene P. Carver and Edward E. Blodgett, for appellant.

Lewis S. Dabney (Frederick Cunningham, on the brief), for appellee.

Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

PUTNAM, Circuit Judge. The appellant undertook to dock at Boston the steamship belonging to the libellant, for the purpose of permitting repairs to be made of damages which had occurred during her voyage. She was of iron, 400 feet long, and of 4,904 gross tons, and therefore large and heavy. The owner of the dock was, of course, bound to use reasonable care in docking her; and, under the circumstances, in view of her size and weight, "reasonable care" means a dock in suitable condition, and very great diligence and skill. *Mather v. Rillston*, 156 U. S. 391, 15 Sup. Ct. 464, 39 L. Ed. 464; *Railway Co. v. Barrett*, 166 U. S. 617, 619, 17 Sup. Ct. 707, 41 L. Ed. 1136. The other introductory facts are sufficiently stated in the opinion of the learned judge who disposed of the case in the district court. The

theory now advanced by the ship is as follows: She has a very flat floor,—a “kettle bottom,” so to speak. Her beam is 44 feet, while the distance between the dock’s bilge blocks, when hauled back on its floor, is only 42 feet. The bilge blocks should have been hauled close to the sides of the dock and laid down. Instead of this, they were left standing upright, away from its sides, so that the vessel, as the water was drawn down, had grounded upon them at the bow before her keel forward touched the keel blocks; and, as the water fell, the keel of the vessel took the keel blocks at the stern, but the bow hung on the bilge blocks until the ship crushed the latter and dropped with a great crash. The ship also claims that the keel blocks were insufficient, and that the ship began to cut into those which were aft, and gradually cut in forward, until she crushed the bilge blocks and fell.

On the other hand, the theory of the dock company is that the ship had more draft than was reported; that she entered the dock with her stern to the port of the line of keel blocks; that, as the stern was being hauled over, it displaced some of the keel blocks aft; that thereupon the dock master directed the ship to be hauled out of the dock; that, in place of hauling her out, the captain of the ship made use of his steam winch and hauled her upon the keel blocks; and that then, on account of some of them being displaced, she began to crush into what remained aft, and so gradually settled until the catastrophe was accomplished. The learned judge of the district court found that the dock master did give an order to haul the ship out, but that the order was only the exclamation of a man frightened at finding himself in a position of responsibility, and also, in substance, that he acquiesced in the ship remaining in the dock. The difficulty with the appellant’s theory is that it does not account for the manner in which the ship fell. While all parties claim that she first settled on the keel blocks aft, and also that she then began to settle gradually from aft forward, yet there is no evidence to justify finding that settling on the keel blocks in a right line would have resulted in any injury. Moreover, when she fell she fell with a crash so loud as to bring people from the street. This crash was clearly something connected with the falling of the ship from a height, and could not have been an accompaniment of her merely crushing down the keel blocks. She fell, moreover, with a list to the starboard forward; and, what is more conclusive, she fell with her bow forward to the starboard, and almost entirely, if not entirely, away to the starboard of the keel blocks, and clear of them. So far as she did not fall clear of them, the keel blocks forward were crushed down at the ends to the starboard of the ship, while the ends to her port were lifted. All this shows conclusively that the ship’s bow was thrown to the starboard to a substantial distance. None of these facts is consistent with the theory of the dock company, but they are all consistent with the ship’s theory, and they exclude any other almost to a certainty.

The dock company denies that the bilge blocks had been left standing upright in the dock, away from its sides. Its claim is that the dock master, on finding the ship was settling, ordered them to be

drawn towards the center of the dock, in order to support her forward. This order was given, but it was only partially complied with. Flewelling, who was employed by the dock company, testifies that the dock master said to him that the ship seemed to be crushing all the keel blocks underneath her, and that he might haul in two or three of the forward bilge blocks. He adds:

"We then hauled the port forward block till it fetched up against the plates on the ship's side, and we tried to haul the second one, and before it got out to its place it either caught, or something gave way,—the chain or rope. * * * Then we went around to the other side, and we hauled two on the starboard side, and went to haul the third one, and the chain broke."

Weaver, another employé of the dock company, testifies that he helped to haul one of the bilge blocks forward on the port side. He took a bar to start one of them, which appeared to be frozen or stuck. He did not move it.

The evidence in behalf of the ship with reference to the bilge blocks is of a very positive character. Booth, who was the libelant's general agent and marine superintendent at Boston, testifies that when the survey occurred, on February 6th, the next day after the injury to the ship, he noticed two bilge blocks on her port side, forward of the main rigging, close to her; that these blocks were crushed; and that there was a slight indentation and scraping on the ship's hull, as if she had rested on them. Duncan, who was the ship's chief engineer, testifies that, the day after the injury to the ship, he saw that she had broken down through the keel blocks; that they were crushed completely down into small splinters; that the forward bilge block on the port side was crushed; that there was an indentation in the plating of the ship, caused by the ship resting heavily on the corner of that block; that "No. 2 block from the forward" was crushed somewhat in a similar manner to the other block; and that there was a mark on the ship's side where the ship had scoured down the edge of No. 2. No. 2 was a bilge block. In fact, there is no contradiction on the point that the ship caught on the bilge blocks. The only differences between the ship and the dock company are as to which, and how many, of the bilge blocks the ship caught on, and as to the reason for their being under the ship's bilge. The witnesses for neither party are clear or specific as to the precise number and location of those which were under her. However, none of these discrepancies is of consequence. It is plain that the bilge blocks were fitted with unsuitable chains, which broke; that they were allowed to be frozen in or to be stuck; and that the failure to place them suitably arose in part from a lack of efficient measures, and in part from their unsuitable condition. The result was that one or more bilge blocks were hauled in under the port of the ship's bow, and forced her nose to the starboard, practically off from the forward keel blocks, so that when they were crushed she fell to the starboard, receiving the strain which was the cause of the substantial injury she suffered. On this point the case is clearly against the dock company,—not only that the injury to the ship was caused by the bilge blocks, but also that the efficient reason that they were injurious was its negligence in reference to them.

This leaves only the question of damages. On this branch of the case the court below sustained the finding of the commissioner; and, in accordance with the rule stated by us in *The Providence*, 38 C. C. A. 670, 98 Fed. 133, 135, the result is, in effect, "successive and concurrent decisions of two courts in the same case" on what are mainly mere questions of fact. It is therefore not easily overthrown. The facts are sufficiently stated by the learned judge who sat in the district court in his opinion with reference to the exceptions taken by the parties to the commissioner's report. That report classified the damage into five items. Of course, there is an opportunity for differences of opinion with reference to particulars; but, in view of the straining which the ship received, there can be no doubt that the gross amount awarded was reasonable, and we need concern ourselves with only the practical result.

The damage which the ship received was repaired in a dock in England, and at the same time other work was done, to a very considerable amount. On this account the dock company claims that demurrage during the repairs should not have been allowed. The district judge, however, shows correctly that the other work was not required at that particular time, and that, as the ship was not laid off for that work, it might, in fact, never have been done. *Ruabon S. S. Co. v. London Assurance* [1900] App. Cas. 6, although relating to an adjustment of general average, lays down a rule which apparently supports that view of the law. However, for the reason already stated, to the effect that the gross allowance was plainly reasonable, we do not find it necessary that we should even impliedly adopt any rigid rule which would form a precedent for other cases. We approve the determination of the district court with reference to the amount of damages as a whole, without needing to criticise the several items which entered into it.

The decree of the district court is affirmed, with interest, and the costs of appeal are awarded to the appellee.

VINCENT v. HOGAN et al.

(District Court, S. D. New York. May 6, 1901.)

NEGLIGENT DISCHARGE OF CARGO.

Where a bill of lading consigned a canal boat alongside of a steamer for the purpose of transferring a cargo of iron from the canal boat to the steamer, and the iron was properly put in slings in the hold of the canal boat, and two of the loads fell, from contact with the side of the ship, because there was no guy to control the slings in rising, the canal boat was not liable for the resulting loss.

Peter S. Carter, for libellant.

Wheeler & Cortis, for defendant.

BROWN, District Judge. The damage in this case is I think to be ascribed wholly to the lack of a proper guy and guy tender to keep the sling of iron from coming in contact with the side of the ship while being hauled up alongside. With this, neither the libel-

ant nor his men, as I understand the evidence, had anything to do. His part of the business, as I understand it, was to see that the iron was properly put in slings in the hold of the canal boat, and then it was the business of the stevedore to haul it properly on board. There is no evidence to discredit the fact that the iron was properly loaded and secured in the slings in the hold. Two of the loads fell from contact with the side of the ship because there was no guy to control the sling in rising. A guy would easily have prevented such contact. As it was the defendants' duty to provide this precaution, they must be held responsible for the damage.

I attach no importance to the alleged statements of the superintendent, that it was dangerous to unload from the canal boat by winches, and that the master of the canal boat should assume the responsibility of it, or that he did so. This is denied by the latter, and no witness confirms the superintendent beyond his mere statement to the master. It does appear that the superintendent at first desired him to unload on the dock, to which the master objected on account of the greatly additional expense. The bill of lading that was put in evidence shows that the canal boat was consigned alongside of the steamer, which imports that the discharge should be directly into the steamer, and such was the custom. The superintendent had no right, therefore, to require the canal boat to undergo the additional expense of discharging on the dock, nor would any statements made by him to the captain, as to responsibility, have any force to shift upon the canal boat any damages resulting from the lack of reasonable precautions in taking the cargo from the canal boat upon the ship by steam with the ship's appliances as was intended.

Decree for the libelant with costs, or with an order of reference if the damages are not agreed upon.

THE NO. 6H.

THE NO. 7H.

THE ADMIRAL.

THE JAMES D. LEARY.

(District Court, E. D. New York. April 16, 1901.)

1. SHIPPING—VESSELS MOORED TO OTHERS—LIABILITY FOR NEGLIGENCE.

Two scows owned by libelants were moored to the breakwater in Erie Basin by strong lines, which were sufficient to withstand any strain which such vessels would have put upon them had not the three respondent scows moored to them on the outside. The following morning the wind was high, and there was danger of the vessels breaking away, but the masters of respondent scows took no measures to assist in strengthening the fastenings. The masters of libelants' scows called out to them of the danger, but their suggestion was unheeded, and beyond that they did nothing. The lines finally parted, and libelants' scows were drifted against other objects, and sunk. *Held* that, while the action of respondents in tying up to the other scows was lawful, and in accordance with the custom of the port, it was their duty, when the safety of all the vessels required it, to put out lines to assist in making them secure; that it was

also the duty of the masters of libelants' vessels, having knowledge of the danger, and that nothing was done by the outlying scows, to use some diligence to strengthen their lines for the protection of their own vessels, and that the damages should be divided, one-third to be borne by libelants and two-thirds by the outlying scows, as between themselves to be divided equally.

2. TUG AND TOW—MOORING OF TOW DURING STORM—LIABILITY OF TUG.

A tug, during stormy weather, took her tow to a proper place, where she could safely outride the storm, and left her, moored to other scows, and in charge of her master. During the storm, the tow, although having knowledge of the danger, and ample opportunity, took no measures to extend lines of her own to the breakwater, to which the inner scows were moored, or to assist in strengthening their lines, in consequence of which such lines parted, and she was held liable for resulting injury to the other scows. *Held*, that there was no ground for placing such liability upon the tug, which was not charged with the duty of seeing that her tow was equipped with proper lines, or that she made proper use of them.

In Admiralty.

Peter S. Carter, for libelants.

James J. Macklin, for the No. 6H and No. 7H.

Louis B. Adams, for the Admiral.

Butler, Notman, Joline & Mynderse (F. M. Brown, of counsel), for the Leary.

THOMAS, District Judge. On Saturday, February 24, 1900, two scows (herein called "R scows") were moored alongside the breakwater at Erie Basin with good and strong lines, which would have been quite equal to withstand the strains put upon them by the tempestuous weather that occurred on the following morning had not two other scows (herein called "H scows"), during the afternoon and evening of the 24th, moored to the R scows, and a little later another scow, the Admiral, moored alongside the H scows. So five scows, lashed together, depended upon the lines of the R scows. When the scows were placed alongside on February 24th, the wind was in the south or southeast between 2 and 9 o'clock p. m., and in the southwest from 10 to 12 o'clock. Its velocity in the earlier part of the evening varied from 28 to 35 miles per hour, but declined between 8 and 11 o'clock from 19 to 8 miles per hour. On the 25th, from 1 a. m. to 3 p. m., the wind was west, with a velocity increasing from 25 to 45 miles per hour; at 3 p. m. it was southwest, with a velocity of about 46 miles per hour; at 4 p. m. it was north, with about the same velocity; at 5 or 6 a. m. it was northwest, with slightly increased velocity; and at 7, 8, 9, and 10 a. m. it was north, with a velocity of about 55 to 58 miles per hour. When the scows were placed alongside on February 24th, the wind, previously strong, had moderated; but the weather was not suitable for the scows to go to sea, and hence their presence in the basin, which was an entirely suitable refuge. The increased violence of the wind on the morning of the 25th brought too great strain upon the lines of the R scows, which were not assisted in holding by any lines from the outlying scows. At about 9 o'clock the mooring lines parted, and the tier of boats was blown further out into the basin, the R scows came in collision with other objects, and both sank; and for

the injury thus done the libel is filed. The owners of the R scows libeled the H scows and the Admiral, and the Admiral then brought in her tug Leary, who had placed the Admiral alongside the H scows.

The following conclusions have been reached: (1) The lines of the R scows were strong enough for her own purposes, but obviously not for holding the added scows after the wind grew violent on the morning of the 25th. (2) The master of each of the outlying scows had full notice of conditions gradually growing more and more dangerous, and ample opportunity on the morning of February 25th to make some effort to aid the holding of the tier of boats. He did not make the slightest endeavor to get a line to the dock, or to aid the mooring in any way, but rested in absolute indifference alike to his duty and danger. (3) The omission of the master of each scow to bestir himself in some degree, and to seek to strengthen the moorings in the presence of danger, was such negligence as makes his scow liable for injury to the R scows from the breaking away of the tier of vessels. *The Energy*, 10 Ben. 158, Fed. Cas. No. 4,485; *The Lilian M. Vigus* (D. C.) 22 Fed. 747; *Meyers v. The America* (D. C.) 38 Fed. 256. (4) The master of each of the R scows was on the morning of the 25th aware that the lines were in danger of parting, and claims to have called out to persons on the other scows with reference to that fact. He saw and appreciated the peril, and did no act whatsoever to guard against it, save to call out to the men on the other scows, knowing full well that his suggestion met with no practical response. Hence the R scows should bear some portion of the damage.

Concerning the last finding, it may be observed that the outside scows made fast according to the general custom of the port,—a custom necessary for the business of the harbor. In such case the outlying boats should have put out a line accordingly as necessity demanded it or the conditions permitted it. *The Nora Costello* (D. C.) 46 Fed. 869. When the boats were made fast, the necessity of a line to the pier on the part of the outer scows did not exist. On the morning of the 25th it did exist, and the men on the scows had full warning of it for several hours, and did nothing. This was a neglect of the duty owing to the libelants, and the libelants' masters in control of the R scows knew of the negligent omission. They spoke of the danger, but contented themselves with unheeded suggestions to the men on the outlying scows. Then they went back to the steam dredge lying abaft the R scows, which belonged to the libelants, and did absolutely nothing. It is a good rule that a person should not be idle when he sees his property endangered by another's negligence, but that he should use some energy to preserve his own interest. He is called upon to do only what he reasonably may, but he must act with good faith. The R masters undoubtedly saw the scows blown away, and by their inactivity aided their own injury. It should be noticed that the outlying scows were not trespassers. The masters of the R scows knew well that the others had made fast the night before. They did not order them away. They licensed the connection made to their boats, and thereby consented that they should moor as they did. In this regard the case is unlike *Pope v. Seckworth* (D. C.) 47 Fed. 830, and *The John Cottrell* (D. C.) 34 Fed. 907. Therefore, while

the R boats were not obliged to strengthen their own lines for the safety of outlying boats (*Pope v. Seckworth* [D. C.] 47 Fed. 830, 832), and while, if necessity arose, it was the duty of the outside boats to use care not to put too great strain on the R lines, yet, when the R masters saw that the burden of the licensed boats was likely to prove too great for the mooring lines, they owed the duty to their own scows of strengthening the lines, which could have been done, or to do some other act to avert the threatening disaster. If a man license others to come upon the floor of his building, and thereupon find that the added weight endangers the floor, he may not say, if the licensees fail to aid its strengthening, that he will calmly await the results of the danger at the licensees' risk. If there was danger here which the masters of the other scows should have apprehended, and which should have moved them to action, the R masters saw it too, with better opportunity to see and to act, and probably with superior resources and advantages, as they were on the pier. A master may not indolently stand by and expect the parting of his lines, under the continued strain of his own vessels and other vessels suffered by him to moor at his side, and place the whole blame upon his licensees, the consequences of whose negligence he uses no effort to thwart. Such composure and inactivity in anticipation of disaster should not be approved. The damages should be ascertained, and one-third thereof borne by the libelants and two-thirds by the outlying scows, each scow, as against the other outlying scows, bearing two-ninths of all the damage. *The Brothers*, 2 Biss. 104, Fed. Cas. No. 1,969; *The Peshtigo* (D. C.) 25 Fed. 488, 491. The legality of such apportionment is recognized in *The Anerly* (D. C.) 58 Fed. 794, 796. As each vessel, so far as appears, caused an equal strain, so each vessel should bear a corresponding portion of the damage. The Admiral urges that her tug, the Leary, should bear the Admiral's share. The Leary, under her contract of towage, was permitted to place the Admiral where she was, and was not obliged to provide her with lines. The Admiral should have been provided with mooring lines adequate to resist the weather that prevailed (*Slover v. Erie R. R. Car Float No. 4*, 37 C. C. A. 154, 95 Fed. 495), and the Leary could presume such provision. The place of leaving the Admiral was proper. She was left where she could ride out the storm. If the cause of the accident had been insecure anchorage ground, due to some dangerous conditions, the failure of the Leary to return might have been culpable. But the proximate cause of the accident was the failure of the Admiral to pay due attention to the mooring lines, and the Leary owed her no duty to return and look after her in that regard. The Leary might presume that a scow would be equipped with mooring lines, and that she would use them when necessity required. It was not the duty of the Leary to provide her with mooring lines, or to make them fast for her, under the circumstances here present. For such purpose the Leary did not owe the Admiral the duty of returning. It undoubtedly is the duty of a tug, in seeking refuge from a storm, to use care to leave her tow in a proper place, and it is also her duty to use some oversight concerning her with reference to dangers which she ought to apprehend. But the Leary was not called upon to apprehend neglect

of her tow to put out a proper line, nor to suspect that she might not have usual mooring lines. In *Meyers v. The America* (D. C.) 38 Fed. 256, a tug and her tow were held liable because the former placed the latter in a dangerous position alongside another vessel, moored at the wharf, whereby the tow grounded, and listed over towards the wharf, catching the inner vessel, and holding her under until the rising tide covered her. It was considered that it was certain that the outer vessel would ground, and that it was reasonable to expect that she would list towards the wharf, and, on account of her superiority in size, cause injury. In *The American Eagle* (D. C.) 54 Fed. 1010, a tug was held liable for tying scows in tow up to a dock, and leaving them without lights or watchman, in consequence of which they were carried from their moorings, either by reason of a defective rope, or insecure tying, or other cause, and injury resulted. It was found that the owner of the scows had no notice of the disposition made of them, and did not consent thereto. No one was left aboard to look after them, nor was the responsibility of protecting them in any way lifted from the tug. The circuit court of appeals, Second circuit, in *Morse v. The Charles Runyon*, 5 C. C. A. 514, 56 Fed. 312, held that a tug was liable, who, being turned back by heavy weather, left a canal boat at a pier to which the master objected as unsafe, in consequence of which the canal boat at low water broke in two, and sank. The tow was placed in an unsafe place, and the evidence showed that the captain of the canal boat was both anxious and earnest in his attempt to gain assistance and to save the boat and cargo. In *The Thomas Purcell, Jr.*, 34 C. C. A. 419, 92 Fed. 406, it was held that a tug was responsible for the loss of a barge laden with coal, which she anchored in the evening in an exposed place, thereupon proceeding to another port, where, by reason of not keeping a watch during the night, her master was not advised of an approaching storm in time to save the barge before it sank. Here the obvious fact was that the tow was placed in an exposed place, temporarily abandoned, and no watchfulness of changing conditions observed. In *Hastorf v. The Governor* (D. C.) 77 Fed. 1000, it appeared that a tug having in tow a scow to be taken to sea was obliged to put back on the approach of a south-east gale, and thereupon moored the tow outside of Atlantic Basin, which was safe from a southeasterly gale, but unsafe in high westerly winds. During the night the wind shifted to the westward, and the boat was damaged by pounding. The court held that the tug was in fault, either for not taking the tow inside the basin, or else for not maintaining a sufficient watch during the night, with help at hand sufficient to remove the tow in time to prevent damage upon any change of the wind to the westward,—which was a change to be reasonably anticipated. But in this case, as in the others, the conditions from which the injury arose were those against which the tug would be presumed to provide. In *Phoenix Towing & Transp. Co. v. City of New York* (D. C.) 60 Fed. 1019, Judge Brown made a similar holding, which was to the effect that there was no custom or usage between the parties that authorized the tug to leave the scow at the place where she was, without previous arrangement with the libellant, although two other scows had been left there by libellant's direction

during the few days previous. In the case at bar there is evidence of a consent to do the very thing. In the case cited it appears that at the time of mooring the scow the weather indications were threatening, and the master of the scow protested against being left there. Nothing of the kind appears in the case at bar. It also appears in the case cited that during the night it blew a gale from the northwest, and in the morning the scow was found to be damaged; and it was held that, although the scow was left at the Erie Basin breakwater or sea fence, where it was comparatively safe, except as against strong westerly winds, during the night the wind changed from southward to a violent westerly gale, and the scow sank from pounding. This was a condition against which the scow could not guard herself. The tug was bound to use care with reference to her tow pounding, and keep watch of her in this regard. In *The Battler* (D. C.) 55 Fed. 1006, a tug with two barges left Philadelphia for Boston, but when near the ocean the indications of bad weather were such that the tow was anchored near Brown Shoal, in Delaware Bay. The tug left them there on Thursday evening, and engaged in other services until Saturday, at which time the signs of bad weather had so increased that the tug left the barges for other towage services, and never returned to them, and on the following Tuesday they sank during an unusually violent gale. It was held that, although the tug followed an established custom in anchoring her tow to await a change of weather, and engaged in other towing, it was her duty to provide a safe anchorage, and to keep such watch over the tow as to enable her to render whatever assistance it might need, and that such safe anchorage was not provided, and that such care was not observed. But the circuit court of appeals (*The Battler*, 19 C. C. A. 6, 72 Fed. 537) reversed this holding, and decided that the anchorage ground was safe and proper, and that the tug was not liable for the loss of the tow during the extraordinary and terrific gale, either as regards the place of anchorage, or for not removing them further up the bay before the storm broke. And it was further considered that the fact that the tug, pending threatening weather, left the vessels at their anchorage, and engaged in other towage, was not a ground for liability for their loss during an extraordinary storm, where it appeared that the barges were equipped with all the appliances for safe anchorage, and were as capable of riding out a gale as full-rigged ships, and that it was the common practice to leave barges so anchored; and that, even if the tug had been present, she would have been unable to have prevented the disaster. In the case at bar the place of anchorage was proper, and the injury did not result from any one of the causes suggested in the cases cited and other cases to which the attention of the court has been called, but either from a failure of the Admiral to have proper mooring lines, or, if she did have them, from the failure of her master to make use of the same. Hence the Leary is not holden for the present injury.

THE EDMUND L. LEVY.

(District Court, S. D. New York. May 8, 1901.)

Tow—Collision with Wreck.

Two wrecks were sunk in about mid-channel of a river about 1,600 feet apart. Their positions were known to the captain of a tow, and were marked by buoys, and at night should have been lighted. A tow and tug had passed the wreck safely at night, but a following tow, the wrecks not being properly lighted, ran upon one of them. There was nothing extraordinary in the wind or tide, but the size of the tow had probably something to do with the result, although it was not too large to go with safety sufficiently far to the west of the wreck to escape the danger. *Held* that, as plaintiffs had full knowledge of the obstructions and their location, they should have so regulated the size of the tow and its navigation as to have cleared them, and were liable for the resulting injuries.

J. J. Macklin, for libellant.
Amos Van Etten, for claimant.

BROWN, District Judge. It was probably nearly dark when the plaintiff's boat was run upon the obstruction which was near the center of a channel way about 400 feet wide three-fourths of a mile or more below Albany. There were two wrecks, which had been sunk a week or two before, both in about mid-channel and about 1,600 feet apart. They were situated where there was a slight bend in the river and where the ebb tide sets a little to the eastward. Their positions were known to the claimants and their captain. The wrecks were marked by buoys and at night they should have been lighted. The captain says he was told by some of the government men that they would attend to lighting them. There is no evidence showing that the alleged undertaking to light the wrecks was made by any one in authority or responsibility, or that the captain or the claimants had any right to rely upon it. They were not properly lighted, and that fact must have been evident to the captain some time before they were reached. The captain in charge of the tow says distinctly that the boat was run upon the lower submerged wreck because he did not keep off enough to the westward in passing. The first wreck had been passed safely to the westward; and when he passed that, he says that he could not see the buoy of the wreck below, but that he went as far to the westward as he could.

I do not think that statement can be accepted, inasmuch as another tug and tow a little ahead, had passed the lower wreck safely. If that excuse were good it would follow that the same collision would have happened in any event though the wrecks had been properly lighted; in other words, that the accident was inevitable, because the tow could not have been taken past the lower obstruction without collision. If that were true, the claimants were to blame for sending out so large a tow.

It is very probable that the size of the tow had much to do with the result. But the claimants knew all the circumstances. There was nothing extraordinary in the wind or tide; and the claimants were bound to start the tow so as to pass the wrecks by daylight, or else to see that the buoys were lighted, if lighting was really

necessary to safety. The claimants were also answerable for the size of the tow, if it was too long or large to pass safely.

But I do not think it probable that the tow was too large to go to the westward with safety. It is not probable that the claimants, knowing the situation, with their experience, would have sent out a tow that could not with reasonable skill and judgment have been taken safely past both obstructions, as the tow ahead was taken. There were two helper tugs, and with those I have no doubt the tow could have been kept under perfect control. The captain could have stopped the tow if he had needed to do so, until the exact place of the lower wreck had been ascertained. He did not probably need to do so, because the lights of the tow ahead would naturally be a sufficient indication where he should go.

As the claimants had full knowledge of both obstructions and their location in about the center of the channel, it was their duty to regulate the size of the tow, its time of starting, the number of helpers, and the navigation, so as to clear the obstructions. There were no extraordinary conditions of wind or tide to prevent a safe passage. I must, therefore, hold the claimants liable, whether the accident arose from too great size of the tow to be kept off sufficiently to the westward, from the inefficiency of the helpers, or from the other circumstances named, or from what I regard as the most probable, the failure of the tug to keep to the westward in proper time, i. e. early enough to be effective.

Decree for libellant with costs.

THE NORTH STAR. THE SIR WILLIAM SIEMENS. THE ALEXANDER HOLLEY.

(District Court, W. D. New York. April 6, 1901.)

1. COLLISION—NAVIGATION OF ST. MARY'S RIVER—RULES GOVERNING.

The special rules governing navigation in St. Mary's river, approved by Act March 6, 1896, take precedence of all general rules, where they apply, while, as to matters not covered by them, the general rules for navigation on the Great Lakes, embodied in the White law of February 8, 1895, and those promulgated pursuant to its provisions, govern. These statutory rules are mandatory, and evidence of prior usages and customs cannot justify their violation, but a vessel which disregards them must show, in case of collision, that their violation not only did not, but could not, contribute to the disaster.

2. SAME.

Under special rule 5, governing the navigation of St. Mary's river, which requires an overtaking steamer desiring to pass, at any place where that is permitted, to signal, and the forward vessel to answer such signal, either assenting or dissenting, such agreement by signals is essential to authorize the overtaking vessel to attempt passing, and she is not justified in taking the failure of the forward vessel to answer her signal as an assent to the passing, and in acting upon it as such.

3. SAME—OVERTAKING STEAMERS—ATTEMPTING TO PASS IN VIOLATION OF RULES.

Early in the morning a number of vessels, which had been moored through the night at Old Ft. Brady pier, in St. Mary's river, started to proceed down the river, through Little Rapids Cut, a narrow and difficult

channel, the entrance to which was about $1\frac{1}{2}$ miles from the pier. Among these vessels was the large steamer Sir William Siemens, with her tow, the barge Alexander Holley, each laden with about 5,000 tons of ore, and the large freight steamer North Star. The Siemens first got under way, and had proceeded a quarter of a mile with her tow, on a 600-foot cable, when the Star started. On leaving the pier, the Star signaled her desire to pass ahead, which could only be done, under the rules, before the cut was reached, but the signal was not heard by the Siemens. When the Siemens was within 1,200 feet of the point where the turn was made into the cut, the Star, which was then abreast of the Holley, again signaled her intention of passing, which was immediately answered by the Siemens by four or more short blasts, which, under the rules, signified her dissent, and that it was not safe to pass. Another signal was answered in the same way, the Siemens keeping on at an increased speed, which was about the statutory limit. The Star persisted in her attempt to pass, and the two vessels made the turn into the cut nearly abreast the Star, going at a speed which was four miles in excess of the limit permitted by the rules. Shortly after the vessels came in collision. There was ample time and space for the Star to have stopped after receiving the answer to either of the signals, while, on the contrary, it was not prudent for the Siemens to stop in the short distance before reaching the cut, with her heavily laden tow following, and the current running three miles an hour. *Held*, that the Star was clearly in fault for disobedience of the rules in attempting to pass, after the refusal of the Siemens to assent, which she was not bound, under the circumstances, to do, and that she must be held solely liable, in the absence of evidence showing contributory fault in the Siemens, unless in extremis, and after the collision had become inevitable.

4. SAME—CONTRIBUTORY FAULT.

The fact that the lookout of the Siemens was not at his post at the time the Star's first signal was given, while a violation of the rules, was not a fault contributing to the collision, in view of the fact that the Star persisted in attempting to pass after the subsequent dissenting signals of the Siemens.

5. SAME—ERROR IN EXTREMIS.

Where one vessel has clearly been guilty of a statutory fault, which is sufficient to account for a following collision, she cannot charge the other vessel with contributory fault, except on clear evidence. An error in navigation, when in extremis, is not sufficient.

In Admiralty. Libel and cross libel for collision.

Goulder, Holding & Masten and Clinton & Clark, for libellant.

John C. Shaw, William B. Cady, and Joseph C. Dudley, for cross libellant.

HAZEL, District Judge. This is a cause for collision in Little Rapids Cut, between the steamer North Star, belonging to the Northern Steamship Company, and the steamer Sir William Siemens, of the Bessemer Steamship Company, on the morning of November 28, 1899. On the trial there was much discussion by counsel in relation to the rules governing navigation at the point of collision and in St. Mary's river. The briefs of counsel discuss the question exhaustively. An intelligent disposition of the points at issue requires its determination at the outset.

What are the rules to be invoked in this case, and where are they to be found? The general law regulating navigation on the Great Lakes and their connecting waters, at present in force, is the act of congress approved February 8, 1895, known as the "White Law."

In addition to the requirements contained in the act itself, the supervising inspectors of the United States were authorized to enact certain rules not inconsistent with the act, which, when approved by the secretary of the treasury, had the force of law. March 6, 1896, congress enacted a law providing for special rules and regulations governing the navigation of St. Mary's river. These rules have been promulgated, and at the time of the collision were in force. Such special rules for a particular locality, upon the principles of statutory construction, must take precedence over general rules, where the special rules apply, while at all other places, and even in the special places where the special rules do not cover the situation, the general rules of navigation must dictate the movements of vessels. The rules having special application, therefore, to this case, are entitled "Rules and Regulations Governing the Movements and Anchorage of Vessels in St. Mary's River," approved March 6, 1896:

"(1) No vessel ascending or descending the St. Mary's river shall proceed at a greater speed than nine statute miles per hour over the ground between the Turning Channel Gas Buoy in the northern part of Mud Lake and the northern float lights in Lower Hay Lake of the twenty-foot channel leading from Neebish Channel, nor between the crib light in Upper Hay Lake at the entrance of the twenty-foot channel of the Frechette and Little Rapids Cut and the government pier at Sault Ste. Marie, nor between the western end of Sault Ste. Marie Canal pier and Point Aux Pins Lighthouse.

"(2) No vessel shall pass or approach another vessel moving in the same direction nearer than a quarter of a mile between Everens Point and the northern end of the Dark Hole, nor between the first black spar buoy south of the gas buoy in the northern part of Little Mud Lake and the northern float lights in Lower Hay Lake of the twenty-foot channel leading from Neebish Channel, nor between the southern entrance of the twenty-foot channel of the Frechette and Little Rapids Cut and the crib light at the northern entrance of the Little Rapids Cut, nor between the western end of the Sault Ste. Marie Canal piers and Big Point.

"(3) All vessels navigating the St. Mary's river may pass other vessels moving in the same direction between Turning Channel Buoy in the northern part of Mud Lake and Everens Point; in Little Mud Lake between the northern part of the Dark Hole and the first black spar buoy on the south side of the gas buoy in the northern part of Little Mud Lake; between the crib lighthouse at the northern entrance of Little Rapids Cut and the government pier at Sault Ste. Marie; and between Big Point and the lighthouse at Point Aux Pins.

"(4) No vessel passing another vessel shall move at a rate of speed greater than nine statute miles per hour over the ground.

"(5) In case one steamer desires to pass another going in the same direction on said river, at a point where such passing is permitted by these rules, the pilot of the steamer astern shall, if he intends to pass the steamer ahead on the right hand or starboard side, indicate such intention by giving one short blast of the steam whistle, and if he intends to pass such steamer ahead on the left hand or port side, he shall indicate such intention by giving two short blasts of the steam whistle. Upon the pilot of one steamer astern of another giving such signal, the pilot of the steamer ahead shall immediately answer by giving the same signal; but if he does not think it safe for the steamer astern to attempt to pass at that point he shall immediately signify the same by giving several short and rapid blasts of the steam whistle; and under no circumstances shall the steamer astern attempt to pass the steamer ahead until such time as they have reached a point where it can be safely done, when said steamer ahead shall signify her willingness by blowing the proper signals, then the steamer ahead shall slacken to a slow rate of speed, and the steamer astern shall pass the overtaken steamer, giving the overtaken steamer as wide a berth as possible."

Early in the morning of November 28, 1899, five vessels were moored abreast, at the government pier, generally known as "Old Ft. Brady Pier," in St. Mary's river, ready to proceed down the river through "Little Rapids Cut," so called,—a narrow and difficult channel, 300 feet wide, where there is a current of two to three miles an hour. The distance between the lighthouse crib at the northern entrance to Little Rapids Cut and the government pier at Sault Ste. Marie is about $1\frac{1}{2}$ miles. Little Rapids Cut is about four miles long from its northern entrance. The five vessels referred to were moored at the government pier in the following order: North Star, tied to the pier; the Pennsylvania, with barge in tow abreast; Sir William Siemens and her consort, Alexander Holley, made fast abreast the Pennsylvania's tow. The North Star is 300 feet over all, keel 299 feet, beam 40, gross tonnage 2,400, full speed 12 miles per hour, and at the time of the collision was drawing 16.8 feet of water, laden with package freight, and bound from Duluth to Buffalo. The total length of the Sir William Siemens was 432 feet over all, her keel 413 feet, 48 feet beam, and at the time of the collision she was drawing about 18 feet of water. The Alexander Holley is 361 feet over all. The Siemens carried 5,222 and her tow 5,000 tons of iron ore. At about 6 o'clock in the morning, bright and clear, just about sunrise, the steamers Angeline and Hackett came through the ship canal, and passed down the river without stopping. They passed the moored vessels, the Angeline going ahead, the Hackett signaling to the Siemens, which at the time was getting under way, and was even then ahead of her tow. The masters of the Angeline and Hackett, when in Little Rapids Cut, heard signals afterwards given by the North Star to the Siemens, and, being attracted thereby, observed the North Star and Siemens abreast, making the turn into Little Rapids Cut at the northern entrance by the crib light. The Siemens was the first of the moored vessels to get under way, and had previously proceeded out into the river, and made up her tow, using about 600 feet of steel cable. The cable was wound on a drum by an automatic towing machine, which paid out the cable speedily, and without interference, in getting under way. She therefore quickly chose her course, and was soon moving at a rate between 6 and 7 miles an hour through the water, or 8 or 9 miles over the ground. The Siemens headed to the south of the Bayfield Ranges, distant about $1\frac{1}{2}$ miles, in a northerly direction from the government pier. When passing the red can buoy at the Bayfield Rock, her captain, who was on the bridge over the pilot house, heard the North Star blow two blasts of the whistle, indicating her intention to pass the Siemens on the left or port hand, as provided by treasury rule 5. This was in that part of St. Mary's river between the government pier and the crib lighthouse, at the northern entrance of Little Rapids Cut. The North Star at this time, having cleared the government pier, was abreast the Siemens' tow. The captain of the Siemens immediately responded to the signal given when the North Star was abreast the tow, by five or six rapid blasts of the steam whistle, as testified to by him and by others on the Siemens and the barge Holley, intending to give

notice, as required by rule 5, that he did not think it safe for the steamer astern to attempt to pass at that point. The witnesses for the North Star who heard the Siemens' reply say that it consisted of four distinct blasts of the whistle. These whistles were interpreted by the captain of the North Star as assenting signals, and indicative of the Siemens' desire to have the Star "come on and hurry up." Considerable expert evidence was given on the trial by respondents to establish that four blasts of the whistle are generally understood by navigators of the lakes as an invitation to "come on and hurry up," and that at the time of the collision it was the practice to so interpret that signal.

Proctors for respondents strenuously urge on the consideration of the court the case of *The Maurice B. Grover* (D. C.) 79 Fed. 378, affirmed in 34 C. C. A. 616, 92 Fed. 678. That case was decided in 1897, before the treasury rules relating to the St. Mary's river were promulgated. From an examination of the facts in that case, it appears that the steamer Moran went aground in the St. Mary's river near the light crib at Sailor's Encampment Island. The Grover gave the usual bend whistle to warn approaching vessels that she was coming down the river. The Moran gave no signal to the Grover, but just previous to the collision she blew a signal of four blasts for a tug to come to her assistance. The tug answered the signal, but those in charge of the Grover swore that they did not hear the answer. The court said: "A signal of four blasts may mean a call for a tug, or it may mean, 'Hurry up,' depending upon the length of the blasts." The record of the Grover Case shows that the blasts of the whistle were ordinary blasts, and that the Moran was aground; while in this case the Siemens was speeding towards the turn, increasing her speed as she went. There is no difficulty in differentiating and classifying sound emanating from a steam whistle on a lake steamer. There is no substantial claim that the blasts of the Siemens' whistle were other than such as caused an impression on the witnesses who heard them that there was apparent trouble or danger. The claim of the respondents that a four-blast whistle is commonly understood and interpreted by navigators of the lakes as a "hurry-up" signal can have no substantial bearing upon this controversy. Treasury rule 5 is mandatory. Whatever custom or usage was in vogue prior to the enactment of the rule must yield to the provisions of the statute. The *John L. Hasbrouck*, 93 U. S. 406, 23 L. Ed. 962; *The La Fayette Lamb* (D. C.) 20 Fed. 322; *Steamship Co. v. Smith*, 20 C. C. A. 419, 74 Fed. 267; *The Clement*, Fed. Cas. No. 2,879. And again, in *The Lansdowne*, a case recently decided, and reported in (D. C.) 105 Fed. 436, Judge Swan said: "Both the American and English courts hold that where a vessel has disregarded a rule of navigation it is incumbent upon her to show, in case of collision or other disaster, that violation of the statute not only did not but could not have contributed to the collision." If these rules were not promulgated for the benefit of commerce and trade, and to minimize the dangers attending navigation, and to enforce the inhibitions and restrictions contained in them, what purpose was intended by their enactment? They must be observed and

enforced by navigators of the lakes, and of their rivers and channels, in all cases where they apply.

Witnesses for the libelant testify that the whistles of the Siemens were five or six short and rapid blasts. Other witnesses for the libelant testify that the blasts of the whistle were four or more short and rapid blasts. Capt. Saunders, of the steamer Hackett, when the first reply of the Siemens was sounded, says that as he proceeded on his course he heard several short and rapid blasts, conveying to him a signal of danger and alarm. He looked astern, and saw the Siemens and her consort a short distance above the Bayfield Rock, coming down the river; the North Star then being a little astern of the Holley. After a short interval two blasts were again sounded by the Star, and the Siemens again replied with several short and rapid blasts. The North Star was then abreast of the Holley, at Bayfield Rock. Durand, master of the Holley, says that the Siemens twice blew six short blasts. Capt. Gunderson, master of the Siemens, says that his reply to the signals of the Star was several short and rapid blasts of the whistle,—six or more in number. He was then going under half speed, and gave an order to the engineer to go slow, preparatory to making turn at the bend. Tear, the mate of the Siemens, heard several short and rapid blasts of the whistle, but cannot tell the number. Rae, master of the Pennsylvania, says that there were as many as four blasts of the whistle, and he would take them for danger signals. Other witnesses for the libelant gave testimony that four or more short and rapid blasts of the whistle are not understood by navigators of the lakes as a reply to "hurry up and come on," but are invariably understood to mean alarm and danger. The preponderance of the evidence shows that the answers of the Siemens to the signals of the astern vessel were danger signals, and were sounded in compliance with treasury rule 5. The word "several" is commonly understood to imply more than two, but not very many. It must, therefore, be accepted as undisputed in the case that several blasts of the whistle were blown in answer to the passing signals of the North Star. I am satisfied from the proofs that the blasts of the whistle were short and rapid blasts, not less than four in number. It is clear that there was no justification or defensory propriety in misunderstanding the signals that were sounded by the Siemens, in view of the situation of the vessels and the manner of sounding the whistle by the Siemens. The North Star was the overtaking vessel, going in the same direction as the Siemens and tow. The obligations of precaution and care imposed on her as an overtaking vessel were most flagrantly violated and set at defiance. There may be said to have been a deliberate intent to pass the Siemens and tow, irrespective of laws or rules governing the movements of vessels in St. Mary's river, and for the express purpose of being the first to reach the channel, where passing is prohibited. Navigators of vessels on the lakes must be presumed to have knowledge of the rules and laws governing St. Mary's river. The captain of the Star had actual knowledge of these rules, and yet, without observing or giving heed to an important restriction, he attempted to pass the vessel ahead without receiving an as-

sent. The Siemens and tow at the time that the North Star cleared the government pier were a quarter of a mile distant, heading for a narrow channel $1\frac{1}{2}$ miles from the pier. Moreover, the North Star had the Siemens in full view during her entire attempt to injudiciously pass the Siemens before reaching the turning point at the lighthouse crib. The speed of the Siemens was increased to almost the statutory limit immediately after the reply was sounded by the Siemens to the Star's declared intention to pass on the port side.

In view of the law, and the facts applicable thereto, I do not hesitate to find that the North Star, in her attempt to overtake and pass the Siemens without first receiving the signal prescribed by treasury rule 5, was at fault. The question of contributory fault by the Siemens, at the point where the turn by both vessels was made, is not free from difficulty. The North Star's negligence in coming abreast of the Siemens, and in attempting to pass her without receiving the assenting signal required by law, did not justify the collision, if it could be avoided by the exercise of proper care. The claim of the North Star is that the Siemens' master intended to prevent, and endeavored to prevent, the Star passing, not only by wrongfully accelerating the Siemens' speed, but also by crowding the Star, and by wrongfully directing his course to port just as the Star was about passing clear, thereby precipitating the collision. Capt. Stewart testified that after receiving the last four-blast signal he was not overtaking the Siemens as fast as he had the Holley; that the tow was increasing its speed. Nevertheless, the Star, at a time when prudent seamanship prompted reversing or checking, increased her speed, with the apparent object of overtaking the Siemens before reaching the prohibited channel. I think the preponderance of the evidence shows that it would not have been prudent seamanship for the Siemens to reverse at this time. The Siemens and Holley were laden with iron ore. The length of the tow from the bow of the Siemens to the stern of the Holley was approximately 1,500 feet. The distance from Bayfield Rock to the turn into Little Rapids Cut is 2,700 feet. The Siemens, therefore, was 1,200 feet from the turning point, and within 200 feet of the place where maneuvering is ordinarily commenced to make the necessary turn into the channel, at the time signals were first sounded. Both vessels were then going, approximately, the statutory limit of nine miles over the ground. Obviously, the master of the Star must have been aware of the imprudence of the attempt to overtake the Siemens. There was no obligation on the part of the Siemens to give way. The Governor, 1 Abb. Adm. 110, Fed. Cas. No. 5,645. The Siemens at this time had performed the duty imposed on her by statute. Her master had signified that it was not safe for the Star to pass. It is claimed by the Star that the testimony of the witness Geary, who up to the time of collision was wheelsman on the Siemens, establishes that the Siemens crowded the Star out of her course, and that she was at fault in directing her course to starboard. The claim is that starboarding brought the Siemens over towards the side the Star had signaled she desired to take. In that way her course was impeded. This is denied by the master of the

Siemens and other witnesses on board the Siemens and Holley. The Siemens had proceeded in her usual and ordinary course. The Star obstinately pursued her course, and was soon abreast the Siemens, causing her to sheer to starboard. Both vessels made the turn into Little Rapids Cut at the black stake nearly abreast. The Siemens made the turn at the light crib leading into the cut close to the can buoy,—considerably closer to the buoy than was ordinarily deemed necessary. The turn was to starboard about four points. The Siemens ported her helm. Her helm failing to respond readily, she hard a-ported, and, with the aid of a "kick ahead," made the turn at the bend, and proceeded down the cut. A "kick ahead" increases the velocity of the screw, and brings the current from the propeller wheel against the rudder in making the turn. At this time the Star's bow was amidships of the Siemens, and 30 feet distant. The Siemens checked to half speed. The Star drew swiftly alongside at a rate admitted by her master to be 13 miles an hour over the ground. The Siemens immediately steadied after the turn was made on the west bank of the cut. The Star kept forging ahead, and when her boiler house was abreast the Siemens' pilot house the impact took place. The Star swung across the channel, striking the west bank of the river. The stern anchor of the Siemens was let go, and the current caught her stern, shifting her ahead past the Star, 200 feet from the point of collision. The Siemens' bow was imbedded in the clay bank, with her stern swinging across the channel. The North Star was on the east bank.

The evidence is conflicting as to whether the collision was due to a sheer of the Siemens to starboard at the time the Star was alongside, and swiftly passing, or whether it was due to failure of the Siemens to efficiently manage her port helm. Wheelsman Geary says the Siemens' starboarding when she was near Bayfield Rock brought her over to the northward of the course, and over towards the side the Star had signaled she would take; that the Siemens took a broad turn at the crib in order to unduly crowd the Star out of her course, and to prevent her from passing; and that if she had hard a-ported her wheel at all it was after the collision. The conduct of this witness after the collision, and his statements to impeaching witnesses, are not such as to inspire confidence in his testimony. The evidence of the Siemens' wheelsman Ferris shows that he was near the wheel, and ready to relieve Geary. While he had charge of the wheel he received an order to "port more" and to "hard a-port," but on cross-examination he says that the Siemens was not hard a-ported until after the impact. Respondents' witness Sweet says that the Siemens' bow was from 400 to 450 feet from the crib when she struck the Star, and that she was further from the crib than he ever saw a boat go before. But I believe the weight of the evidence establishes that the turn was made by the Siemens close to the black stake.

Celerity was the chief object of the Star. Her speed steadily increased from the time she signaled the ahead vessel at the Bayfield Rock, so that within a half mile her bow passed the ahead vessel, going at the rate of nine miles an hour. I conclude that the Star

anticipated her greater capabilities for speed would permit her safely to overtake the vessel ahead. When she arrived at the bend there was abundant navigable space, so that she could have reversed or checked with absolute safety. Instead of pursuing this prudent course at the time the Siemens ported her wheel and steadied for the narrow channel, she followed the Siemens around the bend. Her captain says: "The Siemens steadied her wheel, and I steadied the Star, and he ran probably a length, and then started to port again, and I did the same thing, and I ran down that way about on a line with the east edge of the cut, just barely enough to clear the red can buoy."

Respondent's evidence does not make it clear that the seamanship of the Siemens, when making the turn or when lower down in the channel, was such as to impute to her such fault or careless navigation as would hold her in any degree responsible for the collision. Assuming that when the collision became imminent the Siemens did not hard a-port her helm, it yet appears that the collision was then unavoidable. If the Siemens did commit any error of seamanship while in this situation, I regard it as one committed in extremis, and therefore excusable.

It was held in *The George L. Garlick* (D. C.) 91 Fed. 920:

"When fault is traced clearly to a vessel, the innocent vessel will not be adjudged in fault for failure to avert the consequences of the fault of the first vessel, unless it be made very plain that departure from her first duty was demanded imperatively by new conditions, and that a person of good judgment at the time and place would have made such departure."

And in *The City of New York*, 147 U. S. 73, 13 Sup. Ct. 216, 37 L. Ed. 85, Justice Brown, speaking for the court, said:

"Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is of itself sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption, at least, adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor."

There is a conflict of evidence as to the locality of the impact between the Siemens and Star. Whether it occurred at the bend, or in the prohibited channel, about 1,200 feet below, is not material. It satisfactorily appears from the evidence that the barge Holley was abreast the lighthouse, 70 feet from the black stake where the turn was made. When we give consideration to the length of the tow and to the evidence of Capts. Gunderson and Stewart, it is clear that the vessels came together about 800 feet from the bend. There was crowding and backing, resulting in the Star settling on the easterly bank of the cut, about 400 feet from the point of collision. The Siemens brought up on the westerly bank of the prohibited channel, with her stern towards the east. The Holley, having broken her anchor chain in her endeavor to stop after the first impact, came up, striking the starboard quarter of the Siemens, forcing her against the Star.

Respondents claim that the Siemens and Holley were each at fault in not keeping a proper and sufficient lookout; that the Siemens was particularly at fault in its failure to immediately respond

to the Star's signal when she arrived at the government pier. Proofs offered on the trial render it only necessary to consider the alleged fault of the Siemens. She cannot be held for contributory fault because of the failure of her captain to hear the first passing signal sounded by the star immediately after she left the government pier, although treasury rule 5 for St. Mary's river and pilot rule 6 require the steamer ahead to immediately answer a passing signal. No presumption of acquiescence or of concurrence can arise, under the rules of navigation applicable to St. Mary's river, from failure by a vessel ahead to sound an assenting or dissenting signal. Passing a vessel going in the same direction is prohibited, unless a mutuality of purpose be established. Communication between the overtaking vessel and the vessel ahead, by signals of the character and number prescribed by law, is absolutely essential. Manifestly, the interchange of signals by blasts of the whistle must plainly indicate the manner in which the vessel astern intends to pass, and likewise when such passing may safely be done. Silence on the part of the Siemens, when the initial North Star signal was sounded, should have insured circumspection and deliberate wariness by the North Star. The captain of the Siemens testified that he did not hear the Star's first signal; that the first whistles that he heard were when the Siemens was abreast the Bayfield Rocks. It may well be that he was so occupied at the time that the first signals were not heard. The failure to hear the North Star's whistle was not a contributory cause of the collision. It in no sense misled the North Star; for when her signals were repeated they were answered, and such answer gave abundant time for the North Star to keep away by reversing or checking her speed. It was held in the case of *The Florence* (D. C.) 68 Fed. 942, that silence was practically equivalent to an expressed dissent. In *The Orange* (D. C.) 46 Fed. 411, it was held that the fact that no reply to a signal came from a ferryboat was notice that the signal had not been heard, and that it was the duty of the vessel sounding the signal to stop at once. The court said: "Had she stopped, there would have been no collision. Instead of stopping, she kept up her speed, and by so doing she brought herself directly in front of the ferryboat, then heading for her slip, and made collision inevitable." In *The Pavonia* (C. C.) 26 Fed. 106, it was held that, "when the boat having the right of way fails to respond to the signal of the boat whose duty it is to keep out of the way, the latter has no right to assume, because of such silence, that the former abandons her right of way." The Siemens' lookout was not at his post when the Star's first signal was sounded. Neither was this a contributory fault. *The Faragut*, 10 Wall. 334, 19 L. Ed. 946; *The Fannie*, 11 Wall. 238, 20 L. Ed. 114; *The George Murray* (D. C.) 22 Fed. 122. This violation of rule 28 of the White law, in view of the North Star's endeavor to pass without receiving an assent, had nothing to do with the disaster. I conclude that the Star alone must be held responsible for the collision. A decree will be entered accordingly. The cross libel is dismissed, and the cause may be referred to a commissioner to ascertain and report the damages.

THE STEPHEN DECATUR.

(District Court, E. D. New York. April 16, 1901.)

COLLISION—TOW AND ANCHORED VESSEL—INSUFFICIENT LOOKOUT.

One of three scows in tow of a tug came in collision in the night with a schooner anchored in the neighborhood of Craven Shoal, south of the Narrows, in Lower New York Bay. The night was clear, and the schooner had two bright lights, which could be seen a long distance, but the pilot of the tug did not see them, nor the lights of another schooner anchored near, until within 200 feet. While the evidence was conflicting, the weight of it showed that the schooner was within the west anchorage grounds, and that the tug was to the westward of the channel. *Held*, that the fault for the collision must be attributed solely to the tug, by reason of her negligence in failing to sooner see the anchored vessels.

In Admiralty. Suit for collision.

Carter & Ledyard (Walter F. Taylor, of counsel), for libelants.

Foley, Wray & Taylor (Albert A. Wray, of counsel), for claimant.

THOMAS, District Judge. On the night of July 8, 1899, one of three scows in tow of the tug Stephen Decatur came in collision with the starboard bow of the schooner Sarah D. Fell, which was anchored in the neighborhood of Craven Shoal, south of the Narrows, in the Lower Bay, New York. For the injury thus done this libel was filed. The collision occurred about 2 o'clock in the morning. Craven Shoal is opposite Gravesend Bay. To the westward of a line drawn from Craven Shoal to Fort Tomkins Light, and from such shoal to the south of buoy No. 11, are the western anchorage grounds. There are also anchorage grounds on the east side of the channel, opposite Gravesend Bay. The captain of the tug states that he was accustomed to go either to the westward of the shoal, hence through the anchorage grounds, or to the eastward of the shoal, where the main part of the channel lies. He also states that he did not know that the water lying to the westward of the shoal was anchorage grounds, but assumed that they were to the eastward, in the location already stated. He states that it was the purpose of the tug at the time in question to go to the eastward of the shoal. The channel proper all lies east of Craven Shoal, and is about half a mile wide, and on each side of it the waters are devoted to anchorage purposes. The captain of the tug was not in the pilot house, and had not been from Owl's Head, which is in the neighborhood of the Bay Ridge Club house, some two miles and a half away; but the navigation was in charge of the pilot, who stated that he was steering S. $\frac{1}{2}$ E., and it appears that he was on the Staten Island or west side, because the ebb tide tended to set the vessels towards the east bank. The pilot did not see the schooner, as he claims, until he was about 200 feet from her, and that he could not pass on either side, which difficulty, as he claims, was aided by the proximity of other vessels; but that if he had seen these vessels soon enough he would have had room to pass on the east side. His claim is that when he saw the schooner she was dead ahead of him, and that he thought the safest course was to port his wheel, and to try to go

to the westward. He states that he did not see the lights of the schooner Fell, or of the schooner Pierce, which was anchored near her, until he was about 200 feet away. It appears that the night was clear; that the Fell had two bright lights, one forward on the starboard forerigging, and one on the end of the spanker boom; and that they could be seen a long distance. There is no reason whatever for the failure of the pilot to see the lights of the vessel had proper watchfulness been observed. This was obvious negligence on the part of the Decatur, and all the injury must be ascribed to this negligence, unless the schooner in some way contributed.

It is urged against the schooner that she did not keep an anchor watch, which charge the evidence does not support, and that she and the Pierce anchored considerably to the eastward of Craven Shoal in the main channel. Whether this was so, and, if so, the culpability ascribable to it, is the final subject of investigation. The persons who testified on the subject for the libelants were Wood, for 26 years a Sandy Hook pilot, and for 50 years familiar with the harbor; Loveland, captain of the schooner Fell; Crowley, captain of the Pierce; and Lynch, mate of the Fell. Loveland had no precise knowledge of the locality of the anchorage, and, notwithstanding the statements to the contrary, it is believed that he left the matter of anchorage to the pilot. Crowley, whose schooner was eastward of the Fell, testified that he could see Craven Shoal buoy opposite his forerigging; that he was 200 or 300 feet away, to the northwest of it, and that the Fell was to the northwest of the Pierce, and some 300 feet away; that the Pierce, with her position unchanged, remained at anchor until morning; and that he then saw in the daylight Craven Shoal buoy 200 or 300 feet off the Pierce's starboard cathead, bearing nearly east. Lynch, the mate of the Fell, states that they anchored just below Staten Island, in the course way, upon the captain's order, and against the insistence of the pilot that they should get clear of the channel; that the Pierce was anchored between 300 and 500 feet to the eastward, so that the Fell was to the westward side of the channel, and the Pierce to the eastward side of the channel. This evidence tends to confirm the evidence of the claimant. But it appears that there is nothing to show that Lynch had any knowledge of the locality. He did not even know the points of the compass. He did not see the buoys, and the following illustrates his uncertainty and error:

"Q. Which side of the channel did you anchor in? A. A little to the westward of the course way. Q. Near any buoy there? A. There is a bell buoy there, and we were a little to the southward of the bell buoy, and there is another buoy, but I disremember. If I had a chart, I could tell you exactly where the vessel was at. About buoy 11, I think. Q. That marks the edge of the course way, doesn't it? A. Yes, sir."

Buoy 11 was far to the southward.

Reserving for the moment the statement of the pilot, attention may be given to the evidence of the claimant. Kevlin, the captain of the tug, did not come on deck until just before the collision. He testified that he looked at the range lights, and knew thereby that the Fell was in the channel. But it appears that he did not do this

until the collision was over, and he was some distance below the place thereof. He also stated that just before the collision he picked up Craven Shoal buoy with the night class. His ignorance of the westward anchorage grounds makes it very doubtful whether his observations were either correct or valuable. Kreck, the pilot of the tug, as he states, saw Craven Shoal buoy after the collision, and after the tug had drifted to the southward and had returned; that he only knew that he was east of the buoy because he said he was sailing on a course S. $\frac{1}{2}$ E. That would have been a correct course had he been in the center of the channel, but he was far to the Staten Island side, and such course might take him to the westward of the channel. One Robertson, who at the time of the collision was steward of the *Fell*, but left her when she came into port, states that he heard after the collision the captain and mate say that the *Fell* was anchored in the channel, about 30 feet to the southeast of the red buoy there; and he states that the *Pierce* was anchored to the eastward of the *Fell*, over on the east shore, some 250 or 300 feet from the *Fell*. Giving due weight to all the evidence appearing on the part of the claimant, the court prefers the evidence of the pilot of the *Fell*. He states that he gave the order to anchor, and that the captain left the matter to him; that the effect of the collision was to break the *Fell* loose, and drag her below Craven Shoal, so that the pilot let go of the anchor; that the second anchor held, 200 or 300 feet below Craven Shoal, and that she remained in that position until the tug took her away; that when the barges dragged him he knew that he went to the westward of Craven Shoal buoy, because he could see it. He states that he was 10 or 11 or perhaps 50 feet inside the anchorage grounds. Here is the evidence of a man who knew the locality from 50 years of experience, whose duty it was to anchor the schooner within the anchorage grounds, who has not exaggerated the distance that the vessel was within the anchorage limits, and his evidence, in connection with that of the other witnesses, which tends to aid it, is preferred by the court. Judge Brown has just decided in the case of *The Municipal* (D. C.) 108 Fed. 895, that, under the facts presented in that case, a vessel without the anchorage grounds was not negligent when she could have been and should have been seen by the tug which caused the collision with her. It is not necessary to make a similar finding here, but the doctrine would have much force if applied to the facts now present. The libelants should have a decree, with costs.

ZEBERT v. HUNT.

(Circuit Court, D. Indiana. May 6, 1901.)

REMOVAL OF CAUSES—SUFFICIENCY OF PETITION—ALLEGATION OF NONRESIDENCE.

An averment, in a petition for removal on the ground of diversity of citizenship, that the defendant was, at the time of the commencement of the suit, and still is, a citizen and resident of another state, named, is a sufficient allegation that he was at the time of the commencement of the suit and when the petition was filed a nonresident of the state in which the suit was brought, within the requirements of the removal act of 1887-88, since a person cannot be a resident of two states at the same time. While it is the well-established rule that the fact of such nonresidence must clearly appear from the petition or record, and that no fact can be taken by intendment, no set form of words is indispensable, and it is sufficient to allege facts from which such nonresidence follows as a necessary legal conclusion.

On Motion to Remand to State Court.

A. W. Hatch, Roscoe Kimple, and Blacklidge, Shirley & Wolf, for plaintiff.

Brown & Geddes and C. A. Schmetteau, for defendant.

BAKER, District Judge. This is an action brought in the circuit court of Howard county, Ind., by Peter Zebert against Samuel Hunt, receiver, for the recovery of \$20,000 as damages for personal injuries alleged to have been sustained by the plaintiff by reason of the negligence and carelessness of the receiver and his servants. The defendant seasonably filed his petition, with a proper bond, for the removal of the action from the state court into this court. The application was sustained, and the action is now pending here. The plaintiff moves the court to remand the action to the state court on the ground that the petition does not show the requisite facts to authorize this court to entertain jurisdiction. This question must be determined solely upon the facts stated in the petition for removal and the record. The jurisdictional facts contained in the petition are stated in these words:

"That the controversy herein is between citizens of different states, to wit, the plaintiff, Peter Zebert, who was at the time of the commencement of this suit, and still is, a citizen and resident of this, the state of Indiana, and your petitioner, the defendant herein, who was at the time of the commencement of this suit, and still is, a citizen and resident of the state of Ohio."

The plaintiff's contention is that the above statement is insufficient, because it is not alleged that the defendant was, at the time the suit was begun, and still is, a nonresident of the state of Indiana. When the removal is sought on the ground of diverse citizenship, it must be made to appear by the petition for removal or elsewhere in the record that such diversity of citizenship existed at the time the suit was begun, as well as at the time the removal is sought; and it must further be made to appear that the defendant was, when the suit was begun and when the removal is sought, a nonresident of the state where the suit was originally brought. Certain propositions are too thoroughly settled to justify any citation of authority. Among these are: (1) The courts of the United States are courts whose jurisdiction in respect of parties and subject-matter is solely con-

ferred by the statutes of the United States, and there is no presumption in favor of their jurisdiction when it is directly drawn in question. Hence, when the question of their jurisdiction is directly presented, it cannot be sustained unless the record affirmatively discloses a cause of action within their statutory jurisdiction. (2) The judiciary act of 1887, as re-enacted and re-enrolled in 1888, was intended to contract the jurisdiction of the circuit courts of the United States in respect of original as well as removed causes of action. (3) Jurisdiction of no removed cause of action can be maintained unless every fact necessary to confer jurisdiction is affirmatively shown either in the petition for removal or elsewhere in the record. It is not, however, required that the existence of the jurisdictional facts should be shown in any set form of words. If the jurisdictional facts are shown by direct and positive averment in the language of the statute, it is uniformly agreed that it discloses a cause within the jurisdiction of the court. It is insisted, however, that nothing short of this strictness will suffice. It is true that the jurisdiction of the court cannot be sustained by argument, inference of fact, or intendment. But it is equally true that, when facts are disclosed in the petition for removal or elsewhere in the record which conclusively prove the existence of the requisite jurisdictional facts, it will be sufficient. When facts are alleged in the petition or elsewhere in the record which establish, as a necessary legal conclusion therefrom, the existence of the requisite jurisdictional facts, it is unnecessary to do more. In such a case it would be a work of supererogation to allege the facts so proven in the language of the statute. This doctrine is announced and applied in the case of *Bondurant v. Watson*, 103 U. S. 281, 26 L. Ed. 447. The record in that case showed that the husband of the original defendant, of whose will she was executrix, was, at the time of his death, and for many years before had been, a citizen of the state of Mississippi, and the court held that it necessarily followed that the defendant was a citizen of such state at the time of her husband's death, which took place before the filing of the petition in the case; and that, as it appeared that she was a citizen of the same state at the time of the commencement of the suit against her, the jurisdiction should be sustained. See, also, *Denny v. Pironi*, 141 U. S. 121, 125, 11 Sup. Ct. 966, 35 L. Ed. 657. In the case of *Bondurant v. Watson*, supra, the record showed that the petitioner's husband had been for many years, and up to the time of his death, a citizen of the state of Mississippi, and the supreme court found therefrom, as a necessary legal conclusion, that his wife was a citizen of that state. This established her citizenship in the state of Mississippi before the suit was brought, and, as she alleged her citizenship in that state at the time she filed her petition for removal, the court concluded as matter of law, from these facts, that she had been continuously a citizen of the state of Mississippi from the time of her husband's death until the filing of her petition for removal. The doctrine of this case is in harmony with the familiar principle that, when one proves a fact from which the law conclusively presumes the existence of another fact, the latter fact is established as satisfactorily as though it had been proved by direct evidence. The

petition for removal in this case is formal, and confessedly sufficient in every particular except that it does not allege in *ipsisimis verbis* that the defendant was when sued and when he sought a removal a nonresident of the state of Indiana. He alleges that he was when sued and when he asked for a removal a resident of the state of Ohio. But when he alleged that he was a resident of the state of Ohio he stated a fact from which the law deduces the conclusion that he was not, at the same time, residing in the state of Indiana. A man cannot at the same time be a resident in two states, any more than he can be at the same time a citizen of two states. This is a legal and physical impossibility. Residence is defined as "the act of residing, abiding, or dwelling in a place for some continuance of time"; also as "the place where one resides" (Webst. Dict.); and as "the act or state of being seated or settled in a place"; "the act, state, or habit of dwelling or abiding; the act or state of being a resident or inhabitant; the place where one resides; habitation" (2 Burrill, Law Dict.). In *Reeder v. Holcomb*, 105 Mass. 93, it is said, "It usually imports the place of one's permanent domicile, rather than a temporary abode." "It may happen that one may have two places of residence, in one of which he resides during one portion of the year, in the other during the remaining portion. In such case the place at which he happens to be constitutes his residence so long as he is there, and ceases to be such as soon as he leaves it for the other place." 21 Am. & Eng. Enc. Law, 123; *Stout v. Leonard*, 37 N. J. Law, 492. But one cannot at the same time have more than one residence, within the legal meaning of the term. See authorities *supra*, and also *People v. Schoonmaker*, 63 Barb. 44; *Houghton v. Ault*, 16 How. Prac. 77; *Chaine v. Wilson*, Id. 552; *Kranshaar v. Steamboat Co.*, 7 Rob. 356. It being legally impossible for a man to reside in more than one place at one time, it inevitably follows that, when the defendant shows that he resided in the state of Ohio when the suit was begun, and also when he sought to remove it, he thereby shows conclusively that he was a nonresident of the state of Indiana at the same time. I am aware that a contrary conclusion is reached in the case of *Fife v. Whittell* (C. C.) 102 Fed. 537, but, after an attentive examination of that case, I find myself unable to follow it. The motion to remand is overruled.

VIRGINIA-CAROLINA CHEMICAL CO. v. SUNDRY INS. COS.

(Circuit Court, D. South Carolina. March 22, 1901.)

1. INSURANCE—TRANSFER OF PROPERTY.

A policy of insurance against fire declared that the transfer of the property insured, without the consent of the insurer, would avoid the policy. When the property covered by such a policy is transferred to a third party, with the consent of the insurer, a new contract arises between the insurer and the transferee of the property, in effect the same as the issuance of a new policy.

2. SAME—CONSTRUCTION OF POLICY.

When a policy of insurance is issued to A., loss, if any, payable to A., or B., as interest may appear, this is a contract to insure B. as well as A. to

the full extent of his interest; and, if A. indorse on the policy a disclaimer of an interest in the property covered by the policy, B. is the only party insured under this contract, and may bring suit upon it in his own name and in his own right.

B. SAME—REMOVAL OF CAUSES.

An action brought by B., a Virginia corporation, under these circumstances, in the state court, against a corporation of another state, is removable into the federal court, at the instance of the defendant corporation, notwithstanding that neither the defendant corporation nor the plaintiff corporation is a resident of South Carolina.

(Syllabus by the Court.)

Mitchell & Smith, for plaintiff.

King & Spalding and Smythe, Lee & Frost, for defendants.

SIMONTON, Circuit Judge. These cases come up on a motion to remand the causes to the state court. The plaintiff, the Virginia-Carolina Chemical Company, a corporation of the state of Virginia, brought its several actions in the court of common pleas for Charleston county against 15 corporations, to wit: The Manchester Fire Assurance Company, of the United Kingdom of Great Britain and Ireland; Caledonian Insurance Company, of the United Kingdom of Great Britain and Ireland; the Liverpool & London & Globe Insurance Company, of the United Kingdom of Great Britain and Ireland; North British & Mercantile Insurance Company of London & Edinburgh, of the United Kingdom of Great Britain and Ireland; the Commercial Union Assurance Company, Limited, of London, England, a corporation of the United Kingdom of Great Britain and Ireland; Phoenix Assurance Company of London, a corporation of the United Kingdom of Great Britain and Ireland; the Lancashire Insurance Company of Manchester, England, a corporation of the United Kingdom of Great Britain and Ireland; Norwich Union Fire Insurance Society, a corporation of the United Kingdom of Great Britain and Ireland; Scottish Union & National Insurance Company of Edinburgh, a corporation of the United Kingdom of Great Britain and Ireland; the Western Assurance Company of Toronto, Canada, a corporation of the dominion of Canada; the Home Insurance Company of the City of New York, a corporation of the state of New York; Connecticut Fire Insurance Company of Hartford, Conn., a corporation of the state of Connecticut; the National Fire Insurance Company of Hartford, Conn., a corporation of the state of Connecticut; the Hartford Insurance Company, a corporation of the state of Connecticut; and the German-American Insurance Company of New York, a corporation of the state of New York,—in as many separate suits. In every case was filed a petition for removal, with bond, in the state court, praying removal on the ground of diversity of citizenship. The motion in each case was denied. Notwithstanding a copy of the record in each case was filed in this court, the causes were docketed, and now in each case a motion is made to remand the cause to the state court. The motions are based on the record as it comes from the state court, to wit, the complaint and petition

for removal. The propriety of the removal is tested by the record. The petition is a part of the record. *Water Co. v. Keyes*, 96 U. S. 201, 24 L. Ed. 656.

Two grounds are stated, upon one or both of which the motion to remand is urged. One is that this court, sitting in this district, cannot entertain a controversy between two corporations neither of which was created by the state of South Carolina, and so not a resident of this district; and that, if this objection can be waived, such waiver must appear either expressly on the record, or by some act, such as a general appearance, from which waiver can be presumed. This ground applies only to such of the defendants as are corporations of states of this Union other than South Carolina. The privilege of requiring suit to be brought in the district of residence inures only to such corporations. An alien corporation can be sued in any district in which valid service can be made on the defendant. *In re Hohorst*, 150 U. S. 661, 14 Sup. Ct. 221, 37 L. Ed. 1211; *In re Louisville Underwriters*, 134 U. S. 488, 10 Sup. Ct. 587, 33 L. Ed. 991. The second ground is that each of the original policies was made out to W. G. Crenshaw, Jr., and was assigned to the Virginia-Carolina Chemical Company, and so an assignee of a chose in action; that the record does not disclose whether Crenshaw is a citizen or an alien, and, if the former, of what state he is a citizen.

1. Can this court, sitting in this district, entertain a suit wholly between citizens of other states than South Carolina, neither of whom reside in this district? Unless this court can entertain such a suit originally, these cases must be remanded. Circuit courts have jurisdiction over controversies wholly between citizens of different states, or between citizens and aliens, when the amount in controversy exceeds \$2,000, exclusive of interest and costs. Act 1888 (25 Stat. 433, § 1). The concluding part of the section, "but when the jurisdiction is founded on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of the plaintiff or defendant," has been uniformly held to confer a privilege on the defendant which he can waive. *Trust Co. v. McGeorge*, 151 U. S. 129, 14 Sup. Ct. 286, 38 L. Ed. 98. Nor need the waiver be in express words. It is implied unless seasonable objection be made. *Martin v. Railroad Co.*, 151 U. S. 688, 14 Sup. Ct. 533, 38 L. Ed. 311. And so the circuit courts of the United States have held that, unless this privilege is exercised, they can entertain a controversy, notwithstanding the fact that neither the plaintiff nor defendant is resident within this district. *Uhle v. Burnham* (C. C.) 42 Fed. 1; *Purcell v. Mortgage Co.* (C. C.) 42 Fed. 465; *Sherwood v. Valley Co.* (C. C.) 55 Fed. 1; *Cowell v. Water-Supply Co.* (C. C.) 96 Fed. 769; *Duncan v. Associated Press* (C. C.) 81 Fed. 417.

But it is urged that in the present case the defendants have made no such waiver, expressly or by implication. The case comes here only on the petition and bond, which are silent on this point; and, as it comes here in the same plight as it left the state court, the defendants may here plead their privilege, and so defeat the juris-

diction of both courts. The supreme court of the United States in *Bushnell v. Kennedy*, 9 Wall. 393, meets this argument:

"It is true, as said in argument, that the section provides that after removal the cause shall proceed in the same manner as if it had been brought by original process. But we cannot recognize the validity of the inference that the defendant, before pleading in the circuit court, may move to dismiss the case for want of jurisdiction. This construction would enable the nonresident defendant in a state court to remove the suit against him into a circuit court, and then, by a simple motion to dismiss, defeat the jurisdiction of both courts. Such a construction, unless imperatively required by the plain language of the act, is wholly inadmissible, and it is clear that the language of the act does not require it. Its plain meaning is that the suit shall proceed, not that it shall proceed unless the defendant moves to dismiss. The defendant is not in court against his consent, but by his own act, and the suit is to proceed as if brought by original process, and the defendant had waived all exception to jurisdiction, and pleaded to the merits. * * * The act of defendant is something more than consent,—something more than waiver of, and objection to, the jurisdiction. It is a prayer for the privilege of resorting to federal jurisdiction, and he cannot be permitted afterwards to question it."

The same doctrine is ably presented by Curtis, J., in *Sayles v. Insurance Co.*, 2 Curt. 212, Fed. Cas. No. 12,421, and by Johnson, Circuit Judge, in *Warner v. Railroad Co.*, 13 Blatchf. 231, Fed. Cas. No. 17,186. See, also, *De Lima v. Bidwell*, 21 Sup. Ct. 743, 45 L. Ed. —.

There is yet another standpoint from which this question can be reviewed. The removal section of the act of 1888 (25 Stat. 433, § 2), gives the right of removal by the defendant, then being nonresident of the state, in any suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction, in section 1 of that act. This section refers only to the first part of section 1, by which jurisdiction is conferred. It has no relation to the clause of that section relating to the district in which suit may be brought. *Railroad Co. v. Davidson*, 157 U. S. 208, 15 Sup. Ct. 563, 39 L. Ed. 672. The right of removal is given wholly to the defendant, without any reference, in a remote degree, to the plaintiff or his wishes. So no waiver on the part of the plaintiff is necessary or proper.

2. The record shows that the plaintiff holds the policy of insurance as assignee of one Crenshaw, and the citizenship of Crenshaw nowhere appears. There can be no doubt that the act of 1887, corrected in 1888, was intended to restrict the jurisdiction of the federal courts. The supreme court and some of the circuit courts had held that a suit could be removed into the federal courts from the state courts, although such a suit could not have been brought originally in the federal court. *Claffin v. Insurance Co.*, 110 U. S. 81, 3 Sup. Ct. 507, 28 L. Ed. 76; *City of Lexington v. Butler*, 14 Wall. 282, 20 L. Ed. 809; *Glenn v. Walker* (C. C.) 27 Fed. 578. To this the act was specially directed, and no case can be removed into the federal court from the state court of which the federal court could not have original jurisdiction. *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511; *Railroad Co. v. Davidson*, 157 U. S. 201, 15 Sup. Ct. 563, 39 L. Ed. 672. The circuit court of the United States cannot entertain jurisdiction of a suit by an assignee, unless such suit could have been brought in the

federal court by the assignor, and that fact must appear in the record. *Corbin v. Black Hawk Co.*, 105 U. S. 659, 26 L. Ed. 1136. The constitutionality of this restriction is discussed and sustained in *Holmes v. Goldsmith*, 147 U. S. 151, 13 Sup. Ct. 288, 37 L. Ed. 118.

The question, then, is, did the plaintiff in each of these cases bring his actions in the state court as assignee and because of the assignment? A policy of insurance is a chose in action. *Plant Inv. Co. v. Jacksonville, T. & K. W. Ry. Co.*, 152 U. S. 71, 14 Sup. Ct. 483, 38 L. Ed. 358. "The contents of a contract, as a chose in action," says *Corbin v. Black Hawk Co.*, 105 U. S. 665, 26 L. Ed. 1138, "are the rights created by it in favor of a party in whose behalf stipulations are made in it, which he has a right to enforce in a suit founded on the contract, and a suit to enforce such stipulations is a suit to recover such contents." The complaint in each case is the same precisely, varying only in name of defendants and the amounts of insurance. The action is stated to be by the Virginia-Carolina Chemical Company, a body corporate of the state of New Jersey, and against the defendant, stating its corporate character, and by what law created; that the defendant issued to W. G. Crenshaw, Jr., its policy of insurance of a certain date, thereby insuring said Crenshaw from 1st October, 1899, to 1st October, 1900, against all loss or damage by fire, except as thereafter provided, to a certain amount, on certain buildings situate near the town of Greenville, S. C. After setting out certain conditions of the policy as to total value of the property, gross amount of insurance, and the proportionate liability of defendant, it alleges that said Crenshaw thereafter, to wit, on 20th November, 1899, in writing, assigned the policy and his interest in the property covered thereby to the plaintiff, which assignment was thereafter, in writing, duly accepted and consented to by defendant, and the loss, if any, payable thereunder, was, by the defendant, agreed to be paid to the plaintiff; that at the time of said assignment, and until the fire occurred, plaintiff had an interest in the property insured, as the owner thereof, equal to the value thereof. Then the loss is set out.

These points deserve notice as important in this discussion: First. The policy set out in the complaint is a policy of fire insurance. Second. The conditions of the policies, attached to and forming part of the complaint, that they shall be void if any change take place in the interest, title, or possession of the property insured, or if the policy be assigned before loss, unless otherwise provided by agreement, and indorsed on, or added to, the policy. Third. The promise upon which plaintiff counts is expressed in these words: "W. G. Crenshaw, Jr., on 20th November, 1899, duly, in writing, assigned said policies of insurance and his interest in the property covered thereby to the plaintiff, which assignment was thereafter, in writing, duly accepted and consented to by defendant, and the loss, if any, payable thereunder, was, by the defendant, agreed to be paid to plaintiff." Fourth. That nowhere on the policy, or in any paper attached to the policy, is there an assignment by Crenshaw to the chemical company of the policy in so many words. Fifth. That the property was destroyed by fire in June, 1900.

The defendants take this position: A fire policy, by its terms, has no further obligation when the insured ceases to have an interest in the property insured. When the insurance company assents to the transfer of the policy held by the vendor to the vendee of the property, by such assent a new contract is created between the company and the vendee, and the only use of the policy is to set out the conditions and limitations of the insurance during the unfinished term of the policy; that the relation between the former holder of the policy is not that of assignor and assignee; nor does the insurance company deal with the vendee as an assignee, but that the contract is between them as original parties.

An assignee takes the chose in action assigned subject to all the equities between the assignor and the maker of the chose; yet no one would maintain, in a case like the present, if it should appear that Crenshaw had in fact violated any of the conditions of the policy, that, the company having assented to the transfer, the plaintiff would be burdened with the result of any such violation. This precise question came up in *Ellis v. Insurance Co. (C. C.)* 32 Fed. 646. In a carefully considered opinion, Mr. Justice Brewer, with the concurrence of District Judges Shiras and Love, held that a party obtaining a transfer of a policy under like circumstances was not bound by any equities between the former holder of the policy and the insurer. This he held because it was a new contract between the vendee and the company, wholly unaffected by the act of the former holder. This same doctrine is held in *Insurance Co. v. Munns (Ind. Sup.)* 22 N. E. 78, 5 L. R. A. 430. The contract in fire insurance is one of indemnity. It is wholly personal to the insured, and has no connection with the property of the insured except so far only to fix the amount of the indemnity. If the insured parts with the property as to which he seeks indemnity, the contract necessarily is at an end; and, were he to assign the contract under these circumstances, no right of action whatever could grow out of it to his assignee. If the insurer is informed of the cessation of the interest of the assured, and its transfer to another, and thereupon accepts the transferee as the insured, this is a new contract to pay; the former insurance being only used to show the terms on which the insurance was effected. In case of loss, the insured recovers on this new contract, and not on the assignment, because the assignor, having nothing, can assign nothing. The doctrine is stated by Shaw, C. J., in *Wilson v. Hill*, 3 Metc. (Ky.) 69:

"If, on a transfer of an estate, the vendor assigns his policy to the purchaser, and this is made known to the insurer, and is assented to by him, it constitutes a new and original promise to the assignee to indemnify him in like manner while he retains an interest in the estate. * * * But such an undertaking will be binding, not because the policy is in any way incident to the estate or runs with the land, but in consequence of the new contract."

The same judge, in *Fogg v. Insurance Co.*, 10 Cush. 345, says:

"In case of the sale or alienation of the insured property, the original insured having no longer any interest in the policy, except to claim a return premium, if he will assign his policy or his contract of insurance to such purchaser, and the company assent to it, here is a new and original contract, embracing all the elements of a contract of insurance between the assignee

and the insurer. The property, having become the purchaser's, is at his risk, and if burnt it is his loss, and he has a good original contract, upon a valid consideration, to guaranty him against such loss."

In *Bullman v. Insurance Co.*, 159 Mass. 122, 34 N. E. 169, a married woman had assigned a policy of insurance to her husband. Payment of loss was resisted on the ground of the disability of the married woman. The court decided against the insurer, saying:

"It is well settled in this commonwealth that when insured property is transferred, and the policy assigned to the new owner, with the assent of the insurer, such assignee, therefore, becomes the insured, and may maintain an action in his own name. * * * A new relation is created between the insurer and the assignee, just as if the original policy was surrendered and a new one issued."

A very large number of cases is quoted from many states. The same doctrine is recognized in *Hooper v. Insurance Co.*, 17 N. Y. 427. It is stated broadly in *Insurance Co. v. Munns* (Ind. Sup.) 22 N. E. 78, 5 L. R. A. 430:

"On a sale of insured property, and an assignment of the policy, duly assented to by the company, a new contract of insurance arises between the company and the assignee, which is not affected by a default of the assignor before the assignment, amounting to a forfeiture of the policy."

And the same doctrine was again maintained in *Assurance Co. v. Glenn* (Ind. App.) 41 N. E. 847, after a rehearing.

There is another point of view from which to consider this case. The original policy insures W. G. Crenshaw, Jr., against all direct loss or damage by fire, except as hereinafter stated, on certain described property. But upon the policy, and as part of it, is placed these words: "Loss, if any, payable to W. G. Crenshaw, Jr., or the Virginia-Carolina Chemical Company, as their interest may appear." As insurance is personal indemnity, paying a loss to the person incurring it, this provision recognizes the Virginia-Carolina Chemical Company as insured in this contract. A month and twenty days after the policy was issued this indorsement was put upon the policy, not assigning the policy, but stating the extent of the interest of the chemical company in it: "The interest of W. G. Crenshaw, Jr., as owner of the property covered by this policy, is hereby assigned to the Virginia-Carolina Chemical Company, subject to the consent of [the insurer],"—followed by this: "The [insurer] hereby consents that the interest of W. G. Crenshaw, Jr., as owner of the property covered by this policy, be assigned to the Virginia-Carolina Chemical Company." This is not, nor does it profess to be, an assignment of the policy. It fixes and establishes the interest of the plaintiff, and sustains the allegation that the defendants thereby promised to pay the plaintiff the whole loss. These indorsements evidently have reference to that part of the policy which states who are to be indemnified under it, and fix the fact that the Virginia-Carolina Chemical Company alone is insured thereunder, Crenshaw having no interest therein. So we have the promise in the original contract to pay the chemical company to the extent of its interest, and the official statement that this interest is exclusive in the whole loss which might, and which in fact did, occur.

The conclusion which has been reached is not in conflict with

Carpenter v. Insurance Co., 16 Pet. 496, 10 L. Ed. 1044. In that case Carpenter had effected a policy in the American Insurance Company, in which it was stated, "loss, if any, payable to Epenetus Reed," which policy was assigned by Carpenter to Reed. This policy was renewed in Carpenter's name, without mentioning Reed, and this was not assigned to Reed. Carpenter effected another policy in the defendant company, and no notice of the former policy was given to it, as required by the terms of the policy. In a suit upon the last-named policy, this defense was set up, and Carpenter contended that the policy in the American Company was for the sole use of Reed, and was not his. This defense was overruled. Mr. Justice Story says:

"If a mortgagor procures a policy on the property against fire, and he afterwards assign the policy to the mortgagee, with the consent of the underwriters, as collateral security, that assignment operates solely as an equitable transfer of the policy, so as to enable the mortgagee to recover the amount due in case of loss, but it does not displace the interest of the mortgagor in the premises insured. On the contrary, the insurance is still his insurance, and on his property, and for his account."

It is apparent that Reed as mortgagee, and merely in that character, can have no interest in, or right to, the policy in the American office. The insurance was not made by him, or in his name or for his account. But this is not the case before us. It may be that when a mortgagor effects insurance, "loss, if any, payable to the mortgagee," or if he assign the policy to the mortgagee as security for his debt, the mortgagor still retains an interest in the property. This is done to secure his debt, and when the loss occurs it is paid on his debt, thus relieving him, and so for his use and benefit. In the case at bar the insurance was effected by Crenshaw, loss, if any, payable to him or the chemical company, as interest may appear, and shortly after that Crenshaw, in writing, disavows all interest, declaring that this is in the chemical company. He does not transfer the policy to the chemical company. He declares that the chemical company, upon whose account, jointly with his own, the policy was effected, as interest might appear, was in fact and in deed the only party insured.

But it is said that the real question in the case is not to whom the loss under the policy must be paid; that, on this motion to remand, the only question is the proper construction and application of the federal statutes. Does plaintiff sue as assignee? And the term "assignee," as used in these statutes, applies to any one who sues under and by the devolution of interest from another. Now, how does the plaintiff in this case obtain its interest in this policy? Not by the assignment of the policy. As has been seen, there are no words assigning the policy to it. Indeed, by his own declaration Crenshaw had nothing to assign. The property, by some deeds aliunde, was conveyed to the plaintiff. But the conveyance of the property could not assign the policy. *Carpenter v. Insurance Co.*, 16 Pet. 496, 10 L. Ed. 1044. The interest in this policy was secured to the plaintiff when it was issued. That interest did not come through, but was jointly with, Crenshaw, as interest may appear. No assignment or transfer of the policy was necessary to enable plaintiff to recover; it being well settled that a policy effected by S., for account of whom

it may concern, or with other equivalent terms, will inure for the benefit of the party for whom it was intended. *Sturm v. Boker*, 150 U. S. 333, 14 Sup. Ct. 99, 37 L. Ed. 1093; *Hooper v. Robinson*, 98 U. S. 528, 25 L. Ed. 219. The weight of authority is that a party may sue in his own name on a promise made to another on sufficient consideration for his use and benefit. *Peck v. Insurance Co. (Utah)* 51 Pac. 255. And in Massachusetts it is held that when a mortgage debt exceeds the loss, which is payable to the mortgagee as interest may appear, the mortgagee may recover the whole in his own name. When the loss exceeds the debt the mortgagor and mortgagee may unite as plaintiffs, or each may sue for his own share, unless, by the terms of the policy, the whole loss is payable to the mortgagee. *Palmer Sav. Bank v. Insurance Co. of North America (Mass.)* 44 N. E. 211, 32 L. R. A. 615. This being so, the sole question in the case is, what is the interest of the plaintiff? The answer is that by the declaration of Crenshaw, assented to and confirmed by the defendant, its interest is in the entire loss; this not because of any assignment, but because it is the sole owner of the property, and the only one to be indemnified for its loss. Its recovery, therefore, is dependent on the very terms of the policy, because of the original policy, and by these alone. This is the contract; the declaration of Crenshaw is only evidence under the contract. The complaint recognizes this. After setting out the transaction by Crenshaw, and the recognition of it by the defendant,—erroneously, as has been seen, called an “assignment,”—it sets out the only promise alleged in the complaint, “Thereupon the defendant promised to pay the whole loss to the plaintiff.” The case at bar bears no resemblance to *Glass v. Police Jury*, 176 U. S. 209, 20 Sup. Ct. 346, 44 L. Ed. 436, quoted by the learned counsel for this motion; for in that case the action was brought upon certain warrants issued to the order of a citizen of Louisiana in the hands of a citizen of Missouri, who bought them at a judicial sale, and sued a corporation of the state of Louisiana on them. The only point decided was that the mode of acquisition did not affect the rule. The case of *Plant Inv. Co. v. Jacksonville, T. & K. W. Ry. Co.*, 152 U. S. 71, 14 Sup. Ct. 485, 38 L. Ed. 360, also quoted by counsel, was one in which an assignee of an interest in realty brought the action. The court in this case say: “The term ‘assignee’ in the statute covers, not merely persons to whom is technically transferred the contract in controversy, but any one who, by virtue of any transfer to him, can obtain the beneficial interest.” In this case before us, Crenshaw declares in writing that he has transferred certain property covered by the policy to the plaintiff. This was not a transfer of the policy; for the policy was not attached to the realty, or in any manner could it go with the same, as an incident thereto, by any conveyance or assignment. *Carpenter v. Insurance Co.*, *supra*. Nor could the plaintiff have set up the policy, or claimed loss thereunder, had it not already been a party for whose benefit the policy was intended. It was not the purpose of this declaration by Crenshaw to assign or devolve his interest in the policy to the plaintiff; but one of the conditions of the policy was that if Crenshaw conveyed away his interest to any person, without the consent of the company, the whole policy would

be void. To escape this, he gave notice to the company that he had conveyed away his interest under the policy to the plaintiff. The company assented to this, and the avoidance of the policy was prevented. But this gave no new right to the plaintiff. It was already protected to the extent of its interest, and this only declared what the extent of its interest is.

It is said, also, that the question is, can the action which was begun in the state court be removed into this court? That it may be that the plaintiff could have brought his action in a different character and form, but that it has selected to bring it in its character as assignee and upon the assignment. So the action in that form cannot be removed.

In code pleading, the complaint confines itself to the facts of the case. The court draws all conclusions of law established by them. In the present case, the complaint, with its exhibit, showed that the original policy was taken out in the name of Crenshaw, for the joint indemnity of himself and of the Virginia-Carolina Chemical Company, as interest may appear. It discloses that at that time Crenshaw, perhaps, may have had some interest, was owner in whole or in part of the property covered by the insurance, and so might have been entitled to indemnity against the risks insured. But a short time afterwards, by indorsement on the policy, Crenshaw disclaimed all interest in the property, and declared that the chemical company was wholly interested therein, by reason of which he ceased to have any further interest in the policy, and his right to indemnity did not exist. Thenceforward the only person remaining insured was the chemical company. And this is distinctly recognized by the insurer, and thereupon the insurer promised to pay the whole indemnity, in case of loss, to the chemical company. The conclusion of law drawn from these facts is that the chemical company had a policy of insurance insuring wholly to it, with a promise made to it alone to pay it the whole indemnity, which promise is the cause of action. Calling it an assignment of the previous contract does not make it so, in face of the authorities quoted. I am of the opinion that the action is upon the promise by the defendant to pay the plaintiff the loss it suffered; that this is an original promise under a policy of insurance; that the assignment by Crenshaw, if any such assignment of the policies was made, carries nothing, for, not being in a position to suffer loss, he could not secure indemnity from loss to the chemical company; that the action, therefore, is not by an assignee, as such, but by an original contractor, dealing directly with the defendant; and that the case does not come within the exceptions of the removal statute. The motion to remand is refused in each case.

PEARSON et al. v. PARSON et al.

(Circuit Court, E. D. Louisiana. April 13, 1901.)

No. 12,942.

EQUITY JURISDICTION—POLITICAL QUESTIONS—ENJOINING VIOLATION OF NEUTRALITY RIGHTS.

A court of equity cannot take cognizance of a suit by private persons to enjoin the shipment from a port of the United States of alleged military supplies and munitions of war destined for the use of one of two foreign nations which are engaged in a war, on the ground that, if the shipments are permitted to be made, the war, which would otherwise cease, will be continued, and property owned by complainants in the country of the other belligerent will be destroyed, and that such shipments are in violation of the principles declared in an international treaty to which the United States was a party, but the countries in which complainants' property is situated were not. The questions involved in such case are entirely political, and, in the very nature of things, the case is one which can be dealt with only by the executive branch of the government.

In Equity. On motion for preliminary injunction.

The complainants are Samuel Pearson, a citizen of the South African Republic, Edward Van Ness, a citizen of the state of New York, and Charles D. Pierce, consul general of the Orange Free State, whose citizenship is not set forth. In their original bill herein they aver, in substance: That the United States are at peace with the South African Republic and the Orange Free State, and that Great Britain is at war with the same. That complainants are owners of property situated in the South African Republic and the Orange Free State. That Great Britain, by means of armies, seeks to destroy, and is now destroying, the property of complainants. That, for the purpose of carrying on the war, the steamship Anglo-Australian, of which J. Parson is master, now lies in the port of New Orleans, and is being loaded with 1,200 mules, worth \$150,000, by Parson, and by Elder, Dempster & Co., who are the agents for the ship, her owners and charterers, and who are represented by Robert Warriner and Mathew Warriner. All of the defendants are averred to be British subjects. That the steamship Anglo-Australian is employed in the war in the military service of Great Britain by her owners and charterers and by the defendants. That for some time past the defendants, in aid of the war, have loaded ships at New Orleans with munitions of war, viz. mules and horses, and have equipped ships with fittings for the purpose of carrying military supplies and munitions of war for Great Britain, and have dispatched the ships, well knowing that the munitions of war and the ships are in the military service of Great Britain, and would be employed in the war. That the steamship Anglo-Australian is about to be dispatched by the defendants, loaded with mules and horses, being munitions of war, which are the property of the government of Great Britain, and the same are to be employed in the military service of Great Britain. That the defendants are making the port of New Orleans the basis of military operations in aid of Great Britain in the war, and are using the port for the purpose of renewal and augmentation of the military supplies and arms of Great Britain in the war. That the defendants have caused and are causing complainants irreparable injury, in that their acts enable Great Britain to carry on the war with the South African Republic and Orange Free State, wherein are found the property of complainants, and that the army of Great Britain is enabled, by the means furnished by the defendants, to lay waste and destroy the farms and homes of complainants, and to hold as prisoners of war the wife and children of the complainant Pearson. That the complainant Pearson has already suffered loss of property to the amount of \$90,000, and is now threatened with further loss of \$100,000, by the acts complained of and the continuation of the war. That the war is only carried on by the renewal and augmentation of the military supplies of Great Britain from the ports of the United States and especially

the port of New Orleans, and that when this ceases the war will end. That the defendants have conspired with certain agents and servants of Great Britain, whose names are unknown, to aid in the carrying on of the war, in the renewal and augmentation of the supplies of Great Britain, and in the equipping with munitions of war and the dispatching of the ship Anglo-Australian and other vessels for the purpose of slaying the citizens of the South African Republic and the Orange Free State, and destroying their property, and more particularly to injure and destroy the property and rights of complainants, all in violation of and against the rights, privileges, and immunities granted and secured to complainants by the law of nations and the constitution and laws of the United States. The prayer of the original bill is, in substance, for an injunction prohibiting the defendants, their agents, servants, etc., from loading on the ship Anglo-Australian, or other vessels, munitions of war, viz. mules and horses destined for use by Great Britain in the war. A restraining order or temporary injunction in advance of a final injunction is also prayed for. By an amended and supplemental bill, the original complainants seek to also enjoin a shipment of mules and horses by the steamship Monterey, now in the port of New Orleans, under all the conditions and circumstances alleged in the original bill respecting the ship Anglo-Australian. The parties defendant in the amended and supplemental bill are the defendants to the original bill, and, in addition, Capt. Markham and Capt. Marshall, whose citizenship is averred to be unknown; the Anglo-American Steamship Company, whose citizenship is not averred, represented by Robert and Mathew Warriner, averred in the original bill to be British subjects; H. Parry, master of the steamship Monterey, whose citizenship is averred to be unknown; and William J. Hannon and Joseph J. Beranger, citizens of the state of Louisiana. The purpose intended to be subserved by the amended and supplemental bill seems to be to enjoin the shipment of mules and horses by the steamship Monterey, and to charge that Capt. Markham, Capt. Marshall, Hannon, and Beranger were among those who confederated and conspired with the defendants named in the original bill to do the acts therein complained of.

Clegg & Quintero, for complainants.

H. P. Dart, for defendants.

PARLANGE, District Judge (after stating the facts). It was conceded on the argument that the court has no jurisdiction of this cause *ratione personarum*. The complainants sought to maintain the jurisdiction *ratione materiae* by a claim of right under the treaty of Washington of May 8, 1871, between Great Britain and the United States relative to the "Alabama claims," in which treaty it is declared that:

"A neutral government is bound * * * not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men."

The complainants contend that, by reason of this declaration of the treaty, they are entitled to invoke the equity powers of this court for the protection of their property. If the complainants could be heard to assert here rights personal to themselves in the treaty just mentioned, and if the mules and horses involved in this cause are munitions of war, all of which is disputed by the defendants, it would become necessary to determine whether the United States intended by the above declaration of the treaty to subvert the well-established principle of international law that the private citizens of a neutral nation can lawfully sell supplies to belligerents. It is almost impossible to suppose, *a priori*, that the United States would have done so,

and would have thus provided for the most serious and extensive derangement of and injury to the commerce of our citizens whenever two or more foreign nations should go to war; and it would seem that there is nothing in the treaty, especially when its history and purposes are considered, which would warrant the belief that the United States insisted upon inserting therein a new principle of international law, from which the greatest damage might result to the commerce of this country, and which was absolutely different from and antagonistic to the rule and policy which the government of this country had theretofore strenuously and invariably followed. The principle that neutral citizens may lawfully sell to belligerents has long since been settled in this country by the highest judicial authority. In the case of *The Sanctissima Trinidad*, 7 Wheat. 340, 5 L. Ed. 454, Mr. Justice Story, as the organ of the supreme court, said:

"There is nothing in our laws or in the law of nations that forbids our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit, and which only exposes the persons engaged in it to the penalty of confiscation."

See, also, the case of *The Bermuda*, 3 Wall. 551, 18 L. Ed. 200.

16 Am. & Eng. Enc. Law (2d Ed.) p. 1161, verbis "*International Law*," citing cases in support of the text, says:

"A neutral nation is, in general, bound not to furnish munitions of war to a belligerent, but there is no obligation upon it to prevent its subjects from doing so; and neutral subjects may freely sell at home to a belligerent purchaser, or carry to a belligerent power, arms and munitions of war, subject only to the possibility of their seizure as contraband while in transit."

Numerous other authorities on this point could be cited, if it was not deemed entirely unnecessary to do so.

The principle has been adhered to by the executive department of the government from the time when Mr. Jefferson was secretary of state to the present day. Mr. Jefferson said in 1793:

"Our citizens have always been free to make, vend, and export arms. It is the constant occupation and livelihood of some of them. To suppress their callings—the only means, perhaps, of their subsistence—because a war exists in foreign and distant countries, in which we have no concern, would scarcely be expected. It would be hard in principle and impossible in practice. The law of nations, therefore, respecting the rights of those at peace, does not require from them such an internal derangement in their occupation."

To the same effect are numerous other expressions and declarations of the executive department of the government from the earliest period of the country to the present time. See 3 Whart. Int. Law Dig. par. 391, tit. "*Munitions of War*."

Affidavits in the cause purport to show that the vessels which make the exportations of mules and horses of which the bills complain are private merchant vessels; that they are commanded by their usual officers, appointed and paid by the owners; that they are manned by their usual private crews, which are also paid by the owners; that they are not equipped for war; that they are not in the military service of Great Britain, nor controlled by the naval authorities of that nation; that they carry the mules and horses as they would carry any other cargo; and that the mules and horses are to be landed, not on

the territory of the South African Republic or the Orange Free State, but in Cape Colony, which is territory belonging to Great Britain. If these affidavits set out the facts truly, it is difficult to see how a cause of complaint can arise. If a belligerent may come to this country and buy munitions of war, it seems clear that he may export them as freight in private merchant vessels of his own or any other nationality, as cargo could be exported by the general public.

Another consideration in this cause is whether the allegations of threatened injury to the property rights of the complainants would in any case warrant the interposition of a court of equity. The theory of the complainants is that, if the injunction issues in this cause, the war will cease, but that, if these horses and mules are allowed to go to South Africa, the war will be carried on, and one of the results of its further prosecution will be the destruction of the complainants' property in South Africa. It is not claimed, of course, that the horses and mules are to be used specially to destroy the property of the complainants. In such cases as the present one, where the aid of equity is invoked to protect property rights, the injury apprehended must be a clear and reasonable one, proximately resulting from the act sought to be enjoined. The injury apprehended by the complainants from the shipping of the mules and horses seems to be remote, indistinct, and entirely speculative. It seems clear that, even if this cause were within the cognizance of this court, there is herein no such connection of cause and effect between the shipment of the animals and the destruction of complainants' property as could sustain an averment of threatened irreparable injury, and that the averment that the war would cease if the shipments are stopped, which, in the nature of things, can only be an expression of opinion and hope concerning a matter hardly susceptible of proof, could not be made the basis for judicial action.

It may be well to notice that there is nothing in this cause upon which could be founded a charge that the neutrality statutes of the United States are being violated. A citation of authorities on this point is deemed unnecessary. While I apprehend fully that the complainants are not claiming through or because of the neutrality statutes, still it would seem that there exists at least a presumption that the United States have been careful to provide in those statutes for the punishment of every breach of neutrality recognized by this country.

But the nature of this cause is such that none of the considerations hereinabove set out need be decided, for the reason that a view of this case presents itself which is paramount to all its other aspects, and leads irresistibly to the conclusion that the rule nisi must be denied. That view is that the case is a political one, of which a court of equity can take no cognizance, and which, in the very nature of governmental things, must belong to the executive branch of the government. No precedent or authority has been cited to the court which, in its opinion, could even remotely sustain the cause of the complainants. No case has been cited, nor do I believe that any could have been cited, presenting issues similar to those of this cause. The three complainants are private citizens. It is true that the complainant Pierce avers

that he is consul general of the Orange Free State; but his demand is exclusively a personal one, and he must be deemed to be suing in his personal capacity. One of the complainants is an alien and a citizen of the Orange Free State. Only one of the complainants is alleged to be a citizen of the United States. They own property in the South African Republic and the Orange Free State, foreign countries now at war with Great Britain. They fear that the war, if continued, will result in the destruction of their property. They believe that, if the shipments of mules and horses from this port are stopped, the war will cease. They claim that, by virtue of a declaration of international law contained in an international treaty to which the foreign countries in which their property is situated were not parties, they have the personal right to enjoin the shipments for the purpose of stopping the war, and thus saving their property from the destruction which they apprehend will result to it from a continuation of the war. When complainants' cause is thus analyzed, and the nature of the alleged right under the treaty is considered, it is obvious that a court of equity cannot take cognizance of the cause. The main case relied on by the counsel for the complainants is the case of *Emperor of Austria v. Day*, 3 De Gex, F. & J. 217 (English Chancery Reports), in which the emperor of Austria sought and obtained an injunction to restrain the manufacture in England of a large quantity of notes purporting to be receivable as money in, and to be guaranteed by, Hungary. That action was brought by the emperor of Austria as the sovereign and representative of his nation, and the case turned and was decided on considerations entirely different from, and in no manner resembling, those presented in this cause. It may be worth noticing that the counsel for the emperor of Austria freely conceded in the argument of the case that the exportation of munitions of war could not be enjoined. I am clearly of opinion that this cause is not within the cognizance of this court, and for that reason the rule nisi must be denied.

BOARMAN, District Judge, who sat in this cause with PAR-LANGE, District Judge, concurs in the opinion.

A. J. LUCE HOP CO. v. MEEKER et al.

(Circuit Court, D. Oregon. April 17, 1901.)

1. EQUITY—JURISDICTION—ADEQUATE REMEDY AT LAW.

A bill alleged that complainant, by a contract with defendant, purchased the entire crop of hops to be raised by defendant the ensuing season, and made advances thereon to enable defendant to raise and secure the crop, the agreement being that complainant should market the same, and that, after the advances were deducted, the remainder should be equally divided between the parties; that defendant had refused to deliver the hops, but had secreted the same and falsely understated the amount. An injunction was prayed to restrain defendant from disposing of such hops. *Held*, that the bill stated a cause of action in equity for an accounting and division of the profits in accordance with the contract; that the allegation of ownership in complainant was merely inci-

dental to such relief, and did not restrict complainant to its remedy at law by replevin or trover,—the entire facts alleged, in effect, making the parties partners in the profits of the crop.

2. CONTRACTS—CONSTRUCTION.

By a contract, complainant agreed to purchase a crop of hops to be raised by defendant, and to advance, as required, to enable defendant to secure the same, seven cents per pound; the proceeds of the hops, when sold by complainant, above the amount of the advances, to be equally divided between them. The contract further provided that defendant might, at his option, retain half the crop, by paying to complainant seven cents per pound for the same. Defendant obtained advances to an amount considerably exceeding seven cents per pound on the crop actually raised, and afterwards sought to exercise his option to retain half the crop by paying the sum of seven cents per pound to complainant. *Held*, that the contract contemplated an equal division of the profits, and that defendant could not exercise his option to retain half the crop in specie without repaying one-half of the advances actually received.

In Equity. Suit for enforcement of contract.

Dolph, Mallory, Simon & Gearin, for complainant.

Pipes & Tift, for defendants.

BELLINGER, District Judge. The defendant Hirschberg is the owner of a hop yard near Independence, Or., which was leased to the defendant Meeker for the year 1900. Hirschberg was to receive one-fourth the crop raised, as rental. It is alleged in the complaint that Meeker, being without the necessary means to cultivate and to care for the crop, entered into a contract in writing with the Luce Hop Company whereby, in consideration of the sum of \$1,000 to him paid as an advance, he sold and conveyed unto the company the entire three-fourths of the crop for the season of 1900, upon these conditions, among others: That Meeker should deliver all the hops subject to the contract at the Southern Pacific Railroad station at Independence, Or. That the complainant was to pay in advance to Meeker the sum of 7 cents per pound for each pound of hops so delivered,—such advances to be without interest,—and from time to time, as required, to harvest, pick, bale, and deliver said hops. These payments were to be made as follows: \$1,000 in advance, on signing the contract; \$1,000 May 1, 1900; \$400 August 1, 1900; the balance due at and during the harvest, as required to pay the expenses of securing the crop. That the complainant should market the entire product of the crop growing upon the premises, and, after deducting the amounts advanced from the net sales of said hops, the residue should be equally divided between Meeker and the complainant. That Meeker should have the right to retain one-half of said crop, provided he elected to do so on or before the 1st day of November, 1900, and at the same time paid to the complainant, cash in hand, 7 cents per pound for said hops so retained, and that upon said retention and payment said hops should become the property of Meeker. That all moneys to become due to Meeker after the payment of complainant's claims on the agreement were to be paid to the defendant the Independence National Bank. In pursuance of this agreement, the complainant advanced moneys to Meeker, from time to time, aggregating a total of \$8,400. The complaint alleges that the total

hop crop raised on the premises for that year was 177,777 pounds, of which, after deducting the one-fourth belonging to Hirschberg as rental, there remained 133,333 pounds subject to the contract between the complainant and Meeker, the profits of which were to be equally divided between them. The complaint alleges that Meeker failed and refused to deliver any part of the hop crop at the railroad station in Independence as he had contracted to do, more than 211 bales, and that on the 20th day of October, 1900, said Meeker, pretending to exercise his option to retain one-half of the said three-fourths of said hop crop, and with intent to cheat and defraud the complainant out of a large amount of said hops, falsely pretended and represented that the entire product of said hop yards for the season of 1900 was 103,072 pounds, and no more, and that, after deducting therefrom the one-fourth interest of Hirschberg, there remained subject to said contract 77,304 pounds of hops, and no more; and it is alleged that thereupon Meeker pretended and represented that one-half of said crop covered by said agreement was 38,652 pounds, and no more, and then offered to pay to complainant the sum of \$2,705.64, and no more,—that being 7 cents per pound for the said 38,652 pounds of hops so claimed and pretended by Meeker to be one-half of the crop covered by the contract,—and that thereafter, without the authority and knowledge of the complainant, Meeker pretended to have sold the one-half of said hop crop to the Independence National Bank, which bank claims to own said hops by reason of said pretended purchase, and offered to pay to the complainant said sum of \$2,705.64, which offer was refused. It is alleged that Meeker, Hirschberg, the said national bank, and other persons have conspired together to wrong and injure the complainant, and to that end have secreted the hops subject to the said contract, and denied to the complainant all access to and all control over the same, and threaten to, and, unless restrained by the order of the court, will, sell the said hops, and remove the same beyond the control of the complainant, and out of the jurisdiction of this court. Pending this suit, upon an order of the court therefor, entered in pursuance of a stipulation between the parties, the crops in controversy were sold to the complainant for 12 $\frac{3}{4}$ cents per pound, and of the purchase price there was deposited in court \$2,250.66 by the complainant pending the determination of the suit.

The defendants contend that, upon the facts alleged in the complaint, the complainant, as the owner of the hops in question, could have brought its action for replevin or trover upon refusal of the defendants to deliver the same, and that, the complainant having a complete and adequate remedy at law, the case is not one for equitable relief, and therefore the complainant's bill should be dismissed. It is true that the complainant claims to be the owner of the hops in question, but the object of the suit is not the recovery of the possession of the hops. The averment of ownership is a mere statement of a fact material in the case, not necessarily decisive of the right to the equitable relief claimed. The complaint alleges that the complainant and Meeker became and were partners in the profits which might arise from the sale of the hops at a price in excess of 7 cents

per pound. The bill is brought for the purpose of affording the complainant an opportunity to examine the hops in the place where they are stored, and to market the same for the purpose of ascertaining and dividing the profits arising from the sale thereof in accordance with the terms of the contract, and for such other and further relief as the circumstances of the case may require. It does not follow that, because the complainant is the owner of the legal title to the property in the profits arising from which he concedes an interest in his adversary, he is thereby precluded from bringing a suit in equity for the purposes of an accounting and a division of the profits in such property. This is what the complainant seeks, and its reliance upon the legal title, so far as it relies upon it at all, is merely a means to the end of such accounting and division. The trouble in the case grows out of the fact that the advance made to Meeker of 7 cents per pound under the contract was for an estimated crop of at least 120,000 pounds, while the actual crop, so far as appears, was but a little above 77,000 pounds. By tendering to the complainant 7 cents per pound upon one-half of the actual crop, for the purpose of retaining ownership in that half, while at the same time retaining the advances actually made upon such half, Meeker would be placed in a position of undue advantage over the complainant. The answer admits that the profits of the crop would have had to be equally divided between the hop company and Meeker, had it not been for the exercise by Meeker of his option to retain one-half of the crop on the payment of 7 cents per pound for the hops so retained. Upon such a division of profits the account would have stood thus:

Total crop for division under the contract, 78,284 pounds. There was realized for these hops 12¾ cents per pound.....	\$9,981 21
Deduct advances by complainant	8,400 00
Leaving the amount to be divided as profits	1,581 21
Share of each party	790 60

But, if Meeker's attempt to exercise his option is maintained, the account will stand thus:

Amount realized for hops	\$9,981 21
Amount necessary to be returned by Meeker as advances on 39,142 pounds of hops	2,739 94
Which sum, deducted from \$4,990.60, being half of the amount realized for the entire crop, leaves a profit to Meeker of \$2,250.66....	2,250 66
Amount advanced by the complainant	\$8,400 00
Amount tendered by Meeker on the half retained by him	2,739 94
Proceeds of the remaining half of the crop	4,990 60
Total amount realized by the complainant	7,730 54
Loss to complainant	669 46

It clearly appears from the terms of the contract, and is admitted by the defendants, that the parties intended an equal division of profits. The option to Meeker to retain one-half of the crop upon payment of 7 cents per pound to the complainant was intended to permit a division of the crop, instead of the proceeds. It assumed that the advances made by the complainant would be upon the basis of 7 cents per pound upon the crop, but, instead of this, the defendant Meeker actually received a much larger sum. The complainant was required to advance upon the crop of 78,284 pounds \$5,479.88. It advanced

instead \$8,400. To permit Meeker, after receiving \$8,400 as an advance of 7 cents per pound upon the crop, to retain one-half of the crop as his interest upon repaying to the complainant \$2,739.94, would operate as a fraud on the latter. (The tender actually made was \$2,706.97, an insufficient amount in any view of the case.) I am of the opinion that Meeker was required, as a condition to the exercise of the option to retain one-half of the crop, to repay at least what complainant had advanced to him on account of the hops so retained. It is the intention of the contract to require a payment of the amount advanced on the hops retained, as a condition to Meeker's right to exercise the option in question. The amount to be repaid is stated as 7 cents per pound, because that was what complainant was required to advance, and what, as I assume, it intended to advance. In no event could Meeker retain half the crop unless he repaid to the complainant on the basis upon which he received these advances. He must, in other words, offer to pay upon the basis of a crop of 120,000 pounds, since he collected advances upon such an estimate. He will not be allowed to say that he received more than he was entitled to, for the purpose of justifying his retention of half the crop on the tender made. In other words, he must offer to repay according to the measure by which he was paid.

The answer of the bank and of Hirschberg shows that they had knowledge of this contract, and of the conditions upon which Meeker's right to the hops which he attempted to sell to the other defendants depended. They therefore took with notice, and their rights are no greater than those of the defendant Meeker.

Out of the \$2,250.66 deposited in court, the complainant is entitled to be paid the sum of \$1,460.06, with its costs in this suit. The defendant the Independence National Bank is entitled to the residue.

LIVINGSTON V. D'ORGENOY.

(District Court, D. Louisiana. 1899.)¹

EJECTMENT—STAY AT REQUEST OF THIRD PARTY.

Plaintiff brought ejectment. Defendant justified the ouster as an official act while marshal of the United States, in pursuance of an act of congress, and denied any other removal, interference, or possession of the premises. Defendant was no longer an officer of the United States. The attorney of the United States moved that the proceedings be stayed. *Held* that, as it would be wrong to decide the rights of the United States in a suit against one no longer an officer thereof, the proceedings would be stayed.

In Ejectment. Proceedings stayed by a third person.

The original petition stated that the plaintiff was in possession of the batture, a tract of land within the limits of the city of New Orleans, and that the defendant ousted him of his possession, and still kept him out. Be-

¹ This case has been heretofore reported in 1 Mart. (O. S.) 86, and is now published in this series, so as to include therein all circuit and district court cases elsewhere reported which have been inadvertently omitted from the Federal Reporter or the Federal Cases.

sides a claim of \$150,000 for damages, it concluded with a prayer that the plaintiff might be restored to his possession. The defendant justified the ouster as an official act while he was marshal of the United States, in pursuance of an act of congress (8 Laws U. S. 317); and he denied any other removal, interference, or possession of the premises. The pleadings were amended by consent. The new petition stated the plaintiff's title to the premises, the claim set up by the corporation of the city, the judgment thereon, and a perpetual injunction quieting his title, and the ouster. It concluded with a prayer for restitution and general relief. To this amended petition the defendant's answer was the same as to the original, except that the last clause, denying the removal, otherwise than as marshal, the interference, and possession, was omitted. The plaintiff demurred to the answer, and the defendant joined in the demurrer. When the demurrer was about to be argued, the attorney of the United States, T. Robinson, read the affidavit of James Mather, stating the possession of the United States, their exercise of acts of ownership on the premises, their officers having at one time allowed the people to take dirt therefrom, and at another recalled this permission, the want of interest in the defendant, and the deponent's belief that the sole object of the plaintiff was to gain possession and oust the United States. The attorney next drew the attention of the court to the original and amended pleadings. He observed that the first petition claimed \$150,000, and the answer thereto denied everything but the ouster, which it justified; that the second petition claimed no special damage, and the answer was amended by striking out whatever had been at first denied. On these suggestions, he moved that the plaintiff be ordered to show cause why the proceedings should not be stayed, as fictitious and collusive, and because, too, the defendant claimed not (notwithstanding his implied admission in the answer) any right of possession or property in the premises, and therefore was entirely uninterested, while the interest of a third party, viz. the United States, was sought to be affected, and the possession of the premises obtained from them. On this the plaintiff offered to allow the United States to be made parties to the suit; but the offer was not accepted, on the ground that the United States could not be made defendants in any case, and in the present could not make themselves plaintiffs, for no right of theirs had been violated, and they had nothing to claim. The plaintiff next showed cause. He denied the fiction and collusion, the want of interest in the defendant, and that his only motive in bringing the suit was to affect the interest of the United States. At his request, and by consent, the defendant was sworn. He deposed that he did not claim any right of property or possession in the premises, and asserted he would not prevent the plaintiff from taking possession if he attempted it. He admitted he had given his consent to the amendment of the pleadings, on the assurance he had received that the plaintiff would claim no damages from him, and had no other object in view but the possession of the premises, and that, if such assurance had not been given him, he never would have consented to the amendment. He declared that no communication, verbal or written, had passed between him and the plaintiff, except a letter announcing the plaintiff's intention to bring the suit. The attorney having advanced, as a presumption of collusion, that Paillette, the general agent of the plaintiff, was the defendant's counsel, the plaintiff admitted the fact, but said that Paillette had no other agency in the plaintiff's behalf, but receiving the petition inclosed to him from New York, filing it, and delivering the plaintiff's letter to the defendant. Paillette, being sworn, deposed he had given the defendant to understand that the plaintiff would not claim damages from him, and expected only to gain possession, and that he had advised the defendant to consent to the amendment. A letter of the defendant to the recorder was then read. It contained these expressions: "It appears that Mr. Livingston has desisted from all pursuit against me, and that his only object is to be reinstated in his possession." In the conclusion the defendant begged the recorder not to communicate this information, which he declared to appear to him very true. Another letter was also read, in which the defendant declined allowing the law officers of the corporation to join his counsel in the defense of the suit.

T. Robinson and Moreau & Martin, for the United States.
Paillette & Alexander, for defendant.

HALL, District Judge. It appears that the defendant is not in the least interested in the decision of this case. No damages are to be recovered of him, because none are prayed for. He is not to be deprived of possession, because he never had any; and, if ever he had, he has since ceased to hold it. The circumstance of Paillette being the plaintiff's agent and the defendant's counsel at first blush might excite suspicion; but, when it appears he has always been of counsel for the defendant in his causes, collusion cannot be inferred from it. Although there is no direct evidence of collusion between the parties, yet it is certain a kind of understanding exists between them. The impression made on the defendant's mind, clearly, was that he was totally hors de combat; that no damages were to be recovered of him, and therefore he was totally uninterested, and became quite indifferent as to the issue of the suit; for, he has told us he had neither possession nor property, and he should have averred so in the pleadings. I do not think that his refusal to blend his interest with that of the corporation ought to have any influence in the decision of the motion. It is clear that the United States claim the premises. They have dispossessed the plaintiff, and his object now is to regain the possession. If any one is in possession, the United States are; and this fact is sworn to by Mather. The interests of the United States alone are at stake. The defendant cannot be expected to defend them. It is immaterial to him what opinion the court pronounces on the legality of the president's orders, or whether it adjudges the possession of the batture to the plaintiff or not. There is nothing adverse in the case. Courts of justice are to decide on real contests. They are never to be used as instruments to work injustice, wound the feelings or affect the interests of others, through the intervention of fictitious or uninterested parties. The defendant can only be considered as a feigned ejector. It is a standing rule in actions of ejectments that no plaintiff shall proceed to recover the land, without giving the tenant in possession a declaration and making him a defendant. Otherwise, the court would be instrumental in doing an injury to a third person, because a declaration might be served on a stranger, a feint defense made and a verdict, judgment and execution obtained, without the tenant having any notice of it. This would be the case if the court were to proceed in this suit. The defendant is no longer an officer of the United States. It would be wrong to decide on their rights in a suit against him. If the United States, who claim the premises, cannot be made defendants, it becomes their dignity to establish a tribunal in which the controversy may be determined. It is much regretted that it has not been already done. Proceedings are not often stayed at the instance of a third party, but the court certainly possess the power to stay them. In the case cited from Cowper, Lord Mansfield said: "If the Chevalier d'Eon had applied to the court, as a person whose feelings were sought to be wounded in the suit, and prayed that the suit might be stopped, the court would have instantly done it." Proceedings stayed.

BALL v. WARRINGTON.

(Circuit Court of Appeals, Third Circuit. April 29, 1901.)

No. 27.**1. JUDGMENT AGAINST CORPORATION—EFFECT AS EVIDENCE AGAINST STOCKHOLDER—IMPEACHMENT FOR FRAUD.**

Under the law of Kansas, a judgment against a corporation is not conclusive against a stockholder who was not a party to the action, if it was obtained through fraud or collusion, although it can only be impeached for fraud or want of jurisdiction; hence, under the "full faith and credit" clause of the constitution, such a judgment rendered by a court of Kansas is required to be given the same effect, but no greater, in an action against a stockholder in a court of another jurisdiction.

2. CORPORATION—ACTION AGAINST STOCKHOLDER—PLEADING.

In an action of assumpsit in a federal court in Pennsylvania against a stockholder in a Kansas corporation to enforce his additional statutory liability, the plaintiff being a judgment creditor of the corporation, the defendant may introduce evidence under a plea of non assumpsit to impeach the validity of plaintiff's judgment for fraud, where an affidavit of defense setting up such special matter has been filed in accordance with the state practice.

3. TRIAL—QUESTIONS FOR JURY—FRAUD.

Fraud is a question of fact, which, where the facts are in dispute and the evidence is conflicting, should be submitted to the jury.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

See 102 Fed. 1000.

J. Morris Waln and A. U. Bannard, for plaintiff in error.

E. Spencer Miller, for defendant in error.

Before **ACHESON** and **GRAY**, Circuit Judges, and **BUFFINGTON**, District Judge.

BUFFINGTON, District Judge. William E. Ball, trustee, the plaintiff in error, brought an action at law in the court below against Anna M. Warrington to enforce her statutory double liability as a shareholder of the Kansas Savings Bank, a corporation of the state of Kansas. The constitution of that state (article 12, § 2) provides, "Dues from corporations shall be secured by individual liability of stockholders to an additional amount equal to the stock owned by each stockholder." In pursuance of the statutory provisions of the state, the plaintiff brought suit in the district court of Harvey county, Kan., against the bank upon a certificate of deposit, and on June 18, 1891, recovered a judgment by default in the sum of \$10,220. On May 12, 1892, an execution was issued on said judgment, which on May 17, 1892, the sheriff returned unsatisfied. The plaintiff then brought this suit in the circuit court for the Eastern district of Pennsylvania against Anna M. Warrington to enforce her liability as a shareholder, and filed a statement of claim in conformity with the Pennsylvania procedure act of 1887; the practice under such act being adopted and followed by the circuit court. The defendant thereupon filed an affidavit of defense, in which she alleged, *inter alia*, that the judgment against the Kansas Savings Bank was fraudu-

lent, that it had been obtained by collusion between the plaintiff and the representatives of the bank, and that the object of the collusion was to avoid a defense which existed, enable the plaintiff to obtain a judgment and pursue the defendant and other stockholders. Deeming the affidavit of defense insufficient, the circuit court entered judgment for the plaintiff. That judgment was reversed by this court (*Warrington v. Ball*, 33 C. C. A. 609, 90 Fed. 464); the court holding that the defendant could defend on the ground of fraud. On a trial of the cause upon that issue the jury found for the defendant, and on entry of judgment in favor of defendant a writ of error to this court was sued out by plaintiff. The error assigned may be resolved into four heads: First, the judgment of Ball, trustee, against the Kansas Savings Bank is conclusive upon the defendant, and she cannot attack it in this case, though it was obtained by fraud and collusion; second, if fraud and collusion in obtaining the judgment will avail to defeat it, such defense is an equitable one only, and the defendant cannot avail herself of it in the present action at law; third, evidence bearing on the question of fraud was not admissible under the pleadings; and, lastly, the evidence was not sufficient to justify submission to the jury of the question of fraud.

The first and second questions were settled by this court when this case was here before. In an opinion of marked clearness and sound reasoning, Judge Butler demonstrated that both under the ruling of the highest court of Kansas (*Ball v. Reese*, 58 Kan. 614, 50 Pac. 875), and in conformity with well-recognized principles of law, the judgment against the company was not conclusive upon the shareholder, when obtained by fraud and collusion. Since our decision above cited, the supreme court of Kansas has, in a case involving the statutory liability here in question, re-enunciated its ruling that a judgment obtained against the corporation "is conclusive against the shareholders, and can be impeached only for fraud or lack of jurisdiction." *Steffins v. Gurney*, 61 Kan. 295, 59 Pac. 725. In *Bank v. Farnum*, 176 U. S. 643, 20 Sup. Ct. 506, 44 L. Ed. 619, the supreme court of the United States, citing *Ball v. Reese*, supra, to evidence the effect given in Kansas to a judgment against the corporation, and quoting from that case as follows: "In the absence of fraud and collusion, the judgment must be held to be final and conclusive against the stockholder if the court rendering it has final jurisdiction,"—says: "This representative character of the corporation has been affirmed by this court in several cases. In *Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. 739, 33 L. Ed. 184, it was held that, 'in the absence of fraud, stockholders are bound by a decree against their corporation in respect to corporate matters, and such a decree is not open to collateral attack.' " In view of these decisions, it was clearly the duty of the court below to hold, as it did, that the judgment against the Kansas Savings Bank Company, to which the defendant was not a party, if obtained by fraud and collusion, was not conclusive upon her. And inasmuch as that court gave the judgment the same force and credit conceded to it in Kansas, namely, that, in the absence of fraud and collusion, it was final and conclusive against the stockholder, there was no violation of the constitutional pro-

vision that "full force and credit shall be given in each state to public acts, records, and judicial proceedings of every other state." That the defense of fraud was an available defense at law, and the defendant in this case was not required to go into a court of equity for relief, was decided by this court when the case was here before.

We are also of opinion the evidence bearing on the question of fraud was admissible under the pleadings. The rules of local courts do not regulate the procedure of the circuit court. Its procedure, as we have noted, is, in cases like the present, adapted to the Pennsylvania procedure act of 1887. That act provides (section 7), "The defendant in the action of assumpsit shall be at liberty, in addition to the plea of 'non-assumpsit,' to plead payment, set off, and, also the bar of statute of limitation, and no other pleas." The pleas in this case were non assumpsit, payment, and set-off. Moreover, the plaintiff was fully advised by the affidavit of defense of the special matter which the defendant proposed to prove. In *Pennock v. Kennedy*, 153 Pa. 581, 26 Atl. 15, the supreme court of Pennsylvania, construing this act, said:

"The act declares that the defendant in all actions of assumpsit shall, if required so to do by the plaintiff, reply to the plaintiff's statement of his cause of action by an affidavit of defense. This affidavit serves a double purpose: It discloses to the courts facts which, if made to appear to the satisfaction of a jury, would make a good defense, and so carries the case to a jury for determination. It is also a notice of special matter to the plaintiff."

We are also of opinion the evidence adduced by the defendant was such as to necessitate the submission to the jury of the question of fraud. So far as the evidence before the court below is concerned, the bank had a clear defense to the claim. The facts shown by the proofs were that the plaintiff, as trustee, held a note of the Arkansas Valley Land & Loan Company which matured January 27, 1891. On this note one W. G. Oldfield, three men named McClain, and the plaintiff, as an individual, were indorsers. Oldfield and the McClains were sole owners of the Arkansas Company, the maker of the note. On September 27, 1890, Oldfield, who had become cashier of the Kansas Savings Bank, took up this note, thereby relieving plaintiff on his indorsement, and gave him a paper in which he falsely and without authority certified that W. E. Ball, trustee, had deposited in the Kansas Savings Bank \$9,662.11, payable on the return of the certificate on January 27, 1891, with interest at 8 per cent. In point of fact, no money was deposited by Ball in the Kansas Savings Bank, nor was any consideration whatever shown to have been received by such bank for its purported obligation. There was no knowledge or ratification by the directors of the bank of the transaction. Indeed, the majority of the directors did not know that any such paper had been issued, or that suit was brought upon it, until after judgment was entered. The bank itself was incorporated March 19, 1890, and began business April 10, 1890. On March 15, 1890, the defendant paid for 42 shares of stock \$4,200. But two meetings of the board of directors were held,—one March 23, 1890, to elect officers, and one November 21, 1890, to authorize an assignment. No other business was transacted by the board at these meetings. Good faith

to the stockholders required that a defense be made to the plaintiff's suit, and it is difficult to conceive how the omission to make it is consistent with honesty to them. It was not defended. The testimony on behalf of the defendant in the court below tends to show that no defense was made by the assignee, because so advised by counsel for the plaintiff, who was alleged to have been counsel for the assignee as well. The testimony in that regard was conflicting, but, being conflicting, we think the court below would have erred, in view of all the facts and circumstances shown, had it refused to submit the case to the jury; the general rule of law being that fraud is a question of fact, and when facts are disputed the jury shall decide. We see no error in the court submitting the issue to the jury. The judgment of the circuit court is affirmed.

HIGGINS v. FIDELITY INS., TRUST & SAFE-DEPOSIT CO.

(Circuit Court of Appeals, Third Circuit. April 29, 1901.)

No. 10.

NATIONAL BANKS—STOCKHOLDERS SUBJECT TO ASSESSMENT—PLEDGE.

A pledgee of shares of stock in a national bank as collateral security for a debt due him from the owner, with power of attorney to transfer the same on the books of the bank, does not become a stockholder, and liable to an assessment as such on the failure of the bank, contrary to his intention, by causing the stock to be transferred into the name of an employé, who holds it for the benefit of all parties interested, nor by any other action which is required or is proper for the protection of both his own interests and those of the pledgor, and not inconsistent with his retention of the stock merely as pledgee, such as paying an assessment required by the comptroller to make good the impaired capital of the bank, and charging the amount to the pledgor.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

John G. Johnson and Asa W. Waters, for plaintiff in error.

Richard C. Dale, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. This was an action brought by George H. Higgins, receiver of the Keystone National Bank of Erie, an insolvent national banking association, against the Fidelity Insurance, Trust & Safe-Deposit Company, to recover the amount of an assessment on stockholders of the bank, made under section 5151 of the Revised Statutes, upon the allegation that the defendant was a shareholder of the bank at the time of its failure, and thus liable to creditors for the assessment sued for. It appears that on November 15, 1890, the defendant company made a loan of \$15,000 to the firm of Delamater & Co. (in renewal of prior loans), for which Delamater & Co. gave to the defendant their note for \$15,000, dated November 15, 1890, payable in 60 days, and as collateral security for the payment of this note deposited with the defendant 230 shares of the capital stock of the Keystone National Bank of Erie, each share being of the par value of \$100; 130 shares thereof standing in the

name of George B. Delamater, and 100 shares thereof standing in the name of George W. Delamater. With the certificates of the stock thus deposited, blank powers of attorney to assign and transfer the same, signed by George B. Delamater and George W. Delamater, respectively, were delivered to the defendant. On December 5, 1890, the firm of Delamater & Co. made a general assignment for the benefit of creditors. On January 10, 1891, the defendant sent to the Keystone National Bank of Erie the original certificates so deposited as collateral, with direction to the bank to transfer the same into the name of W. W. Hand, who was a clerk in the employ of the defendant. This transfer was made on the books of the bank, and new certificates were issued in the name of W. W. Hand, dated January 15, 1891, and were transmitted by the bank to the defendant. Hand signed a transfer in blank on the back of each of the new certificates, and in that form they were retained by the defendant. On March 16, 1892, the comptroller of the currency, finding that the capital of the bank was impaired, ordered an assessment of 25 per centum on the capital of the bank to make good the deficiency. The defendant paid this assessment, namely, \$5,750, on the above-named 230 shares of stock, and charged the same to Delamater & Co. as an additional advance. On December 22, 1892, pursuant to section 5143 of the Revised Statutes of the United States, with the approval of the comptroller of the currency, the capital stock of the bank was reduced from \$250,000 to \$150,000, divided into 1,500 shares of \$100 each. On January 24, 1893, the defendant sent to the bank the certificates which had been issued to W. W. Hand for the 230 shares, and on February 7, 1893, the defendant received from the bank a certificate in the name of W. W. Hand for 172½ shares, being the reduced number. Hand signed a transfer in blank on the back of the new certificate, and in that form it remained in the defendants' possession. On one or more occasions Hand gave a proxy to vote at the annual meeting of stockholders, and he also gave a proxy to vote at the special meeting of the stockholders in favor of the reduction of the capital stock. On June 20, 1897, the Keystone National Bank of Erie closed its doors, and on July 26, 1897, the comptroller of the currency appointed a receiver of the bank. On November 3, 1897, the comptroller ordered an assessment of 100 per centum on the stockholders. The court submitted to the jury the question of fact whether or not the defendant had changed its relation to the stock from that of pledgee to that of owner. The question so submitted was thus stated by the learned trial judge in his charge:

"The question is whether, before this Keystone National Bank failed, the defendant company, the Fidelity Trust Company, of this city, was the real owner of these shares of stock, or whether it continued to be the pledgee of the stock,—whether the stock had become theirs in the sense in which we use in ordinary speech the word 'owner,' or whether it had been continued to be pledged to them as collateral security for the payment of the note which has been offered in evidence."

Again, the learned trial judge said to the jury:

"The whole subject, as I regard it,—for the present, at least,—is a question of fact; and that question I repeat is whether the defendant company, the

Fidelity Trust Company, was, at the time when this bank went into the hands of the receiver, the real owner of these shares of stock, or whether it continued to hold them as collateral security for the payment of the note originally given by the Delamaters."

The verdict of the jury was in favor of the defendant, and subsequently the court entered judgment for the defendant on the verdict.

Undoubtedly, this stock originally was pledged by the owners, the Delamaters, to the defendant company, as collateral security. Wrongful conversion by the defendant is negated by the verdict. Upon the finding of the jury it must be accepted as established that the defendant did not intentionally change its relation to the stock. This, we think, is very clear under the uncontradicted evidence. Did the defendant do anything whereby, contrary to its intention, it became the absolute owner of the stock? The payment of the pro rata share of the assessment ordered by the comptroller of the currency to make good the impairment of the capital stock of the bank was for the protection and benefit of all interested in the pledged stock, and was entirely consistent with the preservation of the pledge. The assent to the reduction of the capital stock of the bank, made agreeably to the statute, under the approval of the comptroller of the currency, did not work any prejudice whatever to the pledgors or their assignees, and we do not see how it could change the relation of the defendant to the stock. It is said, however, that the defendant had no right to transfer the stock to W. W. Hand without the express consent of the Delamaters or their assignees. But we agree with the views expressed by the circuit court that the delivery by the Delamaters of the certificates with the blank powers to assign and transfer them implied their consent to such a transfer of the stock as might be deemed reasonably necessary for the protection of the defendant. The transfer to Hand was not in hostility to the pledge, but subservient to it. He held the legal title for the benefit of all interested in the stock,—the pledgee first, and then the pledgors and their assignees. Moreover, neither the pledgors nor their assignees are complaining. They are not parties here. This suit is by the receiver of the bank against the defendant company to subject it to the personal liability imposed upon shareholders by section 5151 of the Revised Statutes of the United States. Does this record disclose, as against the defendant, any ground for such liability? The court below answered the question negatively, and, we think, rightly. This conclusion accords with the decisions of the supreme court of the United States in *Anderson v. Warehouse Co.*, 111 U. S. 479, 4 Sup. Ct. 525, 28 L. Ed. 478, and in *Pauly v. Trust Co.*, 165 U. S. 606, 619, 17 Sup. Ct. 465, 41 L. Ed. 844. The stock in the Keystone National Bank of Erie owned by the Delamaters, and by them pledged to the Fidelity Insurance, Trust & Safe-Deposit Company, never stood on the registry or books of the bank in the name of the company, and in fact the company was mere pledgee. In *Anderson v. Warehouse Co.*, *supra*, Chief Justice Waite said:

"It is also undoubtedly true that the beneficial owner of stock registered in the name of an irresponsible person may, under some circumstances, be liable to creditors as the real shareholder; but it has never, to our knowledge, been

held that a mere pledgee of stock is chargeable where he is not registered as owner."

And it was there ruled that a pledgee of national bank stock, who was unwilling to assume the liability of a registered shareholder, acting in good faith, and with no fraudulent intent, might lawfully cause the pledged stock to be transferred to and registered in the name of an irresponsible employé for the purpose of perfecting the security of the pledgee without incurring a shareholder's liability. Here the defendant company acted in perfect good faith. At the time of the transfer to Hand, the Keystone National Bank of Erie was in good credit. Moreover, the defendant was under no personal liability, for it was not registered as owner. The facts of the defendant's case, we think, bring it clearly within the principle laid down in *Pauly v. Trust Co.*, *supra*, namely, that, if one receives shares of the stock of a national banking association as collateral security to him for a debt due from the owner, with power of attorney authorizing him to transfer the same on the books of the association, and, being unwilling to incur the responsibilities of a shareholder as prescribed by the statute, causes the shares to be transferred on such books to another under an agreement that they are to be held as security for the debt due from the real owner to his creditor, the latter acting in good faith, and for the purpose only of securing the payment of that debt without incurring responsibility of a shareholder, he (the creditor) will not, although the real owner may, be treated as a shareholder, within the meaning of section 5151. We are not able to see that any one of the numerous assignments of error is well founded. Upon the whole case we are of opinion that judgment in favor of the defendant was rightly entered. The judgment of the circuit court is affirmed

BOARD OF COM'RS OF OURAY COUNTY v. GEER.

(Circuit Court of Appeals, Eighth Circuit. April 13, 1901.)

No. 1,442.

1. APPEAL—REVIEW—QUESTIONS DETERMINED ON FORMER APPEAL.

Questions necessarily involved and determined on an appeal or writ of error cannot be again considered on a subsequent appeal or writ of error in the same case.

2. SAME—REVERSAL—PROCEEDINGS AFTER REMAND.

The circuit court overruled a demurrer to a defense pleaded by defendant in its answer, whereupon plaintiff filed a replication to such defense in the nature of a confession and avoidance, to which the court sustained a demurrer. On a writ of error taken by plaintiff both rulings were assigned as error, and the circuit court of appeals in its opinion held that the action of the trial court in overruling the demurrer to the answer was correct, but reversed its ruling sustaining the demurrer to the replication. *Held*, that such decision left for trial an issue of fact as to the truth of the facts pleaded in avoidance in the replication, and that it was error to render judgment for plaintiff on the pleadings after the cause was remanded.

3. INTEREST—COUPONS FROM MUNICIPAL BONDS—COLORADO STATUTE.

Mills' Ann. St. Colo. § 2252, which provides that "creditors shall be allowed to receive interest * * * for all moneys after they become due

on any bond, bill, promissory note, or other instrument of writing," applies to interest coupons from municipal bonds, which are in effect promissory notes issued by the municipality in its business, as distinguished from its governmental, capacity, and therefore subject to the statute, the same as contracts made by individuals.

In Error to the Circuit Court of the United States for the District of Colorado.

This was an action founded on coupons cut from certain bonds issued by the county of Ouray under the provisions of an act of the general assembly of the state of Colorado approved April 17, 1899, authorizing the issue of bonds, among other purposes, for the satisfaction of judgments. The bonds recited that they were so issued "in satisfaction at par of judgments and accrued interest thereon which had been rendered in the courts of record in this state against Ouray county." An answer was filed setting up several defenses, to which, for the purposes of the present case, no reference need be made. A demurrer, duly interposed to that answer, was sustained by the trial court, and an amended answer was thereafter filed, in which, among other defenses now requiring no consideration, the defendant, now plaintiff in error, alleges as follows: "As an amended seventh defense to the plaintiff's complaint, the defendant alleges that there is no record of any judgment by any court against the defendant for which the bonds were issued, the coupons of which are sued on in this action." A demurrer was interposed to this seventh defense and overruled. Thereupon the plaintiff, now defendant in error, filed a replication denying the allegation of the answer to the effect that no judgments had been rendered against the county, and affirmatively pleading as follows: "And for a further replication to the seventh answer, as amended, plaintiff avers that he is the owner of the bonds described in the complaint and the coupons upon which this action is brought, and that he acquired the same before the maturity of said bonds or of said coupons, for a valuable consideration, and without notice of any defect; that in each of said bonds so acquired by him as aforesaid this defendant expressly declared, as appears from the copy of the bond in the complaint set forth, that said bonds, and each of them, were issued by the defendant under and by virtue of an act of the general assembly of the state of Colorado entitled 'An act to enable the several counties of the state to refund their bonded debt which has matured or may hereafter mature, and to issue bonds in satisfaction of bonds and matured bonds,' approved April 17, A. D. 1899, in satisfaction at par of judgments and accrued interest thereon which had been rendered in the courts of record of this state against said defendant, upon the truth of which declaration and recital this plaintiff relied in the purchase of said bonds, and upon the faith and strength of which he paid the consideration therefor, as he had a right to do, and as defendant intended he should do; and plaintiff avers that defendant should not now be permitted to show that the declaration or recital so made by defendant was false and untrue, to the damage of plaintiff in the premises; and plaintiff further avers that said defendant, by reason of such recital and declaration and the reliance of plaintiff thereon, is estopped from claiming, for the purpose of defeating plaintiff's right to recover in this action, that there is no record of judgments recovered, or that there are no judgments, or that such judgments are void for any reason whatsoever." A demurrer was interposed to this replication and sustained by the trial court. Plaintiff declined to plead further, final judgment was rendered for the defendant, and the case was brought to this court by writ of error. The case was heard at the May term, A. D. 1899, and the judgment of the lower court was reversed, and remanded, with directions to take further proceedings in accordance with the views expressed in the opinion. *Geer v. Board*, 38 C. C. A. 250, 97 Fed. 435. The mandate of this court was filed in the court below, and when the case came on for a trial plaintiff moved for judgment on the pleadings. Defendant objected on the ground that an issue of fact was raised by the replication to the amended answer. Upon an adverse intimation of the court, the defendant asked leave to amend the answer, so as to make it unquestionably clear that the defendant disputed plaintiff's right to recover

as an innocent purchaser without knowledge of the facts claimed by it to avoid the bonds. The court refused to allow the amendment, and sustained plaintiff's motion, and rendered judgment on the pleadings for the plaintiff in the sum of \$9,139.20. Of this sum \$6,720 represents the principal called for by the coupons, and the balance, \$2,419.20, represents the interest thereon from the date of maturity of the coupons to the date of judgment. Exceptions having been duly saved, a second writ of error was sued out, bringing the case here for review. The defendant, by its assignment of errors, challenges the correctness of the court's action in rendering a judgment on the pleadings, and in allowing interest on the face of the coupons after their maturity to the date of rendering judgment.

Carl J. Sigfrid, Lyman L. Henry, and Thomas C. Brown, for plaintiff in error.

Albert E. Pattison, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and ADAMS, District Judge.

ADAMS, District Judge, after stating the case as above, delivered the opinion of the court.

The judgment of this court on the first writ of error is the law of this case, from which, under well-settled authority, we could not, if we would, depart. *Balch v. Haas*, 36 U. S. App. 693, 20 C. C. A. 151, 73 Fed. 974; *Haley v. Kilpatrick* (C. C. A.) 104 Fed. 647 and cases cited. We cannot, therefore, now reconsider any question which was necessarily involved in and determined at the former hearing of this case. An examination of the record on file in this court shows that the two most prominent assignments of error argued at the first hearing were:

"That the court erred in overruling plaintiff's demurrer to the defendant's sixth and seventh defenses, and each of them, and in sustaining defendant's demurrer to the plaintiff's replication to said sixth and seventh defenses, and each of them."

The seventh defense and the replication then under consideration are the same as those hereinbefore set out and now under consideration. This court said, in its opinion rendered on the former hearing (*Geer v. Board*, 97 Fed. 435, 441, 38 C. C. A. 250, 256), as follows:

"The seventh defense was that there never were any judgments in payment or satisfaction of which the bonds were issued. This is a good defense against the bonds in the hands of the original creditor, who accepted them in exchange for the indebtedness of the county to him, upon which he had obtained no judgments. The plaintiff replied to this defense, however, that he had acquired the bonds and coupons for value, before maturity, without notice of any defect in them, and that he paid the consideration for his purchase in reliance upon the recital, which was contained in each bond, that it was issued, by virtue of the act of 1889, 'in satisfaction at par of judgments and accrued interest thereon which have been rendered in the courts of record in this state against Ouray county aforesaid.'"

The trial court had overruled a demurrer to the seventh defense as pleaded, and had thereby pronounced it a good defense. This ruling, being distinctly challenged by the plaintiff, was approved by this court in the language already quoted. The replication was practically a confession and avoidance. It says, in effect, even if there were in fact no judgments in satisfaction of which the bonds in question were issued, the plaintiff purchased the bonds in good faith,

with no knowledge of any such infirmity and in reliance upon defendant's recital, found in the bond, that such judgments had in fact been rendered. The legal sufficiency of this replication was distinctly presented for our determination at the former hearing of the case, and the court then said:

"The demurrer to the replication to the seventh defense should have been overruled."

This replication was, by the language just quoted, distinctly held to be good in law, and in the language hereinbefore quoted from the opinion was held to have been specifically invoked by the plaintiff to overcome the otherwise "good defense" set up in the amended answer. In the light of the record and opinion in the former case, we conclude unanimously that the pleadings adopted by the parties to this suit, as heretofore construed by this court, presented a triable issue as to whether, even if there were no underlying judgments to support the bonds in question, the plaintiff purchased them without knowledge of such defect and in reliance upon the recital to the contrary found in the bond. This conclusion renders it unnecessary and improper to enter into any original consideration of the pleadings.

As this case must be remanded for a new trial, we will indicate for the guidance of the trial court the conclusion reached on the second assignment of error, relating to the allowance of interest on the face value of the coupons sued on. Section 2252, Mills' Ann. St. Colo., so far as applicable to this case, is as follows:

"Creditors shall be allowed to receive interest, when there is no agreement as to the rate thereof, at the rate of eight per cent. per annum for all moneys after they become due on any bond, bill, promissory note, or other instrument of writing. * * *"

It may be conceded that no interest would be recoverable on these coupons without statutory authority to that end, but we cannot appreciate the distinction sought to be made between the municipal coupons in question and coupons taken from bonds or obligations of individuals. The bonds and coupons now in question were issued by the municipality in the exercise of its contractual powers. It had incurred an indebtedness, and, needing money to pay the same, proceeded to borrow it. In the exercise of powers of this character, as distinguished from governmental powers, the municipality is not entitled to invoke for its protection any immunity pertaining to it as a sovereign or governing body. In the case of *Illinois Trust & Sav. Bank v. City of Arkansas City*, 40 U. S. App. 257, 22 C. C. A. 171, 76 Fed. 271, this court drew a sharp distinction, supported by abundant authority, between the principles affecting a municipality in its business functions and those affecting it in its legislative or governmental functions. It is there said:

"It may exercise the business powers conferred upon it in the same way, and in their exercise it is governed by the same rules that govern a private individual or corporation."

The act of April 17, 1899, authorized the county to issue its bonds, with coupons annexed representing interest maturing at certain periods. These coupons, when executed as required by the act, became separate and distinct obligations of the county, and contained

all essential features of a promissory note or other commercial paper, and, when severed from the bonds, became independent claims. *Clark v. City of Iowa City*, 20 Wall. 583, 22 L. Ed. 427; *U. S. Mortg. Co. v. Sperry*, 138 U. S. 313, 11 Sup. Ct. 321, 34 L. Ed. 969. Conformably to the principles just announced, the general statutes in force at the time the bonds and coupons were issued (section 2252, *supra*) became in our opinion applicable to these coupons. They were "promissory notes" or "other [like] instruments of writing" within the meaning of that statute, and bore interest from their maturity as therein provided. This conclusion is supported by the following authorities: *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L. Ed. 520; *Clark v. City of Iowa City*, *supra*; *Walnut v. Wade*, 103 U. S. 683, 26 L. Ed. 526; *Koshkonong v. Burton*, 104 U. S. 668, 26 L. Ed. 886; *Scotland Co. v. Hill*, 132 U. S. 107, 10 Sup. Ct. 26, 33 L. Ed. 261; *Mortg. Co. v. Sperry*, *supra*; *City of Cairo v. Zane*, 149 U. S. 122, 13 Sup. Ct. 803, 37 L. Ed. 673, and cases cited; *Hughes Co. v. Livingston (C. C. A.)* 104 Fed. 306; *Simonton, Mun. Bonds*, § 101.

The judgment is reversed, and the cause remanded for a new trial.

PENNSYLVANIA R. CO. v. ANOKA NAT. BANK.

(Circuit Court of Appeals, Eighth Circuit. April 12, 1901.)

No. 1,452.

CARRIERS—ACTION FOR LOSS OF GOODS—PRESUMPTION FROM FAILURE TO PRODUCE EVIDENCE.

Where plaintiff, in an action against a railroad company to recover for a loss of goods in shipment, introduces evidence which tends strongly to show inferentially that defendant managed and controlled the line of road upon which the loss occurred, although it was owned by a separate corporation, such as that the managing officers of the two companies were the same, that defendant held itself out to the public as operating the line by advertising it as a part of its system, etc., and defendant, although having it within its power, fails to produce evidence to show the actual relation between the two companies, it is a reasonable presumption that such evidence would support plaintiff's contention, and the jury is justified in determining the issue in favor of the plaintiff.

In Error to the Circuit Court of the United States for the District of Minnesota.

On the 22d day of August, 1898, S. H. Hall & Co. delivered to the Minneapolis, St. Paul & Sault Ste. Marie Railway Company 243 sacks of potato starch at Minneapolis, Minn., which by the terms of the bill of lading were to be carried to Frederick Road Station, Md., if on its road, and, if not, to be delivered to another carrier on the route to its destination. The bill of lading upon the day of its execution was duly indorsed to the plaintiff. The complaint alleges the goods were delivered by one connecting line to another until they reached Erie, when they were delivered to the defendant company to be carried to their final destination and were lost by it. The part of the charge of the court containing a somewhat detailed statement of the case and the facts the evidence tended to establish is here inserted:

"Gentlemen of the Jury: Although this case has taken considerable of your time, there is but one issue to be determined by you. The other matters in the complaint, as I understand it, are not contested, and no evidence has been introduced on the part of the defendant to question that introduced on the

part of the plaintiff in relation to those matters. It appears, in brief, that on or about the 24th or 25th day of August, 1898, Mr. Hall shipped to Frederick Road Station, Md., the amount of potato starch which is stated in the bills of lading introduced in evidence, and which you will have before you. This consignment was shipped by the Soo Road to go by the Anchor Line, as stated in the bills of lading, and over the Pennsylvania Road, which indicated a preference on the part of the shipper as to the carrier that should take the property beyond the Anchor Line, to be in care of the Pennsylvania Railroad, equivalent substantially to a statement of 'via the Pennsylvania Railroad,' to transport that consignment on the roads that belonged to it. There are provisions in the bill of lading that the carrier may send the goods by some other route, but the shipper indicates a preference for the Pennsylvania Railroad, and when the latter company took possession of the consignment it assumed the carriage, and this made a contract between it and the consignee to carry the goods as far as its route extended. Now, it seems to be admitted by the defense that from Erie on to Baltimore the route lay over roads which were controlled, managed, and operated by the Pennsylvania Railroad, including the Philadelphia & Erie Railroad from Erie to somewhere in the neighborhood of Harrisburg, there connecting with the Northern Central Railroad Company to Baltimore. It is admitted that both of these roads, while they are not perhaps either of them strictly the road of the Pennsylvania Railroad Company as a corporation, are operated and managed by that company, so that the Pennsylvania Railroad Company was the carrier of these goods in passing over those lines of railroad. So far there is no question, nor until the consignment reached Baltimore. * * * It appears that the goods were delivered without surrender of the bill of lading; and the only question is, was this final carrier that failed to perform its duty and to fulfill the contract of carriage, by delivering the goods without surrender of the bill of lading, the Pennsylvania Railroad, the defendant in this action? That is really the only question in the case. * * * That is a question of fact about which I can help you very little. It is a matter for the jury to determine entirely upon the evidence in the case, and you have heard all the testimony as to the relations of these roads. It is admitted that the Pennsylvania Railroad Company is a corporation by itself; and it is also admitted that the Philadelphia, Wilmington & Baltimore Railroad Company is another corporation, and that as such corporation it is the owner of the line of railway which has been described by the different witnesses who have testified either orally or by deposition before you,—the railroad between Philadelphia and Baltimore,—and that it also operates the railroad of the Baltimore & Potomac, which is a continuation of the same line to the city of Washington.

"The claim on the part of the plaintiff is, in this case, that, notwithstanding these are separate corporations, the Pennsylvania Railroad Company dominates and controls the whole system, and is really the carrier and manager of the traffic upon the Philadelphia, Wilmington & Baltimore Railroad, and the extension the Baltimore & Potomac Railroad, the same as it is of the other lines—the Northern Central, the Philadelphia & Erie, and other lines—connected with it. Now, the mere fact that the same persons may be stockholders in both corporations, or the fact that the Pennsylvania Railroad Company is a large stockholder in the Philadelphia, Wilmington & Baltimore Railroad Company, does not necessarily lead to the conclusion that it operates and manages the railroad of that company. It is a matter to be considered by the jury with the other evidence in the case. Perhaps, of itself, it had very little tendency in that direction. Another matter testified to by the witnesses goes further, and shows that the executive officers of these roads are the same; that is, the superintendent, the general manager, the treasurer, controller, and auditor. I do not know that there was any controller. Perhaps I am mistaken about that. But the jury will remember the different executive officers of these roads who have been testified about, more particularly by the depositions of parties who themselves are officers of this defendant railroad company. It appears that the same persons hold like offices in not only these two railroad companies, but also in the Northern Central and, I think, the Philadelphia & Erie. The jury, however, will remember in relation to that, and, if my memory happens to be at fault, it is a matter which the

jury should themselves determine from their own recollection of the testimony. The fact that certain executive officers of the Pennsylvania Railroad Company are also executive officers of these other railroad companies is a matter which the jury are entitled to consider, as to whether it shows, with the other testimony in the case, that the Pennsylvania Railroad Company really dominates and operates all of these lines of road. It is a matter that is proper to be taken into consideration in that regard. Now, the mere fact that the expenses and the receipts from these different roads are kept separate may have very little tendency one way or the other; for that is a thing that is very often done in different parts and divisions of a single railroad, which belongs without any question to the same corporation. It would be certainly very likely to be done, and it would be hardly good business if it should fail to be done, with reference to separate railroads which are controlled and run by the same corporation; for the reason it would be necessary and proper to ascertain the earnings and the expenses of any division or part of a company of that kind. The board of managers could not have any intelligence at all of the value or the prosperity, or the reverse, of their property, unless they kept accounts of this kind. So, as I said before, that fact would have very little to do with it. The fact that all these accounts are kept by the same set of officers, and that the returns of them are all made to the same officers on these different divisions, and the fact that these general officers, although they hold the same positions in the different companies, are not paid separate salaries by the different companies (if that is the effect of the evidence), but their single salaries are paid by the Pennsylvania Railroad Company, and then apportioned among the different corporations pro rata, seems to me is a matter for the jury to consider, although, if they were all run and owned by the same company, in order to ascertain the real, actual expenses and profits, these accounts would have to be kept, and a share of all the expenses, including the salaries of these officials, would have to be apportioned between the different roads, or different divisions, as the case might be, of the same system, if they were the same system.

"As I stated before, it appears that the officers of the Philadelphia, Wilmington & Baltimore Railroad Company and of the Pennsylvania Railroad Company are the same; that is, that most of the executive officers who have charge of the operation of the railroads, freight and passenger, the general manager, auditor, and treasurer of these roads, are the same officers, and the accounts are kept, to some extent at least, by the Pennsylvania Railroad Company, and the proper apportionments made to the other companies. It is for the jury to determine whether under this evidence they are satisfied that the Pennsylvania Railroad Company is really the company that operates the Philadelphia, Wilmington & Baltimore Railroad Company, under whatever arrangement they may have between them; that is, that it dominates and controls the operation of the latter road. If it does, then the carriage of passengers and freight, and the delivery of freight, would be the business of the Pennsylvania Railroad Company, and it would be (ultimately) responsible for any wrongs committed in the conduct of that business. If, however, the Philadelphia, Wilmington & Baltimore Railroad Company does this business itself, and the Pennsylvania Railroad Company has no part in the transaction of that business, then the Philadelphia, Wilmington & Baltimore Railroad Company would be the company responsible to the plaintiff, and the Pennsylvania Railroad Company would not be responsible, the same precisely as the plaintiff could not hold the Anchor Line or the Soo Road as responsible for the lack of care in that delivery at Frederick Road Station, because they have fulfilled their part of the contract, and have carried and delivered the goods to the next carrier; and if the Pennsylvania Railroad Company did the same thing, and carried the goods as far as it could over its lines, and delivered them to another carrier over whom it had no control, the Philadelphia, Wilmington & Baltimore Railroad Company, then the Pennsylvania Railroad Company could not be held responsible, and the plaintiff's cause of action would be against the Philadelphia, Wilmington & Baltimore Railroad Company. As I have already stated, this is the question for you to determine upon the evidence, and the only question there is in the case. It is not necessary that I should go over the evidence in detail, and refer to the testi-

mony of the different railroad officials who have testified here mainly by depositions, or refer to the advertisements or time tables or schedules, or refer to the waybills, which would seem to be made in Baltimore, upon which these goods were sent from Baltimore to Frederick Road Station, or to any of these matters. The jury have seen these exhibits, and the whole case has been argued very carefully by counsel. It seems to me I would not be warranted in occupying the time of the jury with them, nor in detailing what the testimony is in the case. If upon the whole evidence you are satisfied that this portion of the road is really a part of the route which was under the control and management of the Pennsylvania Railroad Company, either singly or in connection with the Philadelphia, Wilmington & Baltimore Road, if the two roads were jointly interested in the carriage of the goods over that road, then, in either of those cases, the defendant would be liable to the plaintiff for the amount of the claim, \$2,695, with interest from the 15th of September, 1898, at 7 per cent. If the evidence fails to satisfy you of that, fails to satisfy you that the Pennsylvania Railroad Company was in control and management of that part of the road from Baltimore to Frederick Road Station, and that that station was solely and alone under the charge of the Philadelphia, Wilmington & Baltimore Railroad Company, then your verdict should be for the defendant."

Due exception was taken to various paragraphs of the charge of the court and to the refusal of the court to give a peremptory instruction to the jury to return a verdict for the defendant. There was a verdict and judgment for the plaintiff, whereupon the defendant sued out this writ of error.

Albert E. Clarke (Arthur M. Keith, Robert G. Evans, Charles T. Thompson, and Edwin K. Fairchild, on the brief), for plaintiff in error.

Edward Savage (C. E. Purdy, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The goods were lost on the line of the last carrier, and the only material contested question of fact in the case was whether the defendant was the last carrier, or was liable as such. The plaintiff maintained that it was. The defendant maintained that it was not, but that the Philadelphia, Wilmington & Baltimore Railroad Company was the last carrier, and carried the goods from Baltimore to Frederick Road, where they were lost. Upon this disputed question of fact there was a large volume of testimony introduced by the plaintiff, some of which is adverted to in the charge of the lower court. It would serve no useful purpose to set out this testimony. It is sufficient to say that it tended strongly to show that the stock of the Philadelphia, Wilmington & Baltimore Railroad Company was owned in whole or in part, at least, by the defendant company, and that it was in fact operated and controlled by the defendant. In folders, in advertisements, and in various other ways the defendant represented to the public that the Philadelphia, Wilmington & Baltimore Railroad was a part of its "system," and in some instances a "division." One item of the mass of testimony in the case is the waybill made out by the defendant for the shipment of the goods from Baltimore to Frederick Road, which shows their shipment between these points over the defendant's road. The officers of the two companies were mainly the same persons. While

the Philadelphia, Wilmington & Baltimore Railroad Company is a separate legal entity, according to the testimony, it sustained towards the defendant company the relation of a dummy more nearly than that of an independent, self-governing railroad company. Upon the testimony the jury might well find that the corporate existence of the Philadelphia, Wilmington & Baltimore Railroad Company was maintained by and for the use of the defendant company, and that the defendant company held it out to the world as a part of its system, for whose acts it was responsible. We think the jury might rightly infer from the evidence that, if a recovery could be had against the Philadelphia, Wilmington & Baltimore Railroad Company on the plaintiff's claim, the result to the defendant in a financial sense would be precisely the same as if the recovery had been against it. It seems highly probable from the testimony that the losses and gains of the Philadelphia, Wilmington & Baltimore Company are in the end the losses and gains of the defendant company. As before stated, the officers of the two roads are very largely the same persons, and the dominion of the Pennsylvania Railroad Company, the plaintiff in error, over the Philadelphia, Wilmington & Baltimore Company, seems to have been complete and unquestioned. At least, there was evidence from which a jury might rightfully infer such was the case. The defendant company, of course, knew exactly the relation it sustained to the Philadelphia, Wilmington & Baltimore Company, and, if it was not such as the mass of testimony introduced by the plaintiff strongly tended to show it to be, it was open to it to produce convincing evidence of the fact, and show precisely what the relation was; and, not having done so, every inference warranted by the evidence may justly be indulged against it. Where the evidence tends to fix a liability on a party who has it in his power to offer evidence of all the facts as they existed, and rebut the inferences which the proof tends to establish, and he refuses to offer such proof, the natural inference is that the proof, if produced, instead of rebutting, would support, the inference against him. *Railway Co. v. Elliott*, 102 Fed. 96, 42 C. C. A. 188; *Railroad Co. v. Ellis*, 54 Fed. 481, 4 C. C. A. 454; *Blatch v. Archer*, Cowp. 63, 65; 1 Starkie, Ev. 54; *Com. v. Webster*, 5 Cush. 295, 316, 52 Am. Dec. 711; *People v. McWhorter*, 4 Barb. 438; *Wylde v. Railroad Co.*, 53 N. Y. 156, 164; *Kirby v. Talmadge*, 160 U. S. 379, 16 Sup. Ct. 349, 40 L. Ed. 463; *Pacific Coast S. S. Co. v. Bancroft Whitney Co.*, 36 C. C. A. 135, 94 Fed. 180, 198; *McDonough v. O'Niel*, 113 Mass. 92.

The court rightfully refused to give a peremptory instruction to the jury to return a verdict for the defendant, and its charge in chief was a correct statement of the law applicable to the testimony in the case. The law deals with things, not names; with the substance, not with the shadow; with realities, and not forms. Conceding that the Philadelphia, Wilmington & Baltimore Railroad Company is a legal entity and maintains a complete corporate organization, it by no means follows that that company alone is liable for the loss of the goods. Whether that company and the defendant company were partners, and as such jointly and severally liable for the loss of the goods, or whether that company's road is a part of the defend-

ant's "system," or one of its "divisions," and dominated and operated by the defendant for its own exclusive benefit, or for the joint benefit of both roads, were questions of fact fairly open for the consideration of the jury upon the evidence. In *Railroad Co. v. Howard*, 178 U. S. 153, 20 Sup. Ct. 880, 44 L. Ed. 1015, the contention of the defendant railway company was that it was not liable for an injury received by a passenger because, prior to the accident, the defendant's road had been leased to a Kentucky corporation, which was operating the road at the time of the accident; but the supreme court held that that fact would not bar a recovery, if, notwithstanding the existence of the lease, the defendant company, through its agents, directed and controlled the train to which the accident happened. The court said:

"The lease might exist, and the Virginia company might still manage the Kentucky company, or some particular through train over that road."

And it was further said that whether it did so or not was a question of fact for the jury, whose verdict ought not to be disturbed upon the evidence, which is set out in the opinion and is much less cogent in support of the verdict in that case than is the evidence in support of the verdict in the case at bar.

An exception was taken to the ruling of the court excluding certain evidence offered by the plaintiff in error; but, as the exception is not argued in the brief of counsel for the plaintiff in error, we infer it is not regarded as tenable, in which view we concur. Finding no error in the record, the judgment of the circuit court is affirmed.

CARUTHERS v. KANSAS MUT. LIFE INS. CO.

(Circuit Court, E. D. Arkansas, E. D. April 29, 1901.)

1. LIFE INSURANCE—AVOIDANCE OF POLICY—BREACH OF WARRANTY.

A negative answer by an applicant for life insurance to the question in the application whether he ever had "any serious illness, constitutional disease, or surgical operation," is not a false representation which will avoid the policy as a breach of warranty because he has had a slight illness, or because he once broke his leg, which was set and attended to by a physician.

2. SAME—MEDICAL ATTENDANCE.

The failure of an applicant for life insurance to fully and truthfully answer a question in the application, requiring him to give the name and address of each physician consulted by him or who prescribed for him during the preceding five years, where his answers are made warranties, constitutes a breach of warranty which avoids the policy.

3. SAME—ESTOPPEL—KNOWLEDGE OF MEDICAL EXAMINER.

Where a medical examiner for a life insurance company has nothing to do with the acceptance of risks or the issuance of policies, and his only duty in connection with the questions in a medical report to be answered by the applicant is to correctly write down the answers as made, his knowledge in regard to facts covered by such answers cannot be imputed to the company, and will not estop the company from showing the falsity of such answers, unless it appears that they were not written as given by the applicant.

Action at Law on a Policy of Life Insurance.

The plaintiff instituted this action to recover on a policy of insurance issued by the defendant on the life of her son. By stipulation in writing, trial by jury was waived, and the cause submitted to the court. The court makes the following findings of facts:

On the 27th day of June, 1900, Robert H. Caruthers made an application for insurance at Helena, Ark., to the defendant, a life insurance company organized under the laws of the state of Kansas, and having its domicile in the state of Kansas. The application was made in writing by the assured, Robert Hager Caruthers. Accompanying the application, and a part thereof, was the medical examiner's report, made by Dr. C. R. Shinault, the medical examiner of the defendant at Helena, Ark. In the medical examiner's report a large number of questions were asked of the assured, and by him answered, and reduced to writing on the application by the medical examiner; and the last paragraph on that application is as follows, to wit:

"I hereby warrant and agree on behalf of myself and of any and all persons who shall have or claim any interest in any policy issued hereunder each of the above and foregoing answers to be full, complete, and true, and that each and all of said answers are correctly recorded; that I am the same person described above; and that I am temperate in my habits, and am now in good health.

"Dated this 27th day of June, 1900.

"[Signed]

Robert Hager Caruthers.

"Signature of the applicant (to be written in the presence of the medical examiner)."

The signature to the application proper was made by the assured, but that to the medical examiner's report was signed by the medical examiner, Dr. Shinault, at the request of the assured, who, although able to read and write, was illiterate, and requested the medical examiner to sign it for him. That this application for insurance, together with the said medical examiner's report, which is a part thereof, was forwarded by defendant's agents to the home office of the defendant at Topeka, Kan., and thereon the defendant issued the policy of insurance sued on in this case, dated June 30, 1900. The policy was thereupon sent by the defendant to its agents at Helena, and by them delivered to the assured; and the consideration was paid by the assured by executing two notes of \$42 each, but neither of which notes have been paid, not having matured at the time of the death of the assured; and upon the trial the notes were offered by the defendant company to be returned and filed in court.

The policy of insurance issued by defendant is in part as follows: "The Kansas Mutual Life Insurance Company, in consideration of the written and printed application for this policy, which is hereby made a part of this contract, and of the sum of eighty-four dollars to be paid in advance, hereby insures the life of Robert H. Caruthers * * * for the sum of \$2,500.00, to be paid to Mirenda H. Caruthers, his mother," etc. Attached to the policy is a true and exact copy of the application for insurance, made by the assured, together with the medical examiner's report, and questions and answers of the assured. Among the questions asked by the medical examiner and the answers made thereto by the assured were the following:

"(4) Have you ever had any serious illness, constitutional disease, injury, or undergone any surgical operation? Answer. No."

The seventeenth question is as follows: "Have you now, or have you ever had, any of the following diseases? Answer 'Yes' or 'No' opposite each." There were then submitted thirty-three questions referring to particular diseases, but there is no question asking about malarial fever or hematuria. The thirty-third specification is, "Typhoid or other fever," which was answered by the assured, "Yes."

The eighteenth question is: "When last attended by a physician, and for what disease or injury? Answer. Malarial fever in the fall of 1899."

"(20) Give name and address of each physician consulted, or who has prescribed for you, during the past five years, if any, and dates and cause of the same, in the clinical form No. 22 below.

"(21) Have you ever had any ailment or injury whatever not already mentioned? Answer. No.

"If any of the foregoing questions are answered 'Yes,' or if you had any other disease or injury, explain fully in the clinical form No. 22 below.

Question 22.	Disease or Injury.	Date.	Duration.	Was Recovery Complete.	Name and Address of Medical Attendant.
Answers.	Malarial fever.	1899.	One week.	Yes.	Dr. C. R. Shinault, Helena, Ark.

"Nothing else for ten years."

On September 27, 1895, the assured suffered a fracture of the tibia fibula of one lower limb while residing in Obion county, Tenn., for which he was attended by Drs. Frank Roberts and W. W. Holloway, regular practicing physicians, by whom the fracture was reduced, and the limb placed in splints and bandages; but no surgical operation performed by them. That Dr. Roberts continued his visits and attendance upon said Caruthers for a week, and the assured was confined to the house about six weeks. That at that time the assured had chills and fever for two days, which grew out of his confinement to his bed, caused by the fracture of his leg. That about three or four weeks after the fracture Dr. Roberts prescribed for the assured for malarial chills and fever. In September, 1899, the assured was attended by Drs. W. C. Russwurm and B. M. Ward, of Helena, Ark., who were regular practicing physicians, for malarial hematuria, and Dr. Russwurm continued his visits and attendance upon the assured, on account of said disease, from the 22d day of September, 1899, until the 30th day of September, 1899, making 10 visits to him. This attack of hematuria of the assured was a severe one. The disease of hematuria is one of the most malignant forms of malaria, characterized by bloody urine, and one of the most fatal of the malarial family. The after-effects of hematuria are that it makes such inroads upon the system of man that, after he has had one attack, he is never the same physically, and it has a tendency to lessen his longevity. At the time of the attendance upon the assured by Drs. Russwurm and Ward, in September, 1899, Dr. C. R. Shinault was associated in the practice of medicine in the city of Helena, Ark., with the said Dr. Ward, but at that time Dr. Shinault was temporarily absent from the city of Helena on a trip to California. Dr. Shinault had been the family physician of the assured for four years prior to his death, and at the time he wrote down the answers of the assured in his application he knew that he had been treated by Drs. Russwurm and Ward in September, 1899, for malarial hematuria. This information was obtained by Dr. Shinault before he was appointed as medical examiner for the defendant company. The answers were put down by Dr. Shinault as directed by the assured. The assured did not direct the said Shinault to state the fact that he had been treated in September, 1899, by Drs. Russwurm and Ward; and the said Shinault failed to state that fact in the medical examination, although he knew at the time of that fact. Nor did the assured inform Dr. Shinault, or request him to put down in his answers to the questions propounded in the examination, that he had suffered from a fractured leg in 1895, in Tennessee, and that he was then treated by Drs. Roberts and Holloway for this fracture, and also for chills and fever. Nor did Dr. Shinault know of that fact at that time. On the 3d day of September, 1900, the assured died, his death being the result of an attack of malarial hematuria, and in his final illness he was treated by Drs. Shinault and Russwurm. That on October 6, 1900, formal proofs of the death of the said Caruthers were mailed to the defendant, and by it received at its home office on the 8th day of October, 1900. That no complaint or objection was urged by the defendant company to the sufficiency or form of said proofs. That thereafter the defendant learned of the defenses made in this cause, and, as soon as it had ascertained the facts, it denied liability under the policy sued on.

John J. & E. C. Hornor and Jacob Fink, for plaintiff.

M. L. Stephenson and R. T. Herrick, for defendant.

TRIEBER, District Judge. The defendant denies liability in this action upon the grounds that the assured, in his application, warrant-

ed and agreed that all the answers made by him in reply to the medical examiner of the defendant, and signed by the assured, were full, complete, and true, and that each and all of said answers were correctly recorded, and that the answers to some of the questions, fully set out in the answer, and which will be as fully stated in this opinion as it is necessary for the determination of this cause, were false. One of the grounds upon which it is claimed by the defendant that the policy was avoided is that the assured falsely answered question 4 that he had never had any serious illness, constitutional disease, or undergone any surgical operation. The court found the facts on that issue to be that "on September 27, 1895, the assured suffered a fracture of the tibia fibula of one lower limb, for which he was attended by Drs. Roberts and Holloway, regular practicing physicians, by whom the fracture was reduced, and the limb placed in splints and bandages, but no surgical operation was performed by them; that Dr. Roberts continued his visits and attendance upon the said assured for a week, and the assured was confined to the house about six weeks; that at that time the assured had chills and fever for two days, which grew out of his confinement to his bed, caused by the fracture of his leg, for which chills and fever Dr. Roberts also prescribed for him." Question 4 was limited to "serious illness, constitutional disease, or a surgical operation." But the court finds from the evidence that that illness of the assured was neither serious nor was it a constitutional disease, nor was the treatment of the fractured leg a surgical operation. The word "serious" in this question means "a grave, important, and weighty trouble." *Brown v. Insurance Co.*, 65 Mich. 306, 32 N. W. 610; *Goucher v. Association (C. C.)* 20 Fed. 596. In the Century Dictionary the words "serious illness" are defined as "attended with danger; giving rise to apprehension." As the company saw proper to use the word "serious" in this question, it is unnecessary to determine whether a failure on the part of the assured to mention, in reply to this interrogatory whether he had ever been ill, every slight ailment, would avoid the policy.

It is next claimed that the policy was vitiated by reason of the fact that the answers of the assured to the twentieth question in the medical examination were false, and avoided the policy. The question and answers are as follows: "Question. Give name and address of each physician consulted or who has prescribed for you during the last five years, if any," etc. "Answer. Dr. C. R. Shinault, Helena, Arkansas." The falsity of this answer is alleged to consist in the fact that in September, 1895, which was within five years, the assured had been prescribed for by Drs. Frank Roberts and W. H. Holloway for a fractured leg and chills and fever, and in September, 1899, he had been attended and prescribed for by Drs. W. C. Russwurm and B. M. Ward for a malignant form of malarial fever, or nematuria. That he was attended by these physicians at these times is admitted, and was so found by the court. But it is alleged in behalf of the plaintiff that the omission to mention the fact of his having been attended by Drs. Roberts and Holloway in 1895 was immaterial, as they only attended him to set a fractured leg, and for a slight case of chills and fever, caused thereby, which was not an ill-

ness, within the meaning of the application or policy; and as to the omission to mention Drs. Russwurm and Ward, it is insisted that Dr. Shinault, the medical examiner of the defendant who examined the assured, knew at the time he wrote down the answer that these physicians had prescribed for the assured for hematuria in 1899, and that his knowledge was the knowledge of the company, which is thereby estopped to claim a forfeiture of the policy. As regards Drs. Roberts and Holloway, counsel overlook the fact that question 20 is not, like question 4, limited to serious illness, but calls for the name and address of each physician consulted or who has prescribed for the assured within five years. The identical question has been before the courts in many instances, and the great weight of authority is against plaintiff's contention. In *Cobb v. Association*, 153 Mass. 176, 26 N. E. 230, 10 L. R. A. 666, in which the same question was before the court, it was held:

"While the question whether the assured had a fixed disease, and what the disease was, might be an inquiry involved in considerable embarrassment, the question whether he had consulted a physician, or had been professionally treated by one, was simply one about which there could be no misunderstanding. Had it been replied to in the affirmative, the answer would have led to other inquiries. Indeed, the question which follows, which remains unanswered, is, 'If so, give dates, and for what disease.' It is upon the existence of this latter question that the plaintiff founds an argument that it was necessary to show that the insured had some distinct disease permanently affecting his general health, before it could be said that he had answered this question untruthfully. But the scope of the question cannot be thus narrowed. Even if the insured had only visited a physician from time to time for temporary disturbances proceeding from accidental causes, the defendant had a right to know this, in order that it might make such further investigation as it deemed necessary. By answering the question in the negative, the applicant induced the defendant to refrain from doing this."

In *Insurance Co. v. McTague*, 49 N. J. Law, 587, 9 Atl. 766, it was held:

"That representation [that he had not consulted a physician, or been prescribed for by one] did not aver a condition of health, or that it was requisite or proper to consult a physician. It averred that he had not consulted a physician, or been prescribed for by a physician."

In *Society v. Reutlinger*, 58 Ark. 528, 25 S. W. 835, the court held:

"The obvious purpose of it [this question] was to ascertain the name of a person from whom information affecting the risk of insuring the life of Reutlinger could be derived. * * * It did not aver a condition of health, or that it was requisite or proper to request the attendance of a physician. It averred that he had never called a physician to attend him in sickness. He warranted this statement to be true, and the evidence adduced at the trial of this cause tended to prove that it was untrue,—a breach of warranty."

The court below in that case had charged the jury as it is now claimed on behalf of the plaintiff this court should declare the law to be, to wit:

"The jury are instructed that the question, 'When, and by what physician, were you last attended, and for what complaint?' as used in the application, had reference to a serious sickness or disease, such as affected seriously his constitution or health; and if the jury believe, from the evidence, that the deceased had not been, prior to the application, attended by a physician for such a serious illness, but had been treated for some temporary ailment, the jury should find for the plaintiff."

This charge to the jury was held by the supreme court to be reversible error. To the same effect, see *Brady v. Association*, 9 C. C. A. 252, 60 Fed. 727; *Sladden v. Insurance Co.*, 29 C. C. A. 596, 86 Fed. 102; *Hubbard v. Association*, 40 C. C. A. 665, 100 Fed. 719. The importance to the company of being advised of the names and addresses of all the physicians who attended the applicant for insurance within a limited time, and thus enable it to obtain by inquiry such information as it may deem of importance to the determination of whether the risk should be accepted, is fully demonstrated by the facts in this case. Dr. Shinault, who was the only physician named in the application as having attended the assured within five years, but who did not attend him during his illness in 1899, testified that that attack of hematuria did not in any way affect the general health of the assured; while, on the other hand, Dr. Russwurm, who was the physician who had attended the assured during that illness, but whose name was not mentioned in the application, testified that: "I don't think a man is ever the same after having a severe attack [of hematuria]. It makes an inroad upon the system, so a man is not the same he was before he had any attack." He also testified that "the attack from which the assured suffered was a very severe attack of hematuria." It is very earnestly contended by learned counsel for the plaintiff that the failure of the assured to mention the fact that in September, 1899, he was treated by Drs. Russwurm and Ward is no ground for a forfeiture of the policy, as Dr. Shinault, the defendant's medical examiner, knew that fact at the time the application was made; that his knowledge was the knowledge of the company, and for this reason the company is now estopped to insist upon a forfeiture. Numerous cases have been cited by learned counsel in which the knowledge of the agent is imputed to the company, but in those cases the agent was authorized to issue the policy, while in the case at bar the medical examiner was only authorized to reduce the applicant's answers to writing, and the company issued the policy at its home office, in reliance upon the written warranty of the assured that the answers were full, true, and complete, and correctly recorded. In such case the knowledge of the agent of the company at the time the application was made cannot affect the company, especially when a copy of the application, with the answers, is attached to the policy when delivered to the assured.

A case in which the facts were almost identical with those found in this case is *Foot v. Insurance Co.*, 61 N. Y. 571. It was there held:

"Hence, if we should treat Buhler, on whose medical examination the policy was issued, as the agent of the defendant, the fact that he at the time had knowledge of Major Foot's prior condition, obtained before, while not acting for the defendant, could make no difference with defendant's liability." *Id.* 576.

Nor does the rule laid down by the circuit court of appeals for this circuit in *Insurance Co. v. Robison*, 7 C. C. A. 444, 58 Fed. 723, 22 L. R. A. 325, and other cases like it, cited by plaintiff's counsel, apply to this case; for in those cases the assured gave correct answers, but the medical examiner wrote them down falsely. Judge

Caldwell, in delivering the opinion of the court in the Robison Case, *supra*, said:

"It is conceded that a breach of warranty of the truth of the applicant's answers avoids the policy without reference to the good faith of the applicant, or the materiality of the answer; but it is a grave mistake to suppose that this rule can be extended so as to hold the applicant responsible for the truth of an answer which was the result of a mistake, or an error, or blunder of the company's agent, who was specially charged by the company with the preparation of the application, and who himself dictated the answers upon a full and true statement of the facts by the applicant." 7 C. C. A. 467, 58 Fed. 729, 22 L. R. A. 330.

In the case at bar the only testimony introduced on this point was that of the medical examiner, a witness for the plaintiff, who testified as follows:

"Q. Did he (the assured) direct you to put it down (that Drs. Russwurm and Ward had attended and prescribed for him for hematuria in 1899)? A. No, sir; he didn't direct me to put it down. Q. That within five years previous to the time you made this examination he had been attended during an illness by another physician than you? Did he tell you he had been attended by Dr. Ward or Dr. Russwurm, or tell you to put that down? A. Well, I don't remember about that. Q. You have failed to mark any other name except your own. Is that correct, as he directed you to put it down? A. Well, I suppose it is. Q. Was anything stated there about Doctors Russwurm and Ward attending him in the fall of 1899? A. At the time I made this examination? Q. At the time you all made this examination. A. Well, Mr. Hornor (meaning counsel for the plaintiff), I don't remember whether anything of the kind transpired."

There is thus no evidence whatever to show that the assured made correct answers and the medical examiner failed to write them down correctly. It is claimed by the plaintiff that the false answers in an application for life insurance, which, by the terms of the application and policy, were made warranties, and a copy of them attached to the policy when delivered, will not avoid the policy if the medical examiner of the company at the time had knowledge of the true facts; but neither the diligence of the learned counsel nor a careful search made by the court, has found any authority to sustain this contention. To sustain plaintiff's contention, the court must hold the law to be that the knowledge of the medical examiner, acquired by him even before his appointment as such medical examiner, is the knowledge of the company, and relieves the applicant for insurance of the necessity of answering truthfully the questions propounded to him, and by him warranted to be true. The doctrine of estoppel, as laid down by the authorities in actions of this kind, is that, if the assured has truthfully answered the questions propounded to him, and the agent of the company, authorized to ask the questions and write the answers down, putting his own construction upon such facts, deduces therefrom an erroneous answer, which he writes down, or writes a different answer down, the assured is not estopped by his warranty from showing that he gave true answers; and, if he establishes that fact, the company is estopped from questioning the truth of the answers as written down. No such evidence has been introduced in this case. The evidence, on the contrary, is that the answers as written down by the medical examiner were as the assured gave them. All that is claimed is

that the examiner knew at the time that they were false, so far as Drs. Russwurm and Ward were concerned. This of itself will not create an estoppel in a case where the application has to be forwarded to the home office in another state, and the medical examiner has neither the power to pass upon the question whether the risk be accepted, nor anything to do with the delivery of the policy if issued. *Kenyon v. Association*, 122 N. Y. 248, 25 N. E. 299. It is impossible to distinguish this case from the case of *Insurance Co. v. Fletcher*, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934. In the case at bar, as in that case, the policy sued on, when delivered to the insured, contained a true copy of his application, including his answers as written down by the medical examiner. In the language of Mr. Justice Field:

"Assuming that the answers of the assured were falsified, as alleged, the fact would be at once disclosed by the copy of the application annexed to the policy, to which his attention was called. He would have discovered by inspection that a fraud had been perpetrated, not only upon himself, but upon the company; and it would have been his duty to make the fact known to the company. He could not hold the policy without approving the action of the agents, and thus becoming a participant in the fraud committed. The retention of the policy was an approval of the application and of its statements. The consequences of that approval cannot after his death be avoided." *Id.*, 117 U. S. 534, 6 Sup. Ct. 844, 29 L. Ed. 939.

See, also, *Maier v. Association*, 24 C. C. A. 239, 78 Fed. 571, decided by Mr. Justice Harlan; *Insurance Co. v. Smith*, 34 C. C. A. 506, 92 Fed. 503.

Upon the findings of facts the court's conclusion of law is that, for the reasons stated in the opinion, the defendant is entitled to a judgment.

McCARLEY v. McGHEE et al.

(Circuit Court, N. D. Alabama, N. D. April 10, 1901.)

1. RECEIVERS—VALIDITY OF JUDGMENT AGAINST—PRIOR DISCHARGE.

A judgment in an action against the receivers of a railroad is valid, where at the time of its rendition they had not been discharged in the suit in which they were originally appointed, although the receivership was subsequently extended to another suit against the company, and in such suit they had been discharged prior to the judgment.

2. APPEAL—SUPERSEDEAS—SERVICE OF WRIT OF ERROR.

The provision of Rev. St. § 1007, that, "in any case where a writ of error may be a supersedeas, the defendant may obtain such supersedeas by serving the writ of error by lodging a copy thereof for the adverse party in the clerk's office where the record remains," etc., is permissive, only, as to the manner of serving the writ, and not mandatory, as was the corresponding provision in the judiciary act of 1789, and does not preclude service in any other manner. Under such section the filing of the original writ with the clerk is equivalent to lodging a copy with him, and constitutes a service of the writ for the purpose of a supersedeas.

On Motion to Vacate Judgment.

Milton Humes and John H. Sheffey, for the motion.
Henry K. White and S. S. Pleasants, opposed.

TOULMIN, District Judge. This is a motion by the sureties on the writ of error bond in the above-entitled cause to set aside and vacate the judgment rendered against them at a former term of this court. This motion was made at that term, and was duly continued by the court. The motion is based on the contention (1) that the original judgment from which the writ of error was taken was null and void; (2) that the bond known as the "Writ of Error Bond" did not operate as a supersedeas. It is contended by the movants that the judgment against said receivers was null and void, because rendered against them after they had been discharged, and that no copy of the writ of error was lodged with the clerk of the court, and for that reason the writ of error did not operate as a supersedeas.

It appears from the record evidence that McGhee and Fink were appointed receivers in the equity cause of Thomas against the Memphis & Charleston Railroad Company, and subsequently in the cause of Farmers' Loan & Trust Company against the same, and that they were sued as receivers in Thomas against the Memphis & Charleston Railroad Company. It further appears from the record that said receivers had not been discharged as such in the Thomas case at the time the judgment of McCarley, administrator, against them was rendered by the circuit court, but that they had been discharged from further administration of the property in their hands at the time said judgment was affirmed by the circuit court of appeals.

At the time this motion was argued, my opinion was that the judgment complained of was valid, and I have since seen no reason to change my opinion.

The second proposition contended for by the movants was not so clear, and the question was taken under consideration, and has been given such examination as my time would allow. The judiciary act of 1789 provided that a writ of error "shall be a supersedeas and stay execution in cases only where the writ is served, by a copy thereof being lodged for the adverse party in the clerk's office where the record remains, within ten days after rendering the judgment complained of." Several decisions have been rendered by the supreme court under this act wherein it was held that "the effect of the writ as a supersedeas depended upon compliance with the conditions imposed by the act," and that under the act the lodging of a copy of the writ for the adverse party in the clerk's office was indispensable. These decisions have been cited by the movants in support of their contention. At common law a writ of error was a supersedeas by implication (20 Enc. Pl. & Prac. 1212); but, since the act referred to, a service of the writ is essential to its operation as a supersedeas. The act of 1789 provided that it shall be a supersedeas in cases only where the writ is served by a copy thereof being lodged for the adverse party in the clerk's office. By act of 1872 (17 St. 198, § 11) it was provided that any party desiring to have any judgment reviewed on writ of error, and to stay proceedings thereon during the pendency of such writ of error, may give the security required by law therefor within 60 days after the rendition of the judgment. In *Telegraph Co. v. Eyser*, 19 Wall. 419, 22 L.

Ed. 43, the supreme court held, in reference to this statute, that, where an appeal was taken and the requisite security given within 60 days, a supersedeas followed as a matter of right. In the opinion the court said:

"It is expressly declared that the supersedeas bond may be executed within sixty days after the rendition of the judgment. It is not said when the writ shall be served. The giving of the bond alone is made the condition of the stay. The section is silent as to the writ. The execution, approval, and filing of the bond is substantial. The filing of the writ is matter of form."

In this condition of the law the Revised Statutes were adopted, section 1007 of which provides that:

"In any case where a writ of error may be a supersedeas, the defendant may obtain such supersedeas by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains, within sixty days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of the citation. But if he desires to stay process on the judgment, he may, having served his writ of error as aforesaid, give the security required by law within sixty days after the rendition of such judgment, or afterward with the permission of a justice or judge of the appellate court. And in such cases where a writ of error may be a supersedeas, execution shall not issue until the expiration of the said term of sixty [ten days] days."

The supreme court, in *Kitchen v. Randolph*, 93 U. S. 86, 23 L. Ed. 810, said:

"The revised section is not silent as to the writ, and it is said when it must be served. If the supersedeas is asked for when the writ is obtained, the writ must be sued out and served within sixty days, and the requisite bond executed when the citation is signed. The policy of the old law is thus restored, the only modification being in the extension of time allowed for action. Sixty days are given instead of ten."

The old law, in terms, was not restored, but the policy of the old law was restored. That policy was that the defendant in error must have notice of the writ having been sued out. The policy of the old law requiring service of the writ is restored. Formerly service was to be effected within 10 days. This is modified, and 60 days are now given. It will be observed that section 1007 of the Revised Statutes does not provide that a supersedeas shall be obtained in cases only where the writ of error is served by a copy thereof being lodged for the adverse party in the clerk's office, as was provided by the act of 1789, but the language of the revised section is, "The defendant may obtain such supersedeas by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office." He may serve the writ in that way. It is permissible for him to do so. But it is not provided in terms, and I think clearly not intended to mean, that the supersedeas may be obtained only where the writ of error is served by a copy thereof being lodged in the clerk's office. If such was the intention of the lawmakers, why so materially change the language used in the act of 1789 to that found in section 1007, Rev. St.? The court in *Kitchen v. Randolph*, *supra*, say that, "under the law as it now stands, the service of a writ of error is an indispensable prerequisite to a supersedeas,"—not that the service of the writ in a particular manner is an indispensable prerequisite. The service of the writ of error is

substantial. The filing of it in the clerk's office is matter of form. We know, as a matter of observation and practice, that the service is sometimes effected by personally serving the writ on the adverse party, as is ordinarily the case in the service of any process, and that it is sometimes effected by acceptance or acknowledgment of service by the counsel for the defendant in error. *United States Nat. Bank v. First Nat. Bank*, 24 C. C. A. 603, 79 Fed. 296. It does not appear whether the writ of error in this case was personally served, or that acceptance of service was had, but it does appear from the record that it was filed with the clerk of the court. I know of no statute and of no rule of court that requires the writ of error to be lodged with the clerk. We find it filed with the clerk in this case, and we may well presume that it was so filed for the purpose of effecting service on the defendant in error. It does not appear whether it was a copy of the writ of error or not. It, however, served the purpose of a copy. There is no special virtue in a copy of the writ. If the writ may be served by lodging a copy thereof with the clerk, then surely it may be served by lodging the original writ itself. The service is the substantial act required to be done. The manner or mode of service is a matter of form. The motion to vacate the judgment against the sureties is overruled.

PENNSYLVANIA FIRE INS. CO. v. HUGHES.

(Circuit Court of Appeals, Fifth Circuit. April 23, 1901.)

No. 985.

1. **INSURANCE—AVOIDANCE OF POLICY FOR BREACH OF CONDITIONS—OWNERSHIP OF PROPERTY.**

It is the settled law of Alabama that a vendee of land in actual possession, exercising acts of ownership under a valid executory contract of purchase, and holding the bond of the vendor to make title upon full payment of the purchase money, a portion of which remains unpaid, is the unconditional and sole owner in fee simple of said land, within the meaning of a policy of insurance which is conditioned that "the entire policy shall be void if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple." *Held*, that the same rule as to title applies with equal or greater reason to personal property which passes by delivery, unless the parties have expressly stipulated otherwise.

2. **SAME—CONSTRUCTION OF POLICY—CONDITIONS.**

The conditions of forfeiture in an insurance policy must be construed strictly against the insurer and in favor of the insured, and a vendor's lien on personal property cannot be construed as a chattel mortgage to avoid a policy under a condition making it void "if the subject of insurance be personal property and * * * incumbered by a chattel mortgage."

3. **SAME—ESTOPPEL—GROUNDS OF DENYING LIABILITY.**

A nonwaiver agreement signed by a policy holder after a loss, the purpose of which is to enable the agent of the company to negotiate with regard to the facts of the loss, value of property, etc., without any waiver by the company of its right to contest its liability, is not to be extended by construction beyond its terms, and does not prevent the company from being bound by its statement, made after it had fully investigated the facts, of the grounds on which it denied liability, and which it also set

up as its original defense in an action on the policy; and it is estopped to plead additional defenses on the eve of trial.

In Error to the Circuit Court of the United States for the Northern District of Alabama.

On January 12, 1898, J. B. Hughes, the defendant in error, purchased a foundry property, consisting of an acre of land, more or less, described by metes and bounds; "also all the fixtures, tools, and implements on said property used in connection with the foundry situate on said property, and now in the possession of said J. B. Hughes." The consideration for this purchase was one promissory note for \$1,500 executed by Hughes to the vendor on the day of the purchase, payable, with interest, at the office of the Jasper Land Company (the vendor), in Jasper, Ala., and to become due on January 1, 1903, and bearing interest at the rate of 6 per cent., payable annually on the 1st day of January. The vendor executed and delivered to the purchaser a title bond by which it bound itself to the purchaser in the sum of \$1,500, conditioned that "if, upon the payment of the note promptly at maturity, with interest, as herein stipulated, the said Jasper Land Company causes to be made or makes to the said J. B. Hughes, heirs and assigns, a good and sufficient title to the aforesaid real estate and personal property, then this obligation to be void; otherwise, to remain in full force and effect." On April 28, 1899, Hughes insured this property with the plaintiff in error. The policy provides: "This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance, or the subject thereof, or if the interest of the insured in the property be not truly stated herein, * * * or if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple, or if the subject of insurance be personal property, and be or become incumbered by a chattel mortgage." In the application for this insurance, under the item "Title," the applicant is asked, "Is your ownership of property to be insured absolute, unqualified, and undivided?" to which he answered, "Yes;" and under the item "Incumbrance" he was asked, "Is there any lien or mortgage on the property? If so, for what amount?" which he answered, "No." On May 25, 1899, the property insured under policy 22 in the Pennsylvania Fire Insurance Company on the 28th day of April, 1899, was totally destroyed by fire, with the exception of the frame office building. The insured gave notice to the company that the loss had been sustained, and Mr. George G. Adams, an adjuster, went to see the insured about the fire. They went to the scene of the fire, and the adjuster examined and noted the condition of things. He then told the insured that he wanted to see his deed to the property and to know what he gave for it, and asked him to get it and bring it over to the hotel, which the insured did. The adjuster testified: "It was there that I discovered that he held a bond for title. He showed it to me, and I had his application for insurance, and called his attention to the answer that he had made to the question, 'Is your ownership of the property to be insured undivided, unqualified, and in fee simple?' and to his answer to it, 'Yes,' and to the question, 'Has any other person a claim on the property to be insured?' and whether there was any incumbrance or lien or mortgage on the property, and to his answer, 'No.' And I called his attention to the bond for title, and told him that, in my opinion, there was a lien upon the property; and I told him that the bond for title did not give him a fee-simple title, and that I could not talk any more to him. * * * I called his attention to all that part of the policy beginning with the words, 'This entire policy shall be void,' and ending down to the word 'thereof.' I also called his attention to these words in the policy: 'or if the interest of the insured shall be other than sole or unconditional ownership.'" The adjuster, Adams, made a second trip to Jasper, under instruction to go there and ascertain from the local agent, Mr. Bush, whether the fact of the bond for title was known to him (the local agent) when he issued the policy. On this second trip he met Mr. Hughes on the business of this loss, and told him that he (Adams) could not talk with him (Hughes) unless he signed a nonwaiver agreement, which he agreed to do after Adams showed it to him and explained what the intention of it was.

Adams swears: "He signed it, and then I discussed with him the value of the property, but could not agree with him and left. I asked him if he had made a proof of loss, and called his attention to the fact that the agreement did not waive proof of loss, and that he had only sixty days in which to make it, and that ended our conversation." The nonwaiver agreement is not dated, but the local agent, Bush, testified that it was signed on June 7, 1899. It provides that any action, request made, or information received by the insurance company in or while investigating and ascertaining the cause of fire, the amount of loss or damage, or other matter relative to the claim of the insured for property alleged to have been lost or damaged by fire on the 25th of May, 11 p. m., 1899, shall not in any respect or particular change, determine, waive, invalidate, or forfeit any of the terms, conditions, or requirements of the policy of insurance, or any of the rights whatever of any party thereto, and concludes with the following paragraph: "The intent of this agreement is to save and preserve all the rights of all the parties, and permit an investigation of the claim and the determination of the amount of the loss or damage, in order that the party of the first part may not be unnecessarily delayed in his business, and that the amount of his claim may be ascertained and determined without regard to the liability of the party of the second part, and without prejudice to any rights or defenses which the said party of the second part may have."

On July 24, 1899, the insurance company addressed to the insured the following letter: "Dear Sir: We are in receipt of an envelope inclosing paper dated July 8th, 1899, and sworn to by you before Jas. W. Shepherd, judge of probate, which, we take it, is intended as proofs of loss under policy #22 of the Pennsylvania Fire Insurance Company. Without in any manner admitting liability, and expressly reserving all rights under said policy, we are compelled to return you this paper as being entirely insufficient if intended as proof of loss under your policy. We call your attention generally to the requirements contained in lines 70 to 80, inclusive, of your policy, and particularly to the provisions of lines 72 and 73, requiring that the interest of the assured and of all others in the property shall be set forth, and all incumbrances thereon, and would request that, in complying with the conditions of the policy in regard to the proofs of loss, you particularly set forth fully exactly the state of the title to said property, both at the time of the issuance of the policy and at the time of loss, and also the same as to incumbrances. Upon receipt of your proofs containing this information, this company will then be able to determine its proper course." On July 31, 1899, it addressed to him the following letter: "Dear Sir: Your favor of July 27th, inclosing papers heretofore sent us as proofs of loss, and also paper purporting to be supplemental proofs, have been received and noted. I notice by the paper entitled 'Supplemental Proofs' that the property insured is not owned by you, but all you have is a bond for title interest, the legal title being in the Jasper Land Company. I call your attention to lines 16, 17, and 18 of your policy, which provide that the policy should be void, unless otherwise provided by written agreement indorsed thereon or added thereto, 'if the interest of the assured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the assured in fee simple, or if the subject of insurance be personal property, and be or become incumbered by a chattel mortgage.' Your interest in the property is not unconditional and sole ownership, but merely an equitable interest under a conditional bond for title; the building is on ground not owned by you in fee simple; and, as to the personality, it is unquestionably incumbered. The company must therefore decline to pay said loss, and deny liability, on the ground of the violation of the above clauses of its contract, as shown by your supplemental proofs of loss. I have written this letter immediately upon receiving your proofs. It is proper that I should also call your attention to the fact, while in no way retracting said denial of liability, that the proofs offered are still not in compliance with the conditions of the policy. It fails to give a copy of all descriptions and schedules in all policies. It fails to state by whom and for what purpose the building described and the several parts thereof were occupied at the time of the fire. It fails to furnish any magistrate's or notary public's certificate. It fails to state anything as to the origin of the fire.

These latter criticisms are, however, made simply in reply to your request that we should advise you if the proofs should not conform to the policy requirements, and with no intention of in any way modifying the denial of liability herein made." And on August 21, 1899, it addressed to him the following: "Dear Sir: We are in receipt of your registered letter of August 12th, containing papers purporting to be proofs of loss under policy #22 of the Pennsylvania Fire Insurance Company. The additional information contained in these papers serves to convince us more strongly that you have no legal claim against the Pennsylvania Fire Insurance Company under its policy #22, issued by its agent at Jasper, Ala. In these papers you admit that your only claim to ownership to the property destroyed is based on bond for title, for which you paid no cash, but only gave a note on the 12th of January to the Jasper Land Company for the sum of only \$1,500, not payable until the first of January, 1903. The papers you submit under date of August 12th claim the value of the property to be \$5,670.25, while in the same papers you state that you gave a four-years note for only \$1,500 for the entire property. According to your own admission, you had no title to the property; and the policy under which you make claim distinctly sets forth that 'if the interest of the assured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the assured in fee simple, or if the subject of insurance be personal property, and be or become incumbered by a chattel mortgage,' then the policy shall be void. Under the circumstances above mentioned, we are constrained to repeat our denial of liability."

On August 29, 1899, this action was brought on the policy. The defendant filed six pleas, the first three of which amounted to the general issue. The fourth plea sets up a forfeiture of the policy on the ground that the plaintiff was not the unconditional and sole owner of the property insured. The fifth plea was to the effect that a part of the property insured was personal property which was incumbered by a chattel mortgage at the time the policy was issued. These pleas were filed on the 23d day of November, 1899. On January 6, 1900, six days before the trial, the defendant filed another special plea, setting up that the plaintiff had misrepresented or concealed the fact that there was a lien on the property at the time the policy of insurance was issued, and that the property was incumbered by a lien for the purchase money, the plaintiff having only a bond for title thereto. The plaintiff filed a general replication to each of these pleas, and also certain special replications. Some of them set up a waiver of the alleged forfeiture of the policy on the ground that the defendant had requested the plaintiff to submit proofs after it had become fully informed of all the facts set up in the pleas, which he did submit at much expense and inconvenience to himself. Others of the replications alleged that, after the defendant had become fully informed of all the facts and circumstances set up in the pleas, it denied liability, and refused to pay the loss, solely on the ground that the plaintiff was not the unconditional and sole owner of the property insured, that the building was on ground not owned by the plaintiff in fee simple, and that the personalty was incumbered by a chattel mortgage. The defendant demurred to these replications. The demurrers were overruled. When the testimony had closed, and the argument of counsel had been heard, the court instructed the jury to return a verdict for the plaintiff.

Wm. A. Walker, for plaintiff in error.

E. H. Cabiness and S. D. Weakley, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge, having stated the case as above, delivered the opinion of the court.

There are no contested issues of fact involved in this case. All of the substantial facts are either admitted or accepted as established by undisputed evidence. The questions arising thereon, and in reference to which there is contention, are all questions of law.

The assignment of errors embraces 22 specifications. Counsel for the plaintiff in error insists on those numbered 7, 8, 9, 10, 21, and 22. The first 4 are based on the action of the court in overruling the demurrer of the defendant to the third, fourth, fifth, and sixth replications to the sixth plea. The last 2 are based on the court's action in directing a verdict for the plaintiff. These assignments raise the following questions: (1) Whether the plaintiff in the court below was the sole and unconditional owner of the property insured, and owned the buildings in fee simple. (2) Whether the personal property insured was incumbered by a chattel mortgage. (3) Whether the defendant was estopped, by demanding proofs of loss or denying liability prior to the suit solely on the ground that the plaintiff was not the unconditional and sole owner of the property, that he did not own the building in fee simple, and that the personal property was incumbered by a chattel mortgage, from afterwards setting up the other grounds of forfeiture, to be found in the sixth plea, namely, the misrepresentation or concealment by the defendant that there was a lien on the property for the unpaid purchase money. (4) Whether, under the evidence, the court was justified in directing a verdict for the plaintiff.

In a comparatively recent and well-considered case, the supreme court of Alabama has held, as expressed in the headnote, which accurately formulates the doctrine of the decision, that:

"A vendee of land, in actual possession, exercising acts of ownership under a valid executory contract of purchase, and holding the bond of the vendor to make title upon full payment of the purchase money, a portion of which remains unpaid, is the unconditional and sole owner in fee simple of said land, within the meaning of a policy of insurance which is conditioned that the 'entire policy shall be void if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple'; and, as to an insured holding such interest, a policy with this condition is not void, but can be enforced at the suit of the insured." *Loventhal v. Insurance Co.*, 112 Ala. 108, 20 South. 419, 33 L. R. A. 258.

The distinguished counsel for the plaintiff in error accepts this authority as conclusive as to the real estate, but he insists, notwithstanding, that the proper construction of the bond, so far as the personal property is concerned, is that it amounted only to a conditional sale. The property denominated "personal," the subject of this contention, is described in the bond for title as being the fixtures, tools, and implements on the property used in connection with the foundry, situate thereon, and now in the possession of the purchaser. The other proof does not show or indicate with any clearness the extent and the character of the physical connections of the fixtures, tools, and implements to the land and the buildings thereon, so far as to determine to what extent the same had become part of the realty, or had retained their original status as personal property, under the rules of the common law, which is in force in Alabama. But if the common law in force in that state, as construed by its supreme court, declares that as to real property an unconditional estate is conveyed by a bond for title, on the theory that the seller holds a vendor's lien, and the real estate passes to the purchaser subject

to this lien, it seems to us that this theory would have greater force as to personal property, title to which passes by delivery, unless the parties have expressly stipulated otherwise. On the authority of the case of *Loventhal v. Insurance Co.*, just cited, supported as it is by sound reason and abundant precedents, we hold in this case that, within the meaning of the terms used in the provisions of the policy of insurance on which the plaintiff in error relies, the insured was the unconditional and sole owner of all of the property insured, and that the building was owned by him in fee simple.

It cannot be contended, and we understand that it is not, that the vendor's lien to which the personal property in this case may be subject is a chattel mortgage. Conditions for forfeiture in the printed forms of insurance policies now in general use have been prepared by the insurance companies with studious care, and should be strictly construed against the insurer, and liberally in favor of the insured, when invoked by an insurance company to limit or avoid its liability. No intendment will be indulged to invalidate the policy which the language used does not require. The plaintiff in error having, before suit brought, put its denial of its liability solely on the ground that the insured was not the unconditional and sole owner of the property, that he did not own the building in fee simple, and that the personal property was incumbered by a chattel mortgage, and having placed its original defense to the action on the same ground, as shown by its fourth and fifth pleas, should not be allowed to set up the additional ground presented in the sixth plea, six days before the trial, unless the settled rules of decision on this subject are avoided or qualified by the nonwaiver agreement. Like the forfeiture provisions of the policy, above referred to, if not more strictly, the language of this agreement should be construed strongly against the company, and liberally in favor of the insured. Without undertaking to define exhaustively its scope, it seems clear to us that it cannot reasonably be construed to take out of the operation of the general law on the subject the action of the company itself, as evidenced by the letters set out in our statement of the case, and by the special pleas in its original defense to the action. As the case, in our view of it, presents only questions of law, which should be resolved in favor of the plaintiff below, we conclude that the circuit court did not err in directing a verdict for the plaintiff, and the judgment is affirmed.

UNITED STATES v. WALSH et al.

(Circuit Court, S. D. New York. April 5, 1901.)

CONTRACT FOR CONSTRUCTION OF GOVERNMENT WORK—ACTION FOR BREACH—
WAIVER BY ACCEPTANCE.

Where a contract for the construction of a dry dock for the United States provided for constant inspection of the work by the government as it progressed, and such inspections were made, and on its completion the dock was examined by the board having the matter in charge, and accepted and paid for, the government is bound by such acceptance, and,

in the absence of fraud, is estopped to thereafter claim that the work was not done in accordance with the contract.

At Law. Action on bond of contractor for public work.

Action at law to recover \$171,360.76, with interest from May 8, 1895, for damages on account of failure to construct a timber dry dock in accordance with the contract, and accompanying plans, drawings, and specifications. The dry dock is situated at the navy yard, Brooklyn, N. Y., and is known as "No. 3." The action was brought against the contractor, Augustin Walsh, and his surety, John D. Crimmins. The government put in its direct case, with the exception of the proof of the amount of damages sustained and rebuttal; counsel for defendants conceding, for the purpose of making a motion to direct a verdict in favor of the defendants, that the government had spent \$171,360.76 upon the dock. After this concession on the part of defendants' counsel, the court stated that with the exception of the examination of Rear Admiral Bowles, who had charge of the work of repair, and any rebuttal, the court would now declare the case closed on the part of the plaintiff, and allow the defendants to open, and put in their testimony on the main case, if they should choose to put in any, and to put in their testimony of acceptance of, and payment for, the dock by the government. The defendants thereupon opened, and put the defendant Walsh on the stand, whose testimony, both direct and cross, was taken, after which counsel for the defendants moved that the jury be directed to bring in a verdict in favor of the defendants, which motion, after argument, was duly granted, the court allowing an exception to the plaintiff.

George H. Gorman, Special Atty., and Arthur M. King, Asst. U. S. Atty., for the United States.

Howard A. Taylor and Origen S. Seymour, for defendant Walsh.

James R. Soley, for defendant Crimmins.

LACOMBE, Circuit Judge. Gentlemen of the Jury: There are some very interesting questions in this case,—questions of law, which will appropriately come, at the proper stage, before an appellate tribunal. The view which I have taken of this case for some time has not been changed by the arguments to which I have listened. It is unnecessary for me to deliver, or undertake to deliver, any extended opinion upon the points that have been argued, or the questions presented, and consume your time sitting here to listen to it. It is sufficient that I indicate, in the briefest way, three or four propositions which lead me to the conclusion that there is nothing here to submit to you.

In the first place, it is not disputed that, when the federal government enters into a contract with an individual, the rights which it acquires, and the obligations which it assumes, are the same rights, and the same obligations, which would be assumed were it an individual. The contract is to be construed accordingly. In this particular instance we have a contract whereby an owner of land contracts with a contractor for building a structure on the land, and the contract is an extremely elaborate one, with many provisions in it. It contains provisions whereby, from the very beginning to the very end of the work, the owner shall be advised, from time to time, of what is taking place; and it not only secures to the owner the right to make such examination, but it makes it a duty on the part of the owner to see to it that there is a constant inspection, and that it is constantly advised as to how the work is

going on, so that before the contractor goes to some new branch, to superimpose work on what is already finished below, he goes with that knowledge secured to him that the owner has had opportunity and presumably has observed what work has been done before. And, the matter having reached its conclusion, the builder—the contractor—says: “My work is completed. Here it is. You say you won’t take this, and you won’t pay me, until you have had an inspection and test, and satisfied yourself as to it. Now, here is my work. Look it over, and make your test. I tender it to you, and I claim my money.” And the government—the owner—does look over the work, by its board, and makes a test, and says: “We are satisfied. Here is your money. Give us a release,”—and that transaction takes place. Well, ordinarily, between private parties, that would terminate the matter. Much has been said here as to the lack of knowledge on the part of the owner when such acceptance took place, and that there can be no waiver unless there is knowledge. I do not think there is testimony in this case which would warrant the conclusion that there was not knowledge on the part of the government, or of the government accepting officers, when this work was accepted. Not only was there Mr. Menocal, of whom we have heard so much, the civil engineer in charge, and Mr. White, another civil engineer, but here was inspector piled up upon inspector,—inspectors of timber, inspectors of iron, and inspectors of pile driving; and here in the possession of the federal government, at the time that it accepted this dock, were written reports on its files through which, as we have seen here, it was perfectly possible for them to produce an expert who has testified to us exactly where every pile went, and when it was driven in, his means of knowledge being written reports in the possession of the government long before the work was accepted.

In view of the information thus in the possession of the federal government at the time of the acceptance of this work, and in view of the further fact that there is no express fraud charged, no mala fides charged, and that the points of difference, the points in dispute, as between that work as called for under the contract and the work as shown, do not in the remotest degree approach, in extent of difference, to what in the Barlow Case was held to constitute fraud without any bad faith, I think the government is bound by its acceptance, and cannot now sue to recover back the money. I therefore direct you to bring in a verdict for the defendants, giving an exception thereto to the plaintiff.

BOARD OF COM'RS OF LAKE COUNTY v. KEENE FIVE-CENTS SAV. BANK.

(Circuit Court of Appeals, Eighth Circuit. April 3, 1901.)

No. 1,441.

1. HEARSAY AND SELF-SERVING STATEMENTS—RULE MUST BE ENFORCED WITH JEALOUS CARE.

The rule forbidding the admission of self-serving statements and hearsay testimony as evidence is vital to the protection of the rights of person and property, and must be guarded against encroachment with jealous care.

2. SELF-SERVING STATEMENTS AND HEARSAY DEPOSITED IN A PUBLIC OFFICE INCOMPETENT EVIDENCE.

The self-serving statements of a county or municipality, made by its officers or agents, and written statements of third parties deposited or filed in its offices, are incompetent evidence to prove the facts they relate, in an issue between it and a private party, in the absence of statutory provisions which qualify them. The same rules of evidence govern the trial of an issue between a private party and a municipal corporation which control the trial of a like issue between individuals.

3. SECTION 922, MILLS' ANN. ST. COLO., RELATIVE TO COPIES OF PAPERS IN PUBLIC OFFICES, CONSTRUED.

Section 922, Mills' Ann. St. Colo., which provides that copies of writings duly filed or deposited in county offices shall be prima facie evidence in all cases, makes such copies prima facie evidence of the contents of the original writings, but it does not more. It does not qualify the copies for admission in evidence in any case in which the originals were not qualified.

4. COPIES OF CERTAIN WRITINGS FOUND IN COUNTY CLERK'S OFFICE INCOMPETENT EVIDENCE IN ACTION BY THIRD PARTY AGAINST THE COUNTY.

Copies of county warrants and of lists thereof on the letter heads of Chase & Taylor, aggregating \$65,384.72, found in 1898 in the office of a county clerk of a county which in 1882 exchanged with Chase & Taylor funding bonds aggregating \$75,000 for its warrants, are incompetent evidence that any of these warrants were exchanged for any of 15 bonds, of \$1,000 each, originally issued to Chase & Taylor, in an action thereon by a subsequent bona fide holder.

5. COUNTY CLERK'S ACCOUNT BOOK INCOMPETENT TO PROVE TRUTH OF ITS STATEMENTS IN AN ACTION BETWEEN THE COUNTY AND A THIRD PARTY.

A county clerk's account book, which was not kept in compliance with any statute, but which contained summary statements at the end of each six months of the state of 15 county funds, and of the aggregate amounts of county warrants drawn, canceled, and outstanding, is incompetent evidence of the truth of these statements, in an action between the county and a third party, because it is a self-serving statement of conclusions drawn from original records and writings not produced.

6. FUNDING BONDS NOT VOID BECAUSE DEBT FUNDED EXCEEDS CONSTITUTIONAL LIMITATION, AS THEY CREATE NO DEBT.

Funding bonds neither create nor increase a debt, but simply change its form; hence they are not void because the debt funded exceeds the constitutional limitation.¹

7. BONDS FUNDING EXCESSIVE DEBT PRESUMPTIVELY VALID IF ANY PART OF THE DEBT FUNDED MIGHT HAVE BEEN SO.

Each county bond is a separate promise, and the basis of a separate cause of action against a county. Where the facts and conditions might have been such under the law that any part of the excessive debt funded might have been valid, the legal presumption is, in an action on the bond, that these facts and conditions existed, and that the bond in action was

¹ Constitutional and statutory limitation of municipal indebtedness, see note to City of Helena v. Mills, 36 C. C. A. 6.

issued to fund a valid portion of the debt, because the presumption is that the county officers faithfully discharged their duties, and issued the bond only after ascertaining the validity of the debt for which it was exchanged.

8. COUNTY WARRANTS PRIMA FACIE VALID.

County warrants are prima facie evidence of legal obligations of the county.

9. LAKE COUNTY, COLO., FUNDING BONDS OF 1882 PRESUMPTIVELY VALID.

While the Lake county refunding bonds of 1882, aggregating \$500,000, evidenced a debt in excess of the constitutional limitation, they are presumptively valid, because that county might in 1882 have issued any one of them in exchange for valid outstanding warrants for debts incurred prior to September 1, 1879, when the limitation first took effect, or for debts incurred after that date in each year for current expenses for which a levy of taxes was made; and in an action on any one of these bonds the presumption is that it was issued to fund such a lawful debt.

10. BURDEN OF PROOF TO SHOW INVALIDITY OF THESE BONDS IS ON COUNTY.

The burden of proof on the issue of the validity of the bonds under the constitutional limitation is upon the county, because each bond and the warrants for which it was exchanged are prima facie evidence of the validity of the debt they represent; and these presumptions must prevail unless the county proves by a fair preponderance of competent evidence that the debt for which the bond was given was unauthorized and void.

11. UNNECESSARY AVERMENTS REQUIRE NO PROOF.

Unnecessary averments in a pleading, which are not essential to the statement therein made of the cause of action, require no proof, are mere surplusage, and do not affect the issues.

12. ERROR WITHOUT PREJUDICE NO GROUND FOR REVERSAL.

Alleged errors which the record conclusively shows could not have affected the decision and judgment work no prejudice and constitute no ground for reversal.

13. RULING ON MOTION FOR NEW TRIAL FOR NEWLY-DISCOVERED EVIDENCE NOT REVIEWABLE.

The ruling of the trial court upon a motion for a new trial on the ground of newly-discovered evidence rests in the discretion of the court, and, in the absence of gross abuse of that discretion, does not constitute an error of law, and cannot be reviewed in a national appellate court.

Caldwell, Circuit Judge, dissenting.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Colorado.

This was an action brought by the Keene Five-Cents Savings Bank, the defendant in error, against the board of county commissioners of the county of Lake, the plaintiff in error, to recover upon coupons cut from 15 funding bonds, of \$1,000 each, which were issued on January 2, 1882, in compliance with an act of the general assembly of the state of Colorado entitled "An act to enable the several counties of the state to fund their floating indebtedness," which was approved February 21, 1881. 1 Mills' Ann. St. §§ 939-944. The bonds disclosed upon their face the fact that they were a part of an issue of funding bonds which aggregated \$500,000, and they were payable to Chase & Taylor or bearer. They contained no recital that the amount of this issue was within the constitutional limitation of indebtedness prescribed by the people of Colorado, but simply recited that they were issued under and by virtue of, and in full compliance with, the act of the general assembly, and that they had been authorized by a vote of the majority of the duly-qualified electors of the county who voted upon the question. Out of this issue of bonds, aggregating \$500,000, bonds to the amount of \$75,000 had been issued to Chase & Taylor, and the 15 bonds from which the coupons in this suit were cut were a part of this issue of \$75,000. The defense to the bonds was that they were issued in exchange for county warrants which evidenced debts that were incurred

after the limitation of indebtedness prescribed by the constitution of Colorado had been exceeded by the county. Section 6, art. 11, of the constitution of the state of Colorado, which prescribed the limitation of indebtedness, contained a proviso to the effect that this limitation should not apply to counties having a valuation of less than \$1,000,000. The assessed valuation of the taxable property in the county of Lake did not reach the sum of \$1,000,000 until the 1st day of September, 1879, and there was no time subsequent to that date when this valuation was sufficient in amount to warrant the creation of an indebtedness of \$500,000. The funding bonds aggregating \$500,000, issued January 2, 1882, were exchanged for county warrants, some of which evidenced indebtedness of the county created before, and some of which represented indebtedness of the county created after, September 1, 1879. The foregoing facts are conceded by counsel for both parties in the argument of the questions presented in this case, and for that reason the method by which they were established is immaterial, and will not be considered. After the defendant in error had introduced in evidence its coupons, and the bonds from which they were taken, and had rested its case, the plaintiff in error attempted to prove that the 15 bonds in question were issued in exchange for county warrants which evidenced obligations of the county which had been created subsequent to the time when its debt exceeded the constitutional limitation, and which were for that reason invalid. For the purpose of showing what warrants were exchanged for the bonds in issue, the county offered three lists or statements which were found in the office of the county clerk of Lake county, wrapped around county warrants there deposited, which corresponded, respectively, in numbers, amounts, dates, and dates of registration, with the lists contained in those statements. These statements were in the following form:

"Office of Chase & Taylor, Sioux City, Iowa.

"All Kinds of Municipal Securities Bought and Sold.

".....Warrants.

"Sioux City, Iowa.

No.	Amount.	Date.	Date of Registration.	Acc.	Int.	Total.	Rate.	Am't Paid.
3,177	420	June 8, '80.	June 14, '80.			65"		

There were many entries on each statement, differing only in the figures representing number, date, and amount. One of these statements had on its back, "No. 1, R. J. Chase, \$15,649.24," and also the words, "Registered backed." The figures in the column headed "Amount" in that statement aggregated \$15,649.24. The second statement was backed, "No. 2, Chase & Taylor, \$34,429.98," and the word "Registered" was also written thereon. The third statement was backed, "D. K. Tenney, \$15,305.50," and the words, "Registered backed," were written upon it. To each statement a certificate in substantially the following form was attached:

"State of Colorado, County of Lake--ss.:

"I, H. S. Phillips, clerk and recorder and county clerk of Lake county, do hereby certify that the annexed and foregoing is a true and correct copy of the warrant list and funding bond statement of [R. J. Chase, Chase & Taylor, or D. K. Tenney, as the case was], as the same appears on file in my office, and in my custody as county clerk and recorder of Lake county, Colorado. Witness my hand and official seal this 26th day of November, A. D. 1898.

"[Seal of County.]

H. S. Phillips, County Clerk."

The county clerk who made these certificates testified that he had no knowledge of the original transactions, but that when he entered upon the duties of his office he found the originals of these three statements wrapped up with county warrants which corresponded in number, date, and amount with the figures under the respective columns in the statements; and the warrants so found by him were offered in evidence with the statements. The statements and warrants thus offered were excluded by the court on the ground that they did not constitute competent evidence that any of these warrants were exchanged for the bonds in suit. No other evidence was offered in the case

to identify the warrants which were exchanged for these bonds, and at the conclusion of the trial the court instructed the jury to return a verdict in favor of the defendant in error.

H. B. Johnson (Charles Cavender and W. H. Bryant, on the brief), for plaintiff in error.

Edmund F. Richardson (Thomas M. Patterson and Horace N. Hawkins, on the brief), for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and ADAMS, District Judge.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The issue concerning the trial of which the chief complaint is made in this case was whether or not certain county warrants found in the office of the county clerk of the plaintiff in error about the year 1898 were exchanged in 1882 for any of the 15 funding bonds upon which this action was founded. This was a very simple issue of fact. To establish its claim that some of these county warrants were exchanged for some of these bonds, the county offered in evidence certified copies of three lists of warrants written on the letter heads of Chase & Taylor, aggregating, respectively, \$15,649.24, \$34,429.98, and \$15,305.50, together with three bundles of county warrants corresponding in dates and amounts with these lists. These warrants were found in the office of the county clerk of the county of Lake, with these lists wrapped around them, when the present clerk entered upon the discharge of the duties of his office. Neither of these lists bore any signature or date, and no witness came to testify when, why, or by whom they were made. It is earnestly contended that the rulings of the court below that this evidence was incompetent to prove the fact that any of these warrants were exchanged for any of the bonds in issue was a fatal error. But the established rules of evidence which control the trial of an issue of fact between adverse litigants are not suspended or abrogated when one of the parties to the action is a county or a municipality. Hearsay and self-serving declarations are as pernicious and incompetent to establish a claim or a defense of a county as they are to prove a cause of action or a defense of an individual. If the issue of the exchange of these warrants for these bonds had been on trial between private parties, the defendant certainly could not have established the exchange by proof either that he had himself said or written, or that Chase & Taylor or any other person had said or written, that such an exchange had been made. The former statement would have been a mere self-serving declaration, and the latter the baldest hearsay. The plaintiff would have been entitled upon such an issue to the testimony, under oath, of the witnesses who knew the facts, and to an opportunity to cross-examine them, and in the absence of such evidence the defendant would surely have failed. These rules are equally applicable to the trial of such an issue between a private individual and a county, in the absence of any modification or abrogation thereof by act of congress or of the legislature. The officers of a county are its agents. Their acts and statements in the discharge of their official duties are the acts and

statements of the county, and not those of its adversaries. Upon a simple issue of fact like that in hand, such acts and statements may sometimes be used in evidence against the county as its admissions against interest; but, when offered by the quasi municipality, they are as much self-serving declarations and as incompetent as the prior oral or written statements of an individual in support of his claim or defense, unless they are made competent by some express statute, or unless they fall under the recognized exception applicable to "official registers or books kept by persons in public office, in which they are required by statute or by the nature of their office to write down particular transactions occurring in the course of their public duties and under their personal observation." 1 Greenl. Ev. § 483; *Evanston v. Gunn*, 99 U. S. 660, 25 L. Ed. 306; *White v. U. S.*, 164 U. S. 100, 17 Sup. Ct. 38, 41 L. Ed. 365; *In re Hirsch* (C. C.) 74 Fed. 928. There was no evidence that any of these lists of warrants, or that any of the writing thereon, was made by any officer or agent of the county; and, if there had been, the lists would still have been incompetent, because no such statements were required to be made by any such officer, either by the statutes of the state, or by the nature of his office. The statute under which the bonds were issued provided that, before the vote to issue them was taken, the county commissioners might publish a notice requesting the holders of warrants to submit in writing "a statement of the amount of warrants of such county which they will exchange for the bonds of such county, to be issued under the provisions of this act, and the rate at which they will exchange such warrants for such bonds, taking such bonds at par." Mills' Ann. St. § 939. But these lists are not statements made pursuant to this statute, because they contain no offer to exchange warrants for bonds, and they specify no rate of exchange. Moreover, if they were such statements, they would not constitute any evidence that the proposed exchange was ever made. Nor are they admissible as a part of the *res gestæ* at the time of the exchange; for they bear no date, and there is no evidence or presumption that they were made or deposited at the time when the bonds were issued. So far as the evidence in this record discloses the fact, they may have been deposited in the clerk's office years after the warrants about which they were wrapped were canceled or exchanged, and a ruling that such fugitive, undated, and unidentified writings as these may constitute evidence upon which the rights of litigants must depend would open a plain and easy road to the establishment of all the claims and defenses of municipalities. The mere deposit in a public office at any time before the trial of the statement of the claim or defense of the municipality, without date or signature, and without identification or proof of origin, would be ample to sustain it. These lists cannot be received as a part of the things done at the time of the exchange, because there is no evidence when they were made or when they were deposited in the office of the county clerk. Nor were they admissible as declarations of Chase & Taylor, and that for three reasons: They were not signed, and there was no evidence that they were made by Chase & Taylor; they do not state or attempt to state that any of the warrants aggregating \$65,-384.72 which are listed therein were ever exchanged for the 15 bonds

aggregating \$15,000 which are here in question; and if they had been signed by Chase & Taylor, and if they had contained such a story, they would still have been incompetent as evidence against the defendant in error, because they would have been nothing but hearsay. The county stipulated in the trial of this action that the bank was a bona fide purchaser of its bonds before maturity, without any notice of their invalidity, except such constructive notice as the constitution and laws of the state imposed upon it. Neither the constitution nor the laws gave the bank any notice that its bonds were issued in exchange for any invalid warrants or for any particular warrants. It is conceded in the argument of this case that when these bonds were issued there were valid warrants of the county outstanding for which some of them might have been exchanged. A state of facts might, therefore, have existed under which the bonds might have been valid; and, if conditions and circumstances might have existed under which they would have been lawful under the law, the presumption was that they were so. *City of Evansville v. Dennett*, 161 U. S. 434, 443, 16 Sup. Ct. 613, 40 L. Ed. 760; *Rollins & Sons v. Board of Com'rs of Gunnison Co.*, 80 Fed. 692, 699, 26 C. C. A. 91, 98, 49 U. S. App. 399, 412; *National Life Ins. Co. of Montpelier v. Board of Education of City of Huron*, 62 Fed. 778, 10 C. C. A. 637, 27 U. S. App. 244; *Chaffee Co. v. Potter*, 142 U. S. 355, 363, 364, 12 Sup. Ct. 216, 35 L. Ed. 1040. The bank purchased the bonds in reliance upon this presumption. Each bond constitutes a separate and independent cause of action against the county, and the presumption of its validity goes with it to the end, and must prevail unless it is overcome by a fair preponderance of competent evidence that the warrants for which that particular bond was exchanged evidenced unauthorized obligations. *Nesbit v. Riverside Independent Dist.*, 144 U. S. 610, 619, 12 Sup. Ct. 746, 36 L. Ed. 562; *Board v. Sutliff*, 97 Fed. 270, 275, 38 C. C. A. 167, 171; *Board v. Standley*, 24 Colo. 1, 14, 49 Pac. 23, and cases there cited. Moreover, the owner of each bond has the right to insist that the alleged defense of this county shall not be inferred from incompetent circumstances or established by hearsay. The settled rules of evidence which govern the trial of actions measure the extent and secure the protection of the rights of persons and property. Reversals, modifications, or variations of these rules produce instability and uncertainty in these rights, and breed distrust of courts and of governments. No rule is more salutary, no principle is more vital to the security of the life, liberty, and property of the citizen, than that rule which prohibits the repetition of the narratives of strangers, whether verbal or written, to determine issues between litigants, and prescribes that only after due notice, and opportunity for cross-examination of the very parties whose statements are offered, and then only under the solemnity of an oath or affirmation, shall their stories be evidence. Strike down this rule, and the most sacred rights of person and property rest only upon the whimsical and pernicious gossip of the reckless, the irresponsible, and the vicious. The rule that hearsay is incompetent evidence is essential to the preservation of personal liberty and the rights of property. It should be guarded against encroachment with jealous care. Its enforcement is not dis-

cretionary with the courts, and its violation is fatal error. *Association v. Shryock*, 73 Fed. 774, 777, 20 C. C. A. 3, 7, 36 U. S. App. 658, 665; *Edwards v. Bates Co.*, 99 Fed. 905, 906, 40 C. C. A. 161, 162; *Queen v. Hepburn*, 7 Cranch, 290, 295, 3 L. Ed. 348; *Waldele v. Railroad Co.*, 95 N. Y. 274, 47 Am. Rep. 41; *Tilson v. Terwilliger*, 56 N. Y. 273; *People v. Davis*, 56 N. Y. 95; *Reg. v. Bedingfield*, 14 Cox, Cr. Cas. 341; *Meek v. Perry*, 36 Miss. 190, 260; *Merkle v. Bennington Tp.*, 58 Mich. 156, 24 N. W. 776; *Patterson v. Railway Co.*, 54 Mich. 91, 19 N. W. 761; *Lund v. Inhabitants of Tyngsborough*, 9 Cush. 36; *Martin v. Railroad Co.*, 103 N. Y. 626, 9 N. E. 505; *Association v. McCluskey* (Colo. App.) 29 Pac. 383, 384; *Railway Co. v. McLelland*, 62 Fed. 116, 10 C. C. A. 300, 27 U. S. App. 71.

Now, these lists of warrants were not signed by Chase & Taylor or by the county clerk, and they did not state that any of the warrants there described had been exchanged for any of the bonds in suit; and for these reasons, as we have shown, they were not competent evidence. But if they had contained such a statement, and if they had been signed by Chase & Taylor and by the county clerk, how would those facts have made them evidence against this bank? They would still have been *res inter alios acta* and mere hearsay as against an innocent purchaser of these bonds. They would still have been made by Chase & Taylor and the clerk when they were not witnesses, without notice to the defendant in error, without opportunity for cross-examination, and without the indispensable qualification of an oath. This was an action by the bank, an innocent purchaser of these bonds, against their maker, the county. Chase & Taylor and the clerk of that county were strangers to the bank, and their statements of their transactions were no evidence against it of the truth of the stories they told. The bank had the right to their testimony under oath, and to an opportunity to cross-examine them, before their narratives became evidence against it. The lists of warrants and the warrants they inclosed were therefore incompetent as evidence in this case, under general and well-settled rules of law.

It is insisted, however, that the following statutes of the state of Colorado qualified these lists and warrants for introduction in evidence:

"Copies of all documents, writs, proceedings, instruments, papers and writings duly filed or deposited in the office of any county judge, county clerk, or county treasurer, and transcripts from books of record or proceedings kept by any of said officers, with the seal of his office affixed, shall be *prima facie* evidence in all cases." Act March 24, 1877 (1 Mills' Ann. St. p. 788, § 922). "A copy of any record, or document, or paper, in the custody of a public officer of this state, or of the United States, within this state, certified under the official seal, or verified by the oath of such officer to be a true, full and correct copy of the original in his custody, may be read in evidence in an action or proceeding in the courts of this state, in the like manner, and with the like effect, as the original could be if produced." Civ. Code 1877, § 416; Mills' Ann. Code, § 422.

The claim of counsel for the county is based upon the statute first quoted. It is not that this statute had the effect to make any document or writing competent, relevant, or material evidence of the facts stated therein, but that it had the effect to make a certified copy of

any writing duly filed or deposited in any of the county offices therein named prima facie evidence that the original was what it purports to be, or that the statute qualifies the paper for introduction in evidence without other proof of identification. If this contention could be sustained, it would not render the rejection of the lists of warrants by the court below error, because, conceding that they were what they purport to be, they do not purport to be statements of Chase & Taylor, or of any other particular person or persons; they do not purport to state that any of the warrants listed were exchanged for any of the bonds from which the coupons in suit were cut; and if they did purport to contain such a statement, and to be made by Chase & Taylor or any other person, they would still be the mere narratives of strangers, and thus hearsay testimony, and incompetent evidence against the bank, for the reasons already stated. But the claim of counsel for the county concerning the construction of this statute cannot be sustained. The plain purpose and effect of the section under consideration was to make copies of the writings there specified prima facie evidence of the contents of the original writings,—to do nothing more and nothing less. The object of the statute certainly was not to make mere copies competent, relevant, or material evidence of facts of which the original writings were not evidence; and, in one portion of their argument, counsel for the county concedes this proposition. Now, if the statute identified and qualified the copy for admission in evidence when the original was not so identified and qualified, it would have the effect to make the copy evidence of the facts therein stated in many cases when the original was not competent to prove those facts. Neither the words of the statute, the evil it sought to remedy, nor its purpose requires a construction so unreasonable; and our conclusion is that this section did not, by identification or otherwise, qualify the copy of any writing for admission in evidence when its original was not so qualified. The result is that the lists of the warrants and the warrants themselves were not competent evidence that any of the warrants were exchanged for any of the bonds in action, and the ruling of the court below was right.

It is assigned as error that the court rejected the county clerk's account book, which was practically considered and rejected in *Dudley v. Board*, 80 Fed. 672, 26 C. C. A. 82, 49 U. S. App. 336, and *Board v. Sutliff*, 97 Fed. 270, 38 C. C. A. 167. This book was not a record of daily transactions. There is no statute of Colorado which required it to be kept. It was a mere statement of conclusions which the clerk at the end of each six months drew from an examination of other records and writings, and wrote down in this book. It consisted of summary statements of accounts with 15 different funds, in this general form:

Lake County in Account with County Treasurer, Expenditures Acct.
Road Fund.

1880.

Jan'y 1. Total expenditure on county roads in repairing, making, and bridging	\$4,101 84
Interest paid on warrants	69 28
	<hr/>
	\$4,171 12

1880.		
Jan'y 1.	By amt. of road warrants can.....	\$2,320 59
	By outstanding indebtedness of Lake county in road war- rants, January 1, A. D. 1880. To balance.....	1,850 53
		<hr/> \$4,171 12

In addition to these statements of balances, it contained a summary statement of the aggregate amount of warrants outstanding at the end of each six months. It was offered in evidence to prove the amounts of outstanding warrants and the amounts of the debts of the county at the various times when these semiannual statements were written down in it. There was a general statute in effect in Colorado which required a public record of the indebtedness of this county to be made in a certain way by the county commissioners, and to be published at certain times. But this account book does not comply with that statute, and the county never did comply with it in any way. *Dudley v. Board*, 80 Fed. 672, 677, 26 C. C. A. 82, 87, 49 U. S. App. 336, 345; *Board v. Sutliff*, 97 Fed. 270, 279-281, 38 C. C. A. 167, 175-177. It is evident from an inspection of this book that the written statements of the amounts outstanding and of the balances of the various funds at the respective times when they purport to have been written in this book were mere conclusions which the clerk or clerks who made them drew from an examination of other writings. If the writers of this book had been placed upon the stand as witnesses, and had been asked what they found to be the amount of these outstanding warrants and the balances of these accounts from an examination of the files and records, their testimony would not have been competent, without an introduction of the writings from which they drew their conclusions. Much less is their written statement of these conclusions, without oath and without opportunity for cross-examination. As against the defendant in error such statements of such clerks are nothing but hearsay. The fact must not be forgotten or overlooked in the consideration of all the questions of evidence in this case that this bank was no party to the acts, records, or writings of this county, or of its officers and agents. To all these it is a stranger. This was an action by this stranger, the bank, against the county. The latter alleged that its indebtedness exceeded its constitutional limit at various times. It undertook to prove this averment. In the absence of any modifying statute, the same rules of evidence obtain in the trial of that issue between these corporations that would have governed the trial of the same issue between individuals. The prior statements of its indebtedness by the county and its officers and agents, made for its own convenience, not in compliance with any requirement of the statute or the law, were no better evidence against the bank than the prior statements of any individual would be against his adversary in a lawsuit. They could not rise higher than self-serving statements, and the writings in this account book did not rise to that dignity, even, because they were not required to be made by the county clerk by any statute of the state, or by the nature of his office. They were therefore the mere unsworn statements of the man or men who made them, and were incompetent, both because they were hearsay, and because the writer or writers, if sworn as witnesses, could

not have testified to the bald conclusions they wrote, without a production of the original writings from which they drew them. *Rollins & Sons v. Board of Com'rs of Rio Grande Co.*, 90 Fed. 575, 579, 33 C. C. A. 181, 185, 62 U. S. App. 255, 262; *Dudley v. Board*, 80 Fed. 672, 677, 26 C. C. A. 82, 87, 49 U. S. App. 336, 345; *Board v. Sutliff*, 97 Fed. 270, 279, 38 C. C. A. 167, 176.

Another complaint of the plaintiff in error is that the trial court held that the presumption was that the bonds were valid, and that the burden of proof was upon the county to establish the fact that they had been exchanged for unauthorized obligations of the plaintiff in error. That ruling was made in this state of the case: The bank pleaded that it was a bona fide holder of its bonds, and that they were issued in exchange for warrants which evidenced valid debts of the county. The county denied these allegations, and averred that the warrants for which the bonds were exchanged evidenced unauthorized obligations of the plaintiff in error. The bank put its bonds and coupons in evidence. The county admitted that the bank was an innocent purchaser of them for value before maturity, without any notice of any defenses to them, except such as the constitution and laws imposed upon it. Where was the burden of proof under these circumstances? Conceding that the debt of the county exceeded its constitutional limitation on September 1, 1879, there were still two classes of valid warrants which the county might have issued, and which it might have had outstanding on January 2, 1882, when these bonds were exchanged for warrants: (1) Those issued for debts incurred prior to September 1, 1879 (*Board v. Standley*, 24 Colo. 1, 49 Pac. 23); and (2) those issued after that date for the current expenses of the county for each year against taxes levied to pay those current expenses (*Town-Lot Co. v. Lane* [S. D.] 62 N. W. 982, 984; *Shannon v. City of Huron* [S. D.] 69 N. W. 598, 600; *Lawrence Co. v. Meade Co.*, 10 S. D. 175, 177, 72 N. W. 405; *Darling v. Taylor* [N. D.] 75 N. W. 766; *Grant v. City of Davenport*, 36 Iowa, 396, 404; *Spillman v. City of Parkersburg*, 35 W. Va. 605, 14 S. E. 279; *State v. Medbery*, 7 Ohio St. 522, 528; *State v. Parkinson*, 5 Nev. 15, 24-28).

There might, therefore, have been legal outstanding county warrants of this county in 1882,—those representing the lawful obligations just specified,—for which the bonds in action could have been legally exchanged. These were refunding bonds, and the fact that the debt of the county exceeded its constitutional limitation when they were issued did not in itself invalidate them, because they did not create or increase the debt of the county, but simply changed its form. *Hughes Co. v. Livingston* (C. C. A.) 104 Fed. 306, 317; *Board v. Standley*, 24 Colo. 1, 9, 49 Pac. 23. There might, therefore, have been a state of facts under which these bonds might have been valid under the constitution and laws of Colorado. There might have been valid warrants outstanding for which these bonds were exchanged, and if, under the constitution and laws, there might have been a state of facts or circumstances under which the bonds could have been lawfully issued, the legal presumption was that such a state of facts existed, and that the bonds were valid, because the presumption was that the officers of the county faithfully discharged their duties, and

issued the bonds in exchange for lawful warrants only. *City of Evansville v. Dennett*, 161 U. S. 434, 443, 16 Sup. Ct. 613, 40 L. Ed. 760; *Chaffee Co. v. Potter*, 142 U. S. 355, 363, 364, 12 Sup. Ct. 216, 35 L. Ed. 1040; *National Life Ins. Co. of Montpelier v. Board of Education of City of Huron*, 62 Fed. 778, 10 C. C. A. 637, 27 U. S. App. 244; *Rollins & Sons v. Board of Com'rs of Gunnison Co.*, 80 Fed. 692, 699, 26 C. C. A. 91, 98, 49 U. S. App. 399, 412. Moreover, the answer admitted that these bonds were exchanged for county warrants which it alleged were illegal and void; and this admission alone threw the burden of proving the invalidity of these warrants upon the county, because the warrants themselves were *prima facie* evidence of the justice and legality of the debts they evidenced. *Rollins v. Board*, 90 Fed. 575, 577, 33 C. C. A. 181, 183, 62 U. S. App. 255, 259; *Speer v. Board*, 88 Fed. 749, 756, 32 C. C. A. 101, 108, 60 U. S. App. 38, 52; *Board v. Standley*, 24 Colo. 1, 49 Pac. 23.

The fact that the bank unnecessarily alleged in its complaint that the debts evidenced by the warrants for which its bonds were issued were legal obligations of the county did not impose upon it the burden of proving that fact by other evidence than the bonds themselves, because both the bonds and the warrants, for which the answer admitted they were issued, were *prima facie* evidence of the validity of the debts they evidenced, and because the complaint stated a good cause of action without that averment. Unnecessary allegations in a complaint require proof that would not have been essential if the pleading had been confined to the indispensable averments only, when such allegations constitute an essential part of the statement of the cause of action. If the cause of action is well stated without them, they may be disregarded as surplusage, and they do not affect the issue. *Geer v. Board*, 97 Fed. 435, 442, 38 C. C. A. 250, 257; 1 *Estee*, Pl. & Prac. (4th Ed.) § 191; *Bliss*, Code Pl. § 215.

The result is that each of the bonds in question in this action constitutes a separate and independent promise of this county, and forms the basis of a separate cause of action against it; each bond is sustained by the legal presumption which accompanies the warrants for which it was exchanged that they evidenced legal obligations of the county, and by the presumption which accompanies the bond itself that it was issued in exchange for valid warrants of the county; the burden of proof is upon the county to establish the fact that the debt in exchange for which each bond was issued was an unauthorized obligation of the quasi municipality; and the presumptions of validity which accompany each bond go with it to the end of the trial, and must prevail, unless the county proves by a fair preponderance of competent evidence that the debt which it evidences was, in its inception, unauthorized and void.

There are other assignments of error in the trial of this case, but they are not material to its determination in this court, because, if the rulings of which these assignments complain had been in accord with the views of the counsel for the plaintiff in error, the judgment must still have been against them, because they failed to produce any sufficient evidence of the identity of the warrants in question, and without that essential link in their chain of alleged facts their defense was

fatally defective. The presumption is that there were no errors in these rulings, but, if there were, they were errors without prejudice, and constituted no ground for reversal. For this reason, they will not be discussed or considered.

The action of the court in refusing a continuance and in denying a motion for a new trial on the ground of newly-discovered evidence is assigned as error. But rulings upon motions for a continuance and upon motions for new trials are the mere exercise of the discretion of the court, and do not constitute errors of law which are reviewable in the national appellate courts. Counsel for the plaintiff in error concede this to be the general rule, but argue that motions for new trials upon the ground of newly-discovered evidence constitute exceptions to the rule, and may be reviewed by writ of error. The position is not tenable. The court exercises its discretion in granting or refusing a motion for a new trial upon the latter ground as much as when the ground is that the verdict was excessive, or that there was irregularity in the course of the trial. The decisions of the supreme court clearly indicate that the rulings of the trial courts upon motions for new trials upon the ground of newly-discovered evidence constitute no exception to the general rule. *Henderson v. Moore*, 5 Cranch, 11, 3 L. Ed. 22; *Newcomb v. Wood*, 97 U. S. 581, 24 L. Ed. 1085; *Mattox v. U. S.*, 146 U. S. 140, 147, 13 Sup. Ct. 50, 36 L. Ed. 917. The judgment below is affirmed.

CALDWELL, Circuit Judge (dissenting). At the time the bonds in suit were issued the county of Lake had exceeded the constitutional limit of indebtedness by hundreds of thousands of dollars. Under an act authorizing counties to fund their valid outstanding indebtedness, the county authorities issued funding bonds to the amount of half a million of dollars. These bonds were issued to retire county warrants, 90 per cent. of which had been issued after the constitutional limit of indebtedness had been reached and exceeded, and were, of course, void for that reason. The fact of this indebtedness was sufficiently disclosed by the public-debt record of the county, accessible to all, and of which the holders of warrants and all others were bound to take notice. The warrants in redemption of which the bonds were issued were offered in evidence and rejected. These warrants were found in the clerk's office in the proper place for redeemed warrants of the county, where they had been for many years in official custody; and the dates, amounts of the warrants, and names and memoranda wrapped around the warrants tallied so perfectly with the bonds in suit as to leave little doubt that these were the warrants in redemption of which the bonds were issued. At any rate, it was for the jury to say whether they were the warrants, and the evidence offered undoubtedly tended to prove that fact, and was therefore competent. It is a radical error to hold that county warrants which were issued and dated after the constitutional limit of indebtedness had been reached and exceeded will be presumed to have been issued for an indebtedness contracted prior to the time the constitutional limit of indebtedness was reached. There is no such presumption of law. In this very case the fact is notoriously otherwise. The constitu-

tional limit of indebtedness had been reached years before the warrants were issued. No valid debt could be created after the constitutional limit of indebtedness had been reached, and all indebtedness contracted, as well as the warrants issued for the same, were alike void. When it is shown that 90 per cent. of the warrants in redemption of which the bonds were issued were void, the bonds are void in toto. *Borough of Millerstown v. Frederick*, 114 Pa. 435, 7 Atl. 156; 1 Pars. Cont. 457. At most, the holder of the bonds would recover only the amount of the valid indebtedness included in the bonds.

The court, after indulging in a rhapsody over the rule of evidence which excludes hearsay testimony,—a matter quite foreign to any question of law or fact in the case,—proceeds to declare a series of presumptions of law which make it absolutely impossible for the county to prove a fact as open and notorious as the existence of the county itself. The presumptions declared are arbitrary, contrary to known facts, and have no foundation in the rules of evidence. The rules of evidence laid down by the court are too exclusive. They exclude the facts of the case, and determine it upon presumptions which no jury would ever deduce from the facts. There is no recital in these bonds that they do not exceed the constitutional limit of indebtedness, and the county is not, therefore, estopped by the recitals from showing that fact. *Gunnison Co. v. Rollins & Sons*, 173 U. S. 255, 19 Sup. Ct. 390, 43 L. Ed. 689; *Lake Co. v. Graham*, 130 U. S. 674, 9 Sup. Ct. 654, 32 L. Ed. 1065. In the case last cited, bonds of the very same series of these in suit were held void by the supreme court of the United States. Beyond all doubt, this whole series of bonds is void, and they can be upheld only by overruling all rational rules for the investigation of truth in a court of justice. The judgment of the circuit court should be reversed.

IN RE HARRIS.

(District Court, N. D. Ohio, E. D. October 6, 1899.)

No. 333.

BANKRUPTCY—SECRET PARTNER OF BANKRUPT.

Where a person was adjudged a bankrupt, as sole owner of a business conducted in the name of a company, and has been treated as such sole owner throughout the proceedings,—the only assets received by the trustee being the property of such business, and the only creditors those of the concern,—distribution of the estate will be made on that basis, notwithstanding evidence showing that another person was a secret partner in the business, which interest he denies.

In Bankruptcy.

The following is the report of the referee in bankruptcy:

It has previously been determined in this case that a secret partnership existed between the bankrupt and her husband, F. J. Harris, and that the property assigned by the bankrupt for the benefit of creditors, and now held by the trustee in bankruptcy, was the same property that constituted the actual partnership property of the secret partnership. This secret partnership was not discovered for some months after the adjudication in bank-

ruptcy of Mattie E. Harris. The bankrupt now moves for an order requiring the trustee to administer this property, nevertheless, as the individual property of Mattie E. Harris.

There are two views that may be taken of this bankruptcy. First, it may be considered to be an individual bankruptcy. In that event, as in all other cases of the administration of joint and several estates, the partnership assets should be first used to pay partnership creditors, and only the balance be applied to pay the individual creditors of the bankrupt. This administration of the partnership and individual estates may be had in the bankruptcy proceedings of the individual bankrupt herself, provided the secret and non-bankrupt partner consents thereto. Section 5, cl. "h," of the bankruptcy act provides that "in the event of one or more, but not all, of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt, but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt." No similar provision appeared in the act of 1867. See *Amsinck v. Bean*, 22 Wall. 395, 22 L. Ed. 801. "The assignees in bankruptcy of the joint stock and property of a co-partnership are required to administer the separate estate of the individual members of the firm or company, as well as the described estate of the co-partnership; but the bankruptcy act [i. e., that of 1867] contains no regulations of a corresponding character applicable in a case where an individual member of a co-partnership is adjudged a bankrupt, without any such decree against the co-partnership, or the other partner or partners of which the co-partnership is composed." "Repeated decisions have settled the rule that an assignee of the estate of an individual partner has no such title as will enable him to call third parties to an account for partnership property." Section 5, cl. "h," of the act of 1898 undoubtedly supplies the deficiency of the act of 1867 in this regard, and governs cases where one who is individually in bankruptcy is also at the same time a member of a partnership. In that event, the partnership assets may be administered by the individual trustee, but only by the consent of the other partners. Obviously, a partner cannot, by going into bankruptcy as an individual, divest the partnership creditors of their priority of lien upon the firm assets. The fact that the other partner is willing to let the assets be considered the individual assets of the bankrupt partner would not change the rule. Clause "h" of section 5 does not refer, it seems to me, to cases where a partnership as such is declared bankrupt, and some of the partners are not individually adjudicated bankrupts; for, if it did so refer, it would be vain to have a partnership declared bankrupt unless each and all the individuals composing it were at the same time likewise adjudicated bankrupts individually, because, if any one of them were not adjudicated bankrupt, then the partnership assets could not be administered in bankruptcy without his consent, and the firm creditors would have spent all their efforts without practical result, and the partnership trustee elected by them would be a king without a kingdom. Partnership assets may, then, with the consent of the nonbankrupt partner, be administered as such by the trustee of the individual estate of the bankrupt partner. In the present case the only question upon this branch would be whether the secret partner had consented to the administration of the partnership assets by the individual trustee. It is my opinion that he has done so. He has given his consent by standing by without protest, and even with positive denials of any interest in the fund, and has thus allowed the assets of this partnership to be taken into the custody and control of the bankruptcy court. For months he has thus stood by and acquiesced in this custody, and it is too late for him now to deny consent. Suppose the partner of an individual bankrupt should abandon the partnership property; would any one say that there was lacking a consent to the administration of this property by the trustee of the bankrupt partner? If so, then there is certainly a branch of the bankruptcy act that needs amendment. I apprehend, however, that it is not so, but rather that the bankruptcy act has most carefully provided for a contingency of this kind, and that its provisions will be found to be effective in protecting the rights of firm and individual creditors, where the partnership

itself is not adjudicated bankrupt, but one of its members is individually such.

But there is another view of this proceeding that might also be reasonably taken, and that is that this bankruptcy is in reality an adjudication of bankruptcy of an ostensible partnership, and that, such being the case, the partnership in reality was thereby adjudicated bankrupt under the name of Mattie E. Harris; such appearing to be the firm name under which the secret partnership did business. While there appears to my mind some doubt as to the soundness of this view as applied to the case in hand, yet there is force in the position. One thing is certain, namely, that an adjudication in bankruptcy may bind firm assets and partnership creditors, and also all the partners themselves, although only the ostensible partner or partners are mentioned as parties. The adjudication that a firm is bankrupt cannot be made null and void and inoperative through the mere failure of creditors to join a secret partner, whose name was perhaps being purposely withheld by the ostensible partner. It is sufficient if the ostensible partner be alone mentioned in the adjudication of bankruptcy, provided the act of bankruptcy and the property sequestered by the bankruptcy trustee were in reality the act and the property, respectively, of the partnership. In this way it is quite possible, where a secret partnership existed, doing business in the name of one of the partners, for it to be bound both as to membership and property by a decree rendered in terms against the ostensible partner alone as if he were an individual. If the act of bankruptcy is in reality the act of all, and the property seized the property of all, then partnership creditors cannot be divested of their rights by the concealment of the existence of the partnership. Certainly it does not lie in the mouth of the bankrupt, nor of the bankrupt's secret partner, to urge the point; and whether the creditors of the individual estate could object is not decided here, since none of them are here raising the point. Along this line of reasoning, see the following cases, to wit: *Metcalf v. Officer*, 5 Dill. 565, Fed. Cas. No. 9,496 (syllabus): "(1) It is not essential to the validity of an adjudication of bankruptcy against a partnership that a secret or dormant partner should be made a defendant. (2) The firm property is bound by an adjudication made against the ostensible partners. (3) A dormant or secret partner is not a necessary defendant at law or in equity. (4) Effect of nonjoinder of a joint party to a contract discussed." Also see *Elliot v. Stevens*, 38 N. H. 311; *In re Kelley*, 19 N. B. R. 326, Fed. Cas. No. 7,656.

The bankrupt urges that the nonbankrupt partner should now be given a chance to refuse his consent; his previous attitude having been that no partnership existed at all and that Mattie E. Harris alone was bankrupt. But, in the apt words of the trustee, the decision of the court that a secret partnership really existed did not create the partnership, for it was a secret partnership all the while; and, the very attitude of the secret partner during the entire period being inconsistent with his claiming the rights of a nonconsenting partner under section 5, cl. "h," above quoted, it seems improper to allow him now to shift his position. Therefore, upon consideration of the law of the whole case, it is the opinion of the referee that the motion of the bankrupt is not well grounded, and it is therefore ordered that the same be, and it is hereby, refused, to which ruling the bankrupt excepts, and is granted 10 days' time within which to prepare and file her petition for review.

A. Burt Thompson, for petitioners.
Olds & Willet, for bankrupt.

RICKS, District Judge. The proceedings in this case were instituted against Mattie E. Harris, alleging that prior to September 13, 1899, she was carrying on the grocery business on Detroit street under the name of the West Cleveland Grocery Company. An adjudication was entered on the ground that Mattie E. Harris had assigned all the goods, etc., at that place of business to O. J. Ringle. The only assets in the hands of Thompson, the trustee, are the pro-

ceeds of the sale of the stock of goods there found, and the only liabilities scheduled are for goods sold to said concern; and said Thompson was selected as trustee by the creditors of said grocery concern, assuming during all these proceedings that Mattie E. Harris was the bankrupt. But subsequent testimony developed the fact that F. J. Harris was a secret partner; in short, that Mattie E. Harris and F. J. Harris were partners doing business as Mattie E. Harris. It is not difficult to conceal the members of a partnership, if they are determined to have their connection with the establishment unknown. There has been a great deal of testimony taken in this case to establish that there was no secret partner, and that Mattie E. Harris was the only one interested in the firm, and that she was in fact the firm. Goods were sold to her on that basis, process was served upon her in this case on that basis, and the trustee's finding is on that basis. I have read this testimony with reference to the action of the trustee, and think he was fully justified in the course he has pursued, and his action is approved. The necessary orders may be drawn to enable him to carry out the distribution on the theory set forth by him in his reports heretofore.

In re WETMORE.

(Circuit Court of Appeals, Third Circuit. April 29, 1901.)

No. 13.

BANKRUPTCY—PROPERTY VESTING IN TRUSTEE—CONTINGENT INTEREST IN ESTATE IN REMAINDER.

A testator, who at the time of his death resided in New York, bequeathed a sum in trust to the use of his wife during her lifetime, with power of appointment in her, and provided that, in default of the exercise of such power, "I give the said trust fund upon her decease to my own then surviving next of kin." 3 Rev. St. N. Y. c. 1, tit. 2, § 13, provides that "future estates are * * * vested when there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the intermediate or precedent estate. They are contingent whilst the person to whom, or the event upon which, they are limited to take effect remains uncertain." Section 35 also provides that "expectant estates are descendible, devisable, and alienable in the same manner as estates in possession." *Held*, that neither under such provisions nor by the common law did a son of the testator take any estate in the fund during the life of his mother, transmissible to his trustee in bankruptcy as property, which he could have "transferred, or which might have been levied upon and sold under judicial process against him," since, even if his mother should not exercise the power of appointment, the person who would take remained uncertain until her death.

Petition for Revision of Proceedings of the District Court of the United States for the Eastern District of Pennsylvania, in Bankruptcy.

For opinions below, see 99 Fed. 703, 102 Fed. 290.

Richard C. Dale and Charles E. Morgan, Jr., for petitioner.

Thomas P. Wickes, for bankrupt.

Before DALLAS and GRAY, Circuit Judges, and BRADFORD, District Judge.

BRADFORD, District Judge. William B. Wetmore was on his own petition adjudged a bankrupt January 13, 1899, by the United States district court for the Eastern district of Pennsylvania. G. Plantou Middleton was appointed trustee March 14, 1899, and filed in the court below February 23, 1900, the following petition:

In the United States District Court for the Eastern District of Pennsylvania.
No. 27.

In Bankruptcy.

In the Matter of William B. Wetmore, Bankrupt.

To the Honorable John B. McPherson, Judge of the Said Court:

The petition of G. Plantou Middleton respectfully represents:

That on the thirteenth day of January, 1899, William B. Wetmore filed a petition in bankruptcy in your Honorable Court and was upon the same day duly adjudicated a bankrupt and his case referred to George E. Darlington, Esq., Referee in Bankruptcy.

That on the fourteenth day of March, 1899, your petitioner was appointed by the said Referee, trustee of the estate of the said bankrupt.

That the said bankrupt appeared before the Referee at divers times for examination, and upon his examination held on the twenty-fifth day of November, 1899, the following facts were in evidence, as appear set forth at large in stenographic copy of the notes of testimony taken before the said Referee, duly filed by him with his report in the above entitled cause.

That one Samuel Wetmore, the father of the said bankrupt, died in the City of New York on the 6th day of March, 1886, having first made his last will and testament, dated the eleventh day of October, 1882, duly proven and registered in the Surrogate's office for the City and County of New York and State of New York, on the sixth day of April, 1885, wherein and whereby, inter alia, he provided as follows:

"Fourth. I give and bequeath to my executors hereinafter named other than my wife the sum of one hundred thousand dollars (in cash or in securities or stock valued by my executors at that sum) upon trust to keep the same invested and to receive the income thereof and after deducting reasonable charges for the management of the said trust, to apply the net amount of such income from time to time as it shall accrue, to the use of my wife, Sarah Taylor Wetmore, so long as she shall live; and I empower my said wife to dispose of the principal sum so held in trust and any accumulations thereof by last will and testament duly executed by her, and in such manner as she shall think proper, and in default of such disposition by will I give the said trust fund upon her decease to my own then surviving next of kin in like manner and shares as if the same were to be then distributed as my own proper estate dying at time intestate."

That the said bankrupt, William B. Wetmore, was the only child and issue of his parents, and was one of the executors mentioned in the said will of his said father.

That as such executor the said William B. Wetmore had charge of the investment and management of the said trust fund of one hundred thousand dollars therein mentioned.

That Sarah Taylor Wetmore, the mother of the said bankrupt, the beneficiary under the said trust, died on the seventeenth day of March, 1899, shortly after the adjudication of bankruptcy, having first made and published her last will and testament, bearing date the thirteenth day of January, 1898, which has been duly probated in the office of the Register of Wills of Chester County, wherein and whereby she appointed her son, William B. Wetmore, the above named bankrupt, her executor, and provided in the exercise of the power of appointment in reference to the trust fund of one hundred thousand dollars, as contained in the will of Samuel Wetmore, her husband, as hereinabove set forth, as follows:

"Item. In accordance with, and in exercise of the power of disposition and appointment conferred upon me by the Fourth Item of the last will and testament of my deceased husband, Samuel Wetmore, dated the eleventh day of

October, 1882, duly proven and registered in the Surrogate's office in and for the City and County of New York and State of New York on the sixth day of April, A. D. 1885, I do will, order and direct and do give, devise and bequeath unto my said son, William Boerum Wetmore, his heirs and assigns in fee simple, the said principal sum of one hundred thousand dollars (\$100,000), so devised 'In Trust' for my benefit during my life, as by the said Fourth Item of my husband's will is directed, and so that my said son shall have and hold the same free and discharged from all trusts."

It further appeared from the testimony of the said bankrupt that at the time of his adjudication in bankruptcy, as sole surviving trustee of the aforesaid fund of one hundred thousand dollars, he had in his possession the sum of about fifty-five thousand dollars, the balance of the said fund having been lost through re-investment and by reason of encroachments upon the principal in the lifetime of the said Sarah Taylor Wetmore.

That by virtue of the premises, as aforesaid, the said fund of fifty-five thousand dollars in the hands of the said bankrupt, as trustee for his mother, became the individual property of the said bankrupt and was then in his possession in cash or in securities.

Your petitioner further avers that in the schedules annexed to his petition in bankruptcy, the said bankrupt has made no mention of his interest in the aforesaid fund. That the said fund or the securities in which the same was invested is within the knowledge of the said bankrupt, and that he has failed to disclose the same to your petitioner, as trustee in bankruptcy. That the said fund and the securities in which the same are invested properly belongs to your petitioner as such trustee, being "property which prior to the filing of the petition, he could by any means have transferred or which might have been levied upon and sold under judicial process against him," within the meaning of section 70 of the National Bankrupt Act, and the same lawfully belongs in the custody of the said trustee and is applicable to the payment of the debts of the said bankrupt duly proved against him.

Wherefore your petitioner prays your Honorable Court to make an order requiring the said William B. Wetmore to pay over to the petitioner, as trustee in bankruptcy, the sum of fifty-five thousand dollars or deliver the same to him in securities therefor as above set forth.

And your petitioner will ever pray.

G. Plantou Middleton.

To this petition the bankrupt interposed a general demurrer which was sustained and the petition dismissed by the court below June 12, 1900. The revision of this proceeding is the object of the petition now before us. It is not disputed that the trustee upon or shortly after his appointment became duly qualified to act as such, nor that Samuel Wetmore, the father of the bankrupt, had at the time of his death his domicile in New York. The sole question for our determination is whether on the facts disclosed William B. Wetmore, not as testamentary trustee, but in his individual capacity, had at the time of his adjudication as a bankrupt any "property" in the unexpended balance of the fund mentioned in the fourth item of his father's will and in his mother's will, "which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him." The fact that Sarah T. Wetmore limited or appointed the fund or what was left of it to the bankrupt is unimportant. Property acquired by a bankrupt only after the filing of a petition in bankruptcy does not pass to the trustee. While the interest or estate which one takes by virtue of the execution of a power of appointment is acquired under the authority of the power and is referable to the title of the donor, and not to that of the donee of the power, such interest or estate cannot vest before such execution. Mrs. Wetmore did not

die until after the adjudication, and her will, by which she executed the power of appointment conferred on her by Samuel Wetmore, spoke only from her death. Nor is it material that the bankrupt might for a valuable consideration prior to the filing of the petition by contract in the form of an assignment, or by executory contract, have barred or precluded himself from enjoying or have become bound to permit others to have the exclusive benefit of, the fund in question. One may by deed of conveyance estop himself from claiming title to, and by executory contract may be obliged to transfer to others, property wholly acquired after the execution of such deed or contract. The trustee has no claim to the fund unless the bankrupt had some title to it at the date of the adjudication. It is the "title of the bankrupt, as of the date he was adjudged a bankrupt," which is "vested by operation of law" in the trustee; and this title, so far as pertinent to this case, must be to "property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him." A bare possibility or mere expectation of acquiring property does not constitute property or a title to property; nor can it be transferred or levied upon. While the right of enjoyment may be uncertain and contingent, it is necessary that an interest or title of some kind be vested in the bankrupt in order that it may pass by operation of law to the trustee. If the contingency or uncertainty be such as relates to the person, and not merely to the event, and he who is to take remains unascertained by name, designation or description, obviously no given individual while so unascertained can be held to have a property right to or in the subject matter of the gift or limitation. Samuel Wetmore by the fourth item of his will bequeathed the fund in question, being personalty, to his executors in trust to pay the income thereof to his wife so long as she should live, and conferred on her a general power of appointment of the fund and its accumulations by will. The testator then proceeds as follows:

"In default of such disposition by will I give the said trust fund upon her decease to my own then surviving next of kin in like manner and shares as if the same were to be then distributed as my own proper estate dying at time intestate."

The fourth item contains prior to the above quoted provision no reference either to children or to next of kin. The natural import of the language is that on the death of his wife his next of kin were to take only in the event and to the extent of her failing to execute the power of appointment, and that in such case the next of kin who should take were to be his "then surviving next of kin" and should take the trust fund only in like manner and proportions as if the same were "then distributed" as his own estate, he dying at that time intestate. The next of kin who were to take in default of appointment might or might not include a child or children of the testator, or might or might not include his more remote issue. Within his contemplation either collateral kindred or direct descendants might constitute the ulterior beneficiaries of the fund. His intent was clear that only such of his next of kin as should be living

at the time of his wife's death should in any event share in the fund. There being no provision for children either by name or as a class, the fact that the bankrupt was his child is without special significance. The argument that he had prior to his adjudication a transferable interest in or claim to the fund is no stronger than it would have been had he been only one of the collateral kindred of the testator and the latter had died without leaving issue. The next of kin not only could not be ascertained until the death of the life beneficiary, but even then could not take except in so far as she should fail to execute the power of appointment. While it is true, as a general rule, that the existence of such a power does not prevent the vesting of interests or estates limited in default of appointment, it may tend in some instances, when considered in connection with the language used in their creation, to determine whether they are of a vested or contingent character. Section 13, tit. 2, c. 1, vol. 3, Rev. St. N. Y., is as follows:

"Section 13. Future estates are either vested or contingent. They are vested when there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the intermediate or precedent estate. They are contingent whilst the person to whom, or the event upon which they are limited to take effect, remains uncertain."

If this statute furnishes the rule applicable to personalty, it fails to support the contention of the petitioner. The bankrupt would not under his father's will have had an immediate right to the fund if his mother had died prior to the filing of the petition in bankruptcy. Whether he would have become entitled at that time under the fourth item would have depended upon an event wholly beyond his control, namely, the execution or non-execution by his mother of the power of appointment. Reference is also made to section 35 of the same title and chapter. It is as follows:

"Section 35. Expectant estates are descendible, devisable, and alienable in the same manner as estates in possession."

This section has been held to apply to personalty. The difficulty encountered in the practical application of this provision is found in the determination of what constitutes "expectant estates." If the bankrupt had an expectant estate it undoubtedly passed to the trustee. But if he had no claim or title, absolute or defeasible, vested or contingent, but merely an expectation of an estate or interest in the future, then there was nothing in him to pass to the trustee. It is contended on the part of the petitioner that the limitation to the testator's next of kin vested on his death in the bankrupt a present right to the fund, subject to divestiture by the death of the latter during his mother's life time or by her execution of the power of appointment, and that this right had a marketable value and was properly within the meaning of the bankruptcy act. But it was not necessary to the accomplishment of the plain purpose of the testator that the bankrupt should during the life time of his mother have either a vested or a contingent right to the enjoyment of the fund on and after her death. Enjoyment of the fund by him under his father's will was absolutely dependent upon his survival of his mother and her failure to appoint the fund exclusively to oth-

ers. A right to such enjoyment could not be created by his survival of his father, but could arise only from his survival of his mother coupled with a default of appointment by her. During her life time he could neither enjoy nor transmit a right to enjoyment. Had he died before her, neither his personal representatives nor his issue or other kindred could, on her death, by claiming under him have entitled themselves to the fund or any part of it. Those who were to enjoy the fund on her death without appointment were to take, not by succession from or as representatives of others, but as purchasers under the will of the testator, then for the first time ascertained as constituting his "then surviving next of kin." One may have a contingent right to a future interest or estate. So one may have a right in or to a future contingency. But it cannot with legal propriety be affirmed of anyone that he has either a contingent right or a right in or to a contingency unless the person of whom the affirmation is made is ascertained by name, designation or description. The relationship of the bankrupt at the time of filing his petition to the fund in question bears a striking analogy to the position of an heir apparent with respect to the inheritance. The heir apparent can take only in case he survives his ancestor and to the extent to which the latter shall not have disposed of the inheritance to others. The bankrupt could, under his father's will, take only in case he survived his mother and to the extent to which she should have failed to limit and appoint the fund to others. Courts have frequently gone far, and sometimes apparently in contravention of the intent of the testator as disclosed by his language, in holding future or expectant interests vested. But we are aware of no well considered case which can serve as an authority for holding that the bankrupt had during the life time of his mother by virtue of the will of his father any title, claim or interest to or in the fund in question capable of being transferred by him or taken in execution within the meaning of the bankruptcy act.

The order of the court below dismissing the petition of the trustee is affirmed.

In re CONN.

(District Court, D. Oregon. April 17, 1901.)

No. 230.

1. BANKRUPTCY—DISCHARGE—FRAUDULENT CONCEALMENT OF ASSETS.

Facts and circumstances showing a fraudulent concealment of assets by a bankrupt, which will defeat his right to a discharge, must be proved, and will not be deduced as a matter of doubtful inference, from other facts and circumstances.

2. SAME.

A bankrupt and his wife were stockholders in a company which owned and conducted a retail drug store. The property of the company was conveyed to a trustee, with power to sell the same, and was subsequently sold to the bankrupt's wife; the purchase money being furnished by a wholesale house, which organized a new company to take the property, retaining half the stock, and assigning the other half in equal shares to the bankrupt and his wife, but delivered to them but one share each, re-

taining the remainder as security for the purchase money advanced. This transaction was eight months before the filing of the petition in bankruptcy. The bankrupt scheduled but the one share of stock held by him. *Held* that, in the absence of evidence of actual fraudulent intent, or that the stock in the hands of the wholesale house was worth more than the bankrupt would be compelled to pay to obtain it, its omission from the schedule did not constitute a fraudulent concealment of assets, or the making of a false oath, which barred his right to a discharge.

In Bankruptcy. On objections to application for discharge.

Charles W. Fulton, for objecting creditors.

F. D. Winton, for bankrupt.

BELLINGER, District Judge. This matter comes on to be heard upon objections, filed by certain creditors of the bankrupt, to his discharge, upon the ground that he has concealed, while a bankrupt, from his trustee, property belonging to his estate in bankruptcy, and that he has made a false oath in relation thereto in the bankruptcy proceeding. The facts, in substance, are as follows: Conn, prior to the filing of the petition in bankruptcy, was a stockholder in a company known as the "Estes-Conn Drug Company," engaged in carrying on a retail drug store in the city of Astoria, Or. The other stockholders in the company were Conn's wife and one Estes and wife. The business of the corporation not being in a satisfactory condition, and disagreements existing between its stockholders and directors as to the management of its business, the corporation, on the 2d day of December, 1898, constituted Louis Blumauer, of Portland, its trustee, with authority to take possession of the drug store and business; and if, in his judgment, it was to the best interests of all concerned that the same should be sold, then said trustee was authorized to sell and transfer said property, either at private or public sale, to the highest bidder, upon 10 days' notice to the parties in interest. Thereafter, and in May, 1900, after twice advertising such property for sale, the trustee sold out the drug store and business to Mrs. Conn, the wife of the bankrupt, for \$1,680. The money for the purchase was furnished to Mrs. Conn by the Blumauer-Frank Drug Company. Thereupon a new drug company was organized, at the instance of the Blumauer-Frank Company, with a capital stock of \$2,000, divided into 40 shares, of \$50 each. These transactions took place more than eight months prior to the filing of the petition in voluntary bankruptcy by the bankrupt, Conn. Conn, in filing his schedules in bankruptcy, represented himself as the owner of one share in this new drug company. The objecting creditors now say that Conn was in fact the owner of one-half of the 40 shares in the capital stock of the company; that 10 shares of this stock stood in the name of Mrs. Conn, and the other 10 shares in the name of Conn himself; but that, as a matter of fact, the entire 20 shares belonged to the bankrupt. The creditors further say, as to the value of this stock, that at the time of the sale by the trustee the stock and business on hand were of the value of \$5,000, and that said stock has been kept up in the present company, and is of equal value with that of its predecessor. So far as appears, no book of subscription of stock was kept. None has been found, although diligent search has been made therefor. It is therefore diffi-

cult to determine whether there was any such subscription, and, if not, how the shares of the company came to be issued. It is apparent that the new drug company was organized by the Blumauer-Frank people in the furtherance of their own business as wholesale dealers, and that they disposed of the stock as best suited their own convenience. It appears that, in the allotment of stock, one half was taken by the Blumauer-Frank Company, and the other half divided between Conn, the bankrupt, and his wife, and that 18 of the shares of Conn and his wife were held by the Blumauer-Frank Company as security for \$837, that being one-half of the purchase price of the original stock bought in by Mrs. Conn at the trustee's sale; so that it would appear that the purchase at that sale was made by Mrs. Conn under an arrangement with the Blumauer-Frank Company, who, allowing her and her husband one-half of the stock in the new company, kept that interest to secure themselves for the half of the purchase price paid by Mrs. Conn at the trustee's sale. It was the Blumauer-Frank Drug Company's plan to continue the business at Astoria, under the management of Conn and his wife, and to that end to interest Mr. and Mrs. Conn in the business with themselves. When Conn filed his petition in bankruptcy he had but one share of the stock of the new company in his possession. The other nine shares were held by the Blumauer-Frank Drug Company as security for the payment of the stock. The same is true as to the interest of Mrs. Conn. Conn, in his statement of assets, reported but one share of stock as belonging to him, and subsequently testified to the same effect. The objecting creditors contend that the entire 20 shares of stock are the property of Conn, and that he fraudulently concealed the fact of his ownership, and testified falsely in respect to it, for the purpose of defrauding his creditors. Before filing his petition in bankruptcy, Conn sent his wife to Portland to make inquiry of the Blumauer-Frank Company as to his holdings in the company. L. Blumauer testifies that he told Mrs. Conn that her husband had only one share of stock; that he did this because he considered the other nine shares tied up as collateral.

The transfer of the business of the Estes-Conn Drug Company to Blumauer as trustee, and the subsequent sale by Blumauer, under his trust, of the property to Mrs. Conn, are not, and cannot be, attacked in this proceeding. There is nothing in the transaction that tends to impeach its fairness and good faith. It was a proceeding in the interest of creditors, so far as appears. Blumauer testifies that the property had been advertised twice prior to the sale, and there is nothing to show that the price paid was not adequate, under the circumstances. This is the source of the title which Conn and his wife have in the stock standing in their names. There is no complaint about it, and no ground for complaint; and there is no reason, in law or in morals, why the stock held by Mrs. Conn should be treated as the property of her husband. As already appears, the money with which she paid for the stock was furnished by the Blumauer-Frank Company. If the company had seen fit to allow her to retain exclusive ownership in the new concern, the husband's creditors would *have had no reason to complain*. The Blumauer-Frank Company sub-

scribed one half of the stock in the reorganized company, and retained all but two shares of the remaining half to secure themselves for the money so advanced. The interest of the bankrupt consists of the 10 shares held by him. Was his representation, then, a false and fraudulent one? There is nothing to show that it was fraudulent. The inference is that he knew of the purpose of the Blumauer-Frank Company to continue the business at Astoria under some such arrangement as was in fact effected; but of the details of this, as to the interest which was to be assigned to him, he was ignorant. In law, the nine shares held by the Blumauer-Frank Company, assigned by him, were his property; but, since they were not paid for, his act in omitting these shares from his schedule of assets, upon the representation of Blumauer to Mrs. Conn that Conn owned but one share, ought not to be attributed to an improper motive. It does not appear that these shares are now, or have at any time been, worth more than the debt for which they are held as collateral security. In equity the transaction amounts to one of option on the part of Conn to acquire these shares by paying for them, which he has not yet done.

In order to justify a complaint at what has been done, it ought to appear that these shares have a value substantially higher than their par value; and this does not appear, nor is there any fact or circumstance in the case which warrants an inference that such is the fact. It is claimed that the original stock of the Estes-Conn Company was worth \$5,000, and that the present stock is of equal value. For the purposes of this case, the bankrupt's property must be treated as of the value it will bring at a sale, and it must be remembered that the property of the Estes-Conn Company sold for \$1,675. There is nothing to impeach the openness and fairness of this sale, or that questions the reasonableness of the price at which the property was sold. By the same test, the property of the present company cannot be said to be worth more than the par value of the stock of that company; and the probabilities are that the nine shares of stock held by the Blumauer-Frank Company for the bankrupt when he shall pay for them are not worth more than the \$418.50 for which these shares are held, and until it appears that this stock is worth appreciably more than this sum there is no room to complain on the part of the creditors. The entire transaction is simply one where a large creditor has undertaken to preserve the business of the insolvent corporation by organizing a new corporation, and has seen fit to interest a part of the old owners in the new venture.

The creditors' interest in this transaction must be measured by the actual present value of the bankrupt's interest held for him by the Blumauer-Frank Company, and that interest consists of nine shares of stock not included in the bankrupt's schedule of assets, and one share that is so included. Facts and circumstances, to justify an inference of fraud, must be proved, not deduced as a matter of doubtful inference from other facts and circumstances. As already appears, with the sale of the business of the Estes-Conn Drug Company by L. Blumauer, as trustee, to Mrs. Conn, for a consideration furnished by the Blumauer-Frank Drug Company, this court has noth-

ing to do. That is an accomplished and unquestioned transaction in the case, and is the means whereby the stock sought to be applied as a part of the bankrupt's estate was acquired. It may, I think, be assumed that the Blumauer-Frank Company would not have gone into an arrangement to give Conn and his wife stock for \$838 that had a value of \$2,500, or that was worth appreciably more than they required to be paid for it. That they dealt with Conn and his wife upon a strictly business basis is shown in the fact that they retained all but the two shares necessary to qualify the Conns to hold office in the corporation as security for the price to be paid. In the transaction out of which the bankrupt's interest in the stock in question arises the creditors have lost nothing, and I am satisfied that out of such stock, if it was treated as a part of the bankrupt's estate, they could realize nothing above the purchase price for which it is held as security. The objections to the bankrupt's discharge are overruled.

In re BLAIR.

(District Court, D. Massachusetts. April 30, 1901.)

No. 4,538.

BANKRUPTCY—AVOIDANCE OF LIENS—ATTACHMENTS.

An attachment on mesne process under the statutes of Massachusetts, which creates a lien, under the decisions of the courts, enforceable, however, only by obtaining judgment and issuing execution thereon within a limited time, is not discharged, under Bankr. Act 1898, § 67f, by the filing of a petition in bankruptcy against the defendant more than four months after such attachment was levied, although the judgment was not obtained until within the four months; nor are the judgment and execution issued thereon rendered void by such section, since they do not affect with a lien the property attached, but only enforce the lien already existing, and which, having attached more than four months before the filing of the petition, is, by necessary implication, preserved by the act.

In Bankruptcy. On certificate of referee.

W. F. Kimball, for creditor.

William A. Knowlton and Samuel O. Reinstein, for bankrupt.

LOWELL, District Judge. In this case the personal property of the bankrupt was duly attached on mesne process in this commonwealth more than four months before the filing of the petition in bankruptcy. Thereafter, and within four months before such filing, judgment was entered against the bankrupt, execution was taken out, and a levy was made. The petitioner contended that the judgment, execution, and levy were avoided by section 67f of the bankrupt act; and the question here presented concerns the effect of that subsection upon a Massachusetts attachment made more than four months before the filing, when the execution and levy were within such four months. The material part of the subsection reads as follows:

"All levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months

prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same."

In *Re De Lue* (D. C.) 91 Fed. 510, it was said that the provisions of section 67f were limited to involuntary bankruptcy. The remark was hastily made, both counsel in that case having agreed in argument upon that construction of the section. It was clearly erroneous, and has long been treated in this district as overruled. Section 67f avoids certain liens, if created within four months. This is its object. It does not avoid judgments or levies, except so far as these create a lien. In *re Kavanaugh* (D. C.) 99 Fed. 928; In *re Lesser*, 5 Am. Bankr. R. 320, 324.¹ It releases the property affected by levies, judgments, and attachments, so far as these create a lien. Now, an attachment, in and of itself, and without further proceedings, creates a lien in Massachusetts. This has been decided by the supreme court of the United States in *Peck v. Jenness*, 7 How. 612. With this decision agrees that of the supreme court of Massachusetts in *Davenport v. Tilton*, 10 Metc. (Mass.) 320; and, if it be possible that these concurrent decisions leave a doubt in the matter, that doubt is resolved by the present bankrupt act, which itself speaks of attachments as liens. If any attachment creates a lien, then no doubt this is such an attachment. Hence, if the attachment be made more than four months before the petition is filed, the attachment and the lien which it creates are both preserved, by necessary implication, as against the operation of the bankrupt act. If, therefore, the plaintiff had here permitted his suit to stand without proceeding to judgment, his attachment would necessarily have remained a lien upon the property attached until dissolved by some proceeding outside of bankruptcy. It is urged that whatever be the lien created by an attachment, standing alone, that lien cannot be enforced by judgment entered or levy made within four months of the filing of the petition. Where, however, the lien is created by the attachment, the judgment and levy create no new or additional lien, but only enforce a lien already existing. Hence in this case the levy and execution did not affect the property attached with a lien avoided by the bankrupt act, but only enforced a lien already existing, which lien the bankrupt act expressly protected. The meaning of the subsection appears to be this: Under some circumstances, all liens obtained through legal proceedings are avoided, in whatever part of the suit or by whatever form of proceeding they are created. If the lien is created by the levy, then the lien of the levy is avoided; if created by the judgment, then the lien of the judgment is avoided; if created by the attachment, then the lien of the attachment is avoided; but, if the lien created by the attachment is saved, that lien may be enforced by appropriate proceedings, even though such proceedings include a judgment and levy made within the limited time. I am aware that this decision is in substantial conflict with *In re Lesser*, 3 Nat. Bankr. N. 361, 108 Fed. 201. With the utmost respect for the learned and distinguished judge who

¹ Case certified to supreme court, and opinion withdrawn.

decided that case, I find myself unable to agree with him. The larger part of his opinion is devoted to establishing that an attachment does not create a true lien, but the argument appears to me answered by the cases above cited, and by the express language of the subsection under consideration. Section 67f declares, in substance, that an attachment is a lien, and that, if an attachment is made more than four months before the filing of the petition, the lien created by the attachment is preserved. In *Re Lesser*, 5 Am. Bankr. R. 320, the circuit court of appeals for the Second circuit held that a so-called equitable lien obtained under the law of New York by the commencement of a creditors' suit in equity was avoided by section 67f, though the creditors' bill was filed more than four months before the filing of the petition. The nature of a lien created by state law is ordinarily to be determined by the courts of the state. Doubtless the circuit court of appeals correctly followed the state courts of New York in determining the effect of filing a creditors' bill. Of this so-called lien, the court of appeals said at page 324:

"It is sometimes called an inchoate lien, or a contingent lien, but it is not a right in, or a right to hold, a particular article of property. It is not like the lien obtained by the attachment of personal property in an action at law by virtue of which a sheriff obtains either actual or constructive possession of the property attached, and in such a case the lien is not obtained by the judgment, but by the attachment, and we are not now prepared to say that if the judgment is rendered within four months after the petition in bankruptcy is filed that the lien by attachment is vacated."

It was urged in argument that the act of the bankrupt in failing to dissolve the attachment and permitting the sale of the property attached would be the suffering of a creditor to obtain a preference, under section 3a (3) of the bankrupt act, although the attachment was made more than four months before the petition in bankruptcy was filed. *Manufacturing Co. v. Stoevers*, 38 C. C. A. 200, 97 Fed. 330. It was further argued that, if the creditor thus obtained a preference, that preference would be voidable, under section 60b. It is not easy to reconcile all the language concerning preferences and liens in the bankrupt act, but the argument thus drawn from sections 3 and 60 does not appear to me strong enough to meet the language and plain implication of section 67f. In *Manufacturing Co. v. Stoevers*, above cited, it was said by the circuit court of appeals for this circuit:

"In order to prevent any misapprehension, we will add that the question whether or not the attaching creditor acquired a valid lien as against these proceedings in bankruptcy is not in issue on this appeal."

The decision rendered by the referee, expressly following *In re Lesser*, 3 Nat. Bankr. N. 361, 108 Fed. 201, is reversed, and the injunction issued by him is dissolved. Of course, the judgment cannot be enforced against the bankrupt personally.

McFARLAND CARRIAGE CO. v. SOLANES et al. (JAMES, Intervener).

(Circuit Court, E. D. Louisiana. March 2, 1901.)

**BANKRUPTCY—SUIT TO RECOVER FUND FROM TRUSTEE—RIGHT OF LIEN CLAIM-
ANT TO INTERVENE.**

An action was brought in a circuit court against the trustee of a bankrupt to recover personal property of which defendant had taken possession as a part of the bankrupt's estate, but of which plaintiff claimed to be the owner. The court found plaintiff to be the owner of the property, and rendered judgment for its recovery. Pending the action defendant had sold a part of the property by order of the bankruptcy court, and with plaintiff's consent. After the judgment he surrendered to plaintiff the remaining property, but refused to turn over the proceeds of that sold; and plaintiff instituted proceedings, by rule to show cause, in the circuit court, to require its payment. Defendant answered the rule, setting up certain claims on behalf of the estate for taxes and insurance paid on the property, and that the same was subject to a lien in favor of bankrupt's landlord. On a hearing the court dismissed the rule, remitting plaintiff to his remedy in the court of bankruptcy. The circuit court of appeals reversed such decision on appeal, on the ground that plaintiff's ownership of the proceeds of the property sold, as well as the property remaining, was adjudicated by the original judgment, and directed the entry of an order by the circuit court making the rule absolute. After the cause had been remanded, the landlord of the bankrupt intervened, claiming a landlord's lien, under the statute, against the property for rent due prior to the bankruptcy, which he sought to enforce against the fund in the hands of defendant. *Held*, that such fund, having been received by defendant, in his official capacity, under the orders of the bankruptcy court, was in custodia legis; that such question was not presented to or passed upon by the circuit court of appeals; and that the intervener, not having been a party to the action, was not concluded by the judgment, and was entitled to assert his claim to a lien against the fund.

On Rule to Show Cause.

Denegre, Blair & Denegre, for plaintiff.

Rice & Montgomery, for defendant.

Saunders, Gurley & James, for intervener.

BOARMAN, District Judge. The original suit, still pending, was brought on a rule nisi on the trustee to show cause why a certain fund in his hands as the "trustee of the estate of E. C. Fenner, bankrupt," should not be paid over to the McFarland Carriage Company. The intervention of A. De Gasquet-James, now on trial, is to secure a landlord's lien on that fund. E. C. Fenner was a carriage dealer in New Orleans. On the 26th of May, 1899, he was adjudicated a bankrupt. In June following, Claude D. Solanes was appointed trustee. Fenner turned over to Solanes, trustee, as a part of his estate, a lot of carriages which were then in the storehouse leased, by the bankrupt, Fenner, from the intervener herein, who then held certain unpaid monthly rent notes, against Fenner, for back rent and for the unexpired term of the lease. The McFarland Carriage Company, a citizen of Indiana, claiming to be the legal owner of said certain lot of carriages, and, having made demand in vain on the trustee for the carriages, instituted a suit in the circuit court against "Claude D. Solanes, trustee of the estate

of E. C. Fenner, bankrupt," to recover title to and possession of said carriages. The plaintiff therein obtained a final judgment; the circuit court decreeing it to be the legal owner of the same, and that they were no part of Fenner's estate. During the pendency of that suit, and before a decree therein, for title to the carriages, the bankrupt court, at the instance of the trustee, and with the consent of the McFarland Carriage Company, ordered the trustee to sell some of said carriages. A number of them were sold, accordingly, and the proceeds, \$819.50, were deposited, presumably, by the trustee in the depository designated by the bankrupt court to the credit of the bankrupt's estate. After the final decree mentioned herein, in which plaintiff was adjudged to be the owner of the entire lot of carriages, the plaintiff, McFarland Carriage Company, instituted a suit, on a rule to show cause, against Solanes, trustee, why the money for which the carriages were sold should not be paid over to the company. On this rule the circuit court entered judgment as follows: "Dismissing the rule, and reserving to the plaintiff the right, if it be so advised, to institute proceedings in the bankrupt court in this district." On writ of error to the circuit court of appeals, this judgment dismissing the rule was reversed. 106 Fed. 145. After the mandate therefrom was sent down, the intervener, claiming that the lot of carriages sold in pursuance to the bankrupt court's order were, with the consent of said company, on the premises leased from him by Fenner, on the date he was adjudged to be a bankrupt, instituted his intervention to recover a lien on the said proceeds for all the unpaid rent evidenced by the several lease notes.

The articles in the Revised Civil Code relied upon for the lien claimed are as follows: Article 2705 provides, "The lessor has for the payment of his rent and other obligations of the lease a right of pledge on the movable effects of the lessee which are found on the property leased." Article 2707 provides, "This right of pledge affects not only the movables of the lessee, and under-lessee, but all those belonging to third persons when their goods are stored in the house or store by their own consent, express or implied." The McFarland Carriage Company resists the claim made by the lessor on the said fund: First, because the fund is not now, or has not been, in custodia legis; second, that under the law plaintiff is not entitled to be paid out of the fund on any of the lease notes; third, that the trustee represents the mass of creditors in the management of the bankrupt's estate, but they (the creditors) may and must for themselves, in their own right, pursue the property in the prescribed period, or lose their privilege.

The contention of defendant's counsel as to the property or fund not being in custodia legis is founded, as it appears from his argument, largely on what he says is the legal import of the language which counsel quotes from the opinion of the court of appeals reversing the circuit court's judgment on the motion to show cause, which quotation is as follows:

"In addition to the facts above recited from the transcript of the record, we learn from the brief of counsel submitted on behalf of the defendant trustee that pending a decision of the suit (intermediate the filing of the petition

and the decree), and with the consent of the plaintiff, sales were made of the goods claimed, and the trustee retained the proceeds of the sale of the goods to respond to the final judgment of the court. * * * It thus appears that the defendant trustee did not receive this fund as the trustee of the bankrupt, but as trustee of the parties to the present suit, and to respond to the final judgment of the court therein."

Counsel contends that this statement appearing in the court of appeals opinion has the legal effect, in the pending suit, of *res judicata* on the issue as to whether or not the fund in question is in *custodia legis*. He further contends that the circuit court of appeals, in reversing the circuit court's judgment on the rule nisi, passed on that issue finally, and adversely to the pending claim of the intervenor, and the question now of *custodia legis* is no longer an open one. A transcript of the record, showing the case that was tried, on the rule nisi, in the circuit court, between the carriage company, plaintiff, and Solanes, "trustee of the estate of E. C. Fenner, bankrupt," as defendant, shows all the evidence which was administered therein by either side, and is now before this court as a part of intervenor's evidence. There does not seem to be anything in that transcript to show that the trustee, Solanes, held the fund otherwise than in his official capacity, or that any issue of law or fact pertaining to the matter as to whether or not the proceeds in question were or were not in *custodia legis* was material to the determination of the claim made by the McFarland Carriage Company for said proceeds on the said trustee. It seems from the evidence in the said transcript that the matter heard and passed upon therein by the circuit court was limited to the question as to who was the legal owner of the carriages or proceeds thereof, and there was no issue therein as to where the fund then was, or as to in what capacity it was then held by Solanes. The facts not disputed show that the carriages were scheduled as the bankrupt's property, and that as such property they were turned over to the trustee, who took possession of them and subjected them to his official possession, as he did other property belonging to the bankrupt; that subsequently the carriage company made demand for their property on the trustee of the bankrupt, which was refused by him; that the trustee asked for and received an order from the bankrupt court to sell certain carriages at private sale, and in the court's order there was reserved all the rights of interested parties over the proceeds (then in the bankrupt court's depository) of the sale. It appears, too, that the carriage company consented, on certain conditions, for the trustee of the bankrupt to make the sale; that the proceeds of the sale are now in the bankrupt court's depository, to the credit of the trustee; that plaintiff, the landlord, now intervening in this suit, was not a party to any of the proceedings heretofore had in the circuit court. On this statement of undisputed facts, it appears that the carriages, even though they did not belong to the bankrupt at the time of the adjudication, were then, as the proceeds of said sale are now, in the legal custody of the trustee of the bankrupt; that suit was instituted against him, as the trustee of the bankrupt, for the recovery of the carriages. It appears, too, as a legal presumption, that the McFarland Carriage Company consented that Solanes,

as the trustee of the bankrupt, should sell the carriages and hold the proceeds thereof as such trustee; that Solanes, having the same in his possession as an officer of the court, could not have delivered them to the McFarland Carriage Company except upon a judicial order, nor could he have sold them except on authority of the court for which he held them. Certainly he came into possession of them in his official capacity as the bankrupt's trustee. His possession was not that of a trespasser, but it was the possession of the bankrupt court, to whom the surrender of the bankrupt's estate had been made.

Notwithstanding the suggestion contained in the circuit court of appeals' opinion to the effect that Solanes held the fund in his personal relation to the parties, and not in his official relations, it must be conceded, I think, that a trustee becoming possessed of property turned over to him by the bankrupt, and listed in the schedule of the bankrupt's assets, could not, on his own motion, change his official relations to the property in his possession so as to hold the proceeds of the sale made under judicial authority as an individual trustee, in a personal sense, of the parties to that suit. Considering the issues involved in the rule nisi, I do not think the trial court would have been authorized to admit evidence on either side to show that Solanes consented to disclaim or to forego the legal possession of the carriages or fund, or of his official relations to either the carriages or fund, and to assume merely personal relations, while holding the fund, between the parties affected by the court's order to sell the property. Considering all the proceedings preliminary to the adjudication, inclusive of the schedules showing the bankrupt's estate which was surrendered to the trustee, the law will presume that Solanes, at the time the rule was heard in the circuit court, held the proceeds of that sale as the trustee of Fenner, the bankrupt. This presumption, in the absence of proof to the contrary, shows the legal status of the fund. In fact, the plaintiff in the rule nisi, the carriage company, demanded the carriages, and afterwards the money, from Solanes, trustee, sued Solanes, trustee, for the proceeds, and, it seems, consented that a sale be made by Solanes, trustee. It clearly was not permissible, in law, to either party to that rule, to show that Solanes held the fund otherwise than in his official capacity. The rule nisi instituted by the carriage company was, so far as its purposes are disclosed in the rule, limited to the recovery, as against Trustee Solanes, of the proceeds of a judicial sale, which were then, presumably, in the bankrupt court's depository. The defendant trustee therein put at issue, under his sworn answer, other issues than the matter as to the legal ownership of the carriages. Among such matters, he alleged that the lessor of the store in which the carriages were at the time of the adjudication held unpaid claims for rent against the estate; that the law imposes a lien in the landlord's favor, for a pro rata part of the unpaid rent, on the carriages on his premises. Such issues presented in the answer of the defendant, it seems, by the judgment of the circuit court, were passed upon favorably to him on the trial of the rule. It was the purpose of the trial court in dismissing the rule that the fund should be held

for a hearing in concurso in the bankrupt court. But those issues, and the favorable decision, of the trial court upon them, to Solanes, trustee, seem to have been disregarded in the decision of the circuit court of appeals, leaving the claimants, for such liens on the carriages without a day in court, unless, notwithstanding the decision of the circuit court of appeals, the intervener herein may have a right to a trial in this suit on his claim for a lien on the fund now in the depository of the bankrupt court. If the contention of the counsel for defendant upon the issue as to the fund not being in custodia legis is well founded in fact and law, it may be that the intervener in this suit has lost his lien upon the said fund as the result of a final decision of a court in which he was not a suitor, which, operating as it does directly and peremptorily on the trustee, takes from the jurisdiction of the bankrupt court a fund in its judicial possession, upon which fund, under the state of case herein submitted, he is entitled to a landlord's lien. All of the material evidence heard on the rule nisi was directed to the purpose of enabling the trial court to determine the legal ownership of the proceeds from a judicial sale of the carriages. To determine that single issue, it was a matter of no material importance to the plaintiff as to how or in what capacity Solanes then held the money. There was no testimony on the issues tendered by the respondent in the rule, except his sworn answer stating that he held the money in his official capacity as trustee of the bankrupt's estate; that he claimed under oath that the fund was in custodia legis. There seems to have been no evidence to the contrary. On this state of case, I think it is fair to assume that Solanes was then, as he is now, holding the fund as the trustee of the bankrupt's estate. A thing is in custodia legis when it is shown that it has been and is subjected to the official custody of a judicial executive officer in pursuance of his execution of a legal writ. The officer holding such a thing cannot, after he has made his return on the writ, release it on his own motion to any one claiming title to the thing. The status of the thing so seized, as to third parties, is fixed by his return, and its status can be changed only by an order of the court. If a defendant on whom a marshal is executing an attachment writ turns over movables, the ownership of which he claims, to such officer, the marshal, after he has made his return to the court showing that such things were subjected to his custody in pursuance of his execution of the court's writ, is dispossessed of any power to treat with the parties to the suit in relation to the thing being so held by him in any other than his official capacity. The thing so seized by him, without reference to the question as to whether or not the defendant turned over the property of another person, will remain, by operation of law, in custodia legis until it is withdrawn from such custody by the order of a competent court.

Considering the state of case now presented on behalf of the intervener, I do not think the question of custodia legis, vel non, of the said proceeds, could have been an issue conclusively passed upon adversely to him by the appellate court. It appears on reading the opinion of the appellate court that the proceeds of the sale which

were claimed by the carriage company were treated as representing and standing instead of the carriages, to which title in the carriage company had been vindicated in the preceding suit, wherein the circuit court gave a final judgment in favor of the carriage company adverse to Solanes, trustee. The court of appeals, notwithstanding part of the carriages had been sold, and the money placed by the trustee in the court's depository, and notwithstanding the issues tendered in the trial court on behalf of the respondent in his sworn answer, did not think it advisable, under their view of the state of case, to give them favorable consideration, or to direct that the plaintiff, who recovered title in the carriages and to the proceeds, which stood in lieu of a part of the carriages sold under the bankrupt court's order, should go with the decree of the circuit court (responsive to the mandate of the appellate court) to the bankrupt court of this district for the satisfaction of the final judgment, vindicating its right to the proceeds of the judicial sale.

It appears from the final decree of the circuit court on the rule nisi, which decree is now executory, that the execution thereof responsively to the mandate of the circuit court of appeals will operate directly on the proceeds of the judicial sale made under legal process from the bankrupt court; that Solanes will have to respond to the final judgment in the capacity in which he was sued on the rule (that is, as "the trustee of the estate of Fenner, bankrupt"); that in so responding he will have to pay over to plaintiff in the rule such said proceeds as are now in the bankrupt court's depository to the credit of the said estate; that said trustee will have to pay from the funds of the estate all costs incurred in the suit against him in his official capacity. Notwithstanding such conditions follow the decision of the circuit court of appeals, it is contended that it was the judicial purpose of that court to decide against all parties, including this intervener, who may have or claim an interest in the fund; that Solanes, though sued in his official capacity, held the said proceeds at the time the rule was filed, and holds the same now, not as the trustee of the bankrupt, but as a mere stakeholder for all parties to the rule. This contention is made, as to the legal effect of the language quoted by counsel from the court of appeals opinion, in the face of the fact, which seems to be conceded in argument, that there was no evidence in the trial court tending to show that his relations to the fund in question were other than those of an administrator whose legal duty it is to hold the same for the court appointing him until it is legally withdrawn from judicial custody. It is not contended that the proceeds may not be legally withdrawn under an executory writ responsive to the said mandate. Under frequent judicial interpretations of the bankrupt law respecting the subject-matter of this suit, I think, after the date upon which Fenner was adjudged a bankrupt, the said carriages ceased to be on the leased premises either with the express or implied consent of the owner thereof, and the intervener is not entitled to a lien after the date of such adjudication. Conceding that the rule of law stated in the third proposition is well founded, it is not applicable to the state of case now submitted. The intervener is not

in court at the instance or with the aid of the trustee, Solanes. He is endeavoring to invoke for himself a day in court to prosecute his claim for a landlord's lien on the said fund. In support of this proposition authorities are cited which show conclusively that the trustee, in responding to the rule nisi, could not at his own instance have set up on the trial of the rule nisi a claim on behalf of this intervener for a lien on the proceeds in his hand. It follows, I think, if Solanes held the fund in question as a stakeholder in a personal sense, the fund was not in custodia legis, and the trial court, in passing merely on the ownership of the fund, was without jurisdiction to allow him in that trial to have his day in court to vindicate his claim for a lien. The question now presented on this intervention, however, is not as to the difficulties which may be in the way of executing the decree of the circuit court responsive to the said mandate; nor do I refer to the judicial views or conclusions expressed in the opinion of the court of appeals with a view of discussing difficulties suggested by counsel as to matter of practice in reaching or subjecting the fund by direct execution, which is shown to be in the bankrupt court's depository to the credit of the bankrupt's estate. Such difficulties as are now suggested by counsel, it must be presumed, were duly considered by the court of appeals in giving direction as to how the circuit court should proceed in making effectual the terms of the mandate. The present question is free from the difficulties suggested. It is limited to the single matter as to whether or not the said proceeds are in custodia legis. On the state of case submitted, I think the fund is in custodia legis. Under the articles of the Civil Code cited herein, I think the intervener should be paid as a landlord entitled to a lien on the fund up to the date of the said adjudication. It may be there was property of the bankrupts or property of third persons other than that of said carriages on the leased premises on the day of the adjudication, upon which the law will impose the duty of making a pro rata contribution to the payment of the lease notes for which a lien is now adjudged in favor of the intervener. If an issue of this kind arises, it will have to be dealt with in the court where such an issue may jurisdictionally appear.

UNITED STATES v. KELLY et al.

(District Court, D. Oregon. April 17, 1901.)

No. 4,522.

1. TREATIES—PROCEEDINGS FOR RESTORATION OF DESERTING SEAMEN—TREATY WITH GREAT BRITAIN.

A treaty made in 1892 between Great Britain and the United States provides that a British consul shall have power to require from the proper authority the assistance "provided by law" in apprehending and restoring deserting British seamen. Rev. St. § 5230, in force at that time, provides that, on application of a consul of any foreign government having a treaty stipulating for the restoration of seamen deserting, it shall be the duty of any court, judge, or commissioner to cause the arrest of a person charged with being a deserting seaman, and, if the facts stated

are found to be true, to deliver up such person, not being a citizen of the United States, to the consul, to be sent back, or to detain him at the request of the consul, and at his expense, until the consul finds opportunity to send him back to the dominions of such foreign government. *Held*, that a commissioner, who, proceeding under such treaty and statute, has adjudged persons to be deserting British seamen, while he may lawfully order their delivery to the consul, or his authorized representative, on board a British ship within the district, had no power to order them restored to the ship "under the directions" of the consul.

2. OBSTRUCTING OFFICERS—EXECUTION OF PROCESS—CONSTRUCTION OF STATUTE.

Where a United States commissioner, having adjudged certain persons deserting seamen from a British ship, on complaint of a British consul, instead of ordering them delivered to the consul, as required by the treaty and statute, in excess of his authority ordered them restored to the ship "under the directions" of the consul, the marshal, in carrying out the directions of the consul to deliver the seamen to the ship by delivering them to the master on board thereof, acts as the consul's agent, and not in the execution of any legal writ or process, and persons who interfere with him while so acting by forcibly taking his prisoners from his custody are not guilty of a violation of Rev. St. § 5398, which makes it a criminal offense to knowingly and willfully obstruct or oppose an officer of the United States in attempting to execute any legal or judicial writ or process.

Prosecution for the Obstructing and Opposing Officers of the United States in the Execution of Process. On demurrer to information.

John H. Hall, for the United States.

Henry McGinn and C. W. Fulton, for defendants.

BELLINGER, District Judge. This is an information for violation of section 5398 of the Revised Statutes. The information charges the defendants with having, on the —— day of August, 1900, at the city of Astoria, in this state, knowingly and willfully obstructed and opposed one A. Roberts and one George Maygers, deputy United States marshals for the district of Oregon, with force and arms, by then and there forcibly taking from the custody of the said deputy marshals one Thomas G. Jefferies, one A. Norbin, one N. Johannson, and one Ole Thomson, who had theretofore, to wit, on the 13th day of August, 1900, at the city of Portland, within the district of Oregon, on a hearing and trial then and there had before Edward N. Deady, United States commissioner within said district, been by said commissioner duly adjudged to be deserters from the ship Cedarbank, a foreign vessel, sailing under the flag of Great Britain; and the said commissioner having duly committed the persons named to the custody of the United States marshal for the district of Oregon, to be by him surrendered and restored to the said ship Cedarbank, under the direction of James Laidlaw, the duly-accredited consul of the kingdom of Great Britain and Ireland at the city of Portland, within the state of Oregon; and the said James Laidlaw, as such consul, having, on the —— day of August, 1900, directed the said United States marshal for the district of Oregon, in writing, to restore the said deserters to the said British ship Cedarbank by delivering them to the master of said vessel, on board thereof, at the city of Astoria; and while the said Jefferies, Norbin, Johannson, and Thomson were still in the lawful custody of the said United States

marshals, the said Kelly and Linville, on the —— day of August, aforesaid, did, with force and arms, take said Jefferies, Norbin, Johansson, and Thomson from the custody of said United States marshal, etc. To this information the defendants demur.

The statute under which this information is brought provides that every person who knowingly and willfully obstructs or opposes any officer of the United States in serving or attempting to serve or execute any mesne process or warrant, or any rule or order of any court of the United States, or any other legal or judicial writ or process, shall be punished. A treaty between the United States and Great Britain, entered into in 1892, provides that the British consul shall have power to require from the proper authority the assistance provided by law for the apprehension, recovery, and restoration of seamen who may desert from any ship belonging to a citizen of Great Britain. Section 5280 of the Revised Statutes, in force at the time this treaty with Great Britain was entered into, provides, that:

"On application of a consul or vice-consul of any foreign government having a treaty with the United States stipulating for the restoration of seamen deserting * * * it shall be the duty of any court, judge, commissioner of any circuit court, justice, or other magistrate, having competent power, to issue warrants to cause such person to be arrested for examination. If, on examination, the facts stated are found to be true, the person arrested not being a citizen of the United States, shall be delivered up to the consul or vice-consul, to be sent back to the dominions of any such government, or, on the request and at the expense of the consul or vice-consul, shall be detained until the consul or vice-consul finds an opportunity to send him back to the dominions of any such government," etc.

The treaty gives to the British consul power to require from the proper authorities the assistance provided by law for the apprehension and restoration of deserting seamen. The only assistance provided by law for this purpose is that provided for by section 5280, above quoted. By that section the proper officer has authority to deliver deserting seamen up to the consul, to be sent back to the dominions of the government to which they belong. In this case it is alleged, in effect, that the commissioner committed the deserting seamen to be surrendered and restored by the marshal to the ship Cedarbank, under the direction of the British consul, and that the consul directed the marshal to restore said seamen to the Cedarbank by delivering them to the master of the vessel, on board thereof, at the city of Astoria, and that while in the execution of said order, the defendants, Kelly and Linville, forcibly took the parties named from the marshal's custody. The commissioner had no authority to direct the restoration of the seamen to the ship Cedarbank. The statute only permits their delivery to the consul. I am satisfied that the commissioner had authority to order the delivery of the deserting seamen to the consul on board the Cedarbank at Astoria, either to the consul himself or to some one authorized to act for him in that behalf. Neither the time when nor the place where the delivery is to be made is specified, and I take it that it might have been made, as I have indicated, at Astoria, or at any other place within the limit of the power of the court to order and of the marshal to execute where such delivery was necessary to be effective. But, from what appears

in the information, the deputies were in the execution of an order from James Laidlaw, the British consul, which required them to restore the seamen to the master of the vessel,—a thing not within the power of the commissioner to order. At the time of the act charged as a crime, the deputies were acting, not in pursuance of such an order as the statute provides for, but under the direction of the British consul. The officers, therefore, were obstructed, not in the performance of a duty enjoined by law, but in the performance of an act directed by the British consul. The information does not state facts constituting a crime, and the demurrer is sustained.

THE FRANCIS & ELIZA.

(District Court, E. D. Louisiana. February 20, 1820.)¹

NAVIGATION LAWS—FORFEITURE OF FOREIGN VESSEL.

Where a British vessel sailed from the island of Margarita to Jamaica, which, by the ordinary laws of navigation, is closed against vessels owned by citizens of the United States, and the captain landed there, and brought out passengers, and came to an American port, she is forfeited under the navigation laws providing that any vessel owned by British subjects, coming or arriving from any port or place in a British colony closed against the United States, shall be subject to forfeiture, though the vessel did not enter the port in Jamaica, but stood off and on while the captain was on shore.

HALL, District Judge. The libel in this case alleges that this ship, owned by British subjects, and having then come from a port or place in a colony or territory of his Britannic majesty (to wit, Falmouth, in Jamaica), which, by the ordinary laws of navigation, is closed against vessels owned by citizens of the United States, did attempt to enter the port of New Orleans, contrary to the act of congress entitled "An act concerning navigation." It appears that this vessel sailed from London in January, 1819, bound to South America, and to return to any port in England, or for any port she might have a cargo for. She sailed, and arrived at Margarita, having on board a considerable number of men intended to be employed in the service of the revolutionary government in Venezuela. She remained there some months, and on the 8th of November last sailed. It is alleged on the part of the United States that she sailed for Jamaica, and by the claimant that her intended port was New Orleans, but that want of provisions compelled the master, Capt. Coats, nine days after leaving Margarita, to stop a few days off Falmouth, in Jamaica, which port he visited in his boat; that the vessel never entered the port, but sailed off and on, waiting the return of the master; and that while at Falmouth he purchased some provisions, and then sailed for New Orleans. In support of

¹ This case has been heretofore reported in 7 Mart. (O. S.) 713, and is now published in this series, so as to include therein all circuit and district court cases elsewhere reported which have been inadvertently omitted from the Federal Reporter or the Federal Cases.

the libel the log book is referred to. The entry made on the 9th of November is in these words: "Francis and Eliza, Captain Coats, from island of Margarita to Jamaica." The next is: "Francis and Eliza, towards Jamaica." On Tuesday, the 16th of November, the following entry is made: "Captain Coats determined to send the boat ashore for provision. At 10, hove to, with head to the westward. At daylight made all possible sail. At 11, pilot came on board, and showed us the harbor of Falmouth. Bore up, and at noon Captain Coats went ashore with the passenger." On the 18th the next entry is: "Captain Coats came on board, and made all possible sail. At 12 Captain Coats went ashore, and passenger left the ship. On the 20th Captain Coats sent the skiff aboard with four bolts of canvas, and two small casks pork, and boat to return. On the 24th the boat came aboard with captain and one passenger." On the 25th the log book is headed: "Francis and Eliza, Captain Coats, towards New Orleans." In further support of the libel is a pass from Admiral Brion, dated at Juan Griago, November 8, 1819, granting permission to Capt. Coats, in the English ship Francis and Eliza, to proceed to the colonies friendly to the republic, requiring those under his jurisdiction not to interrupt him, and requesting others to aid and respect him. It appears, also, from a document in evidence, that while ashore, on the 16th November, 1819, Capt. Coats made application to the officers of the customs at Falmouth to have his register indorsed, which was refused him unless the vessel came into port; and the notary certifies that Capt. Coats considers it best (considering the great expense and detention that should arise) to proceed to New Orleans, and there report his case to the British consul, in order to get his name indorsed on the register. Martin Thomas, a witness, says that he sailed with Coats from Margarita, bound to Falmouth, in Jamaica; heard they were bound to Falmouth from the people on board; heard nothing about New Orleans till they came here; lay about four miles from Falmouth, but did not anchor. This witness has had a quarrel with Capt. Coats. Capt. Loomis, of the revenue cutter, in passing down the river, hailed the Francis and Eliza, and asked where she was from. The answer was, "Jamaica." Asked Capt. Coats what he was doing off Jamaica. He said he went in to get his name indorsed on the register, and to get a freight to England; but, the crops not coming in, he did not get one. He then determined to make for New Orleans for freight. Capt. Loomis told him he would be under the necessity of seizing the vessel under the navigation law. The captain then said he went in for provisions. Falmouth is a port closed to American commerce. On his cross-examination he says he does not know that it was the captain who answered his hail, though he thinks it was, as it is a matter of course for the captain to answer, and it was not afterwards contradicted. He asked Capt. Coats if he would not have taken a freight at Jamaica, who said he would have done the best for his owners. Capt. Loomis further says that, in nautical language, "touching" at a place is standing in close to the land, and sending a boat ashore; and a vessel is said to be where her papers are; and when her papers are

in the custom house she is considered as in port. Lieut. Taylor says (he was an officer on board of the revenue cutter) Capt. Loomis hailed the Francis and Eliza. She answered "From Jamaica." Witness understood from the captain that he had put in at Falmouth for a freight. He heard nothing of distress, but understood from the captain that, not being able to get a freight at Jamaica, he had come here for it. Mr. Chew, the collector of this port, was on board the revenue cutter on the 6th of December last, when the Francis and Eliza was hailed by Capt. Loomis and answered "From Jamaica," and repeated it; heard no other answer. On the part of the claimants, Peter Heinds, first mate of the ship, was examined, and says: They first arrived in Margarita with about 170 or 180 passengers. Continued at Margarita, and along that coast, till November, when they sailed for New Orleans. That provisions were very scarce there, and could not procure enough for a voyage to New Orleans. Got a barrel of beef off St. Domingo from an American vessel. Had a crew of 25. The beef went little way to support the wants of the crew. They were without bread. Nothing aboard fit to eat but the barrel of beef. Between St. Domingo and the east end of Jamaica, fell in with a brig, solicited supplies, but could not obtain any. Proceeded on the voyage for New Orleans. Arrived off Falmouth, which was in the course of the voyage. The captain went ashore to get provisions. Procured two barrels of pork, one of flour, and some yams, and returned next day. Went ashore again for more provisions. Remained three or four days. He brought fowls, pigs, etc., and a small quantity of spirits,—four or five gallons; and sailed immediately for New Orleans. The island of Jamaica was the first land they could make with convenience and safety to get provisions. They could get nothing at Margarita, and lived on fishing, etc., about three weeks. He says there was no communication between Falmouth and the ship; did not cast anchor, but stood off and on. The provisions procured at Falmouth were barely sufficient to reach New Orleans. When the pilot came on board, had scarcely any. The first captain from London was Stone, who died on the passage. He was succeeded by the first mate, who died at Margarita. He does not know the ultimate object of the voyage. He signed articles for South America. Did not go to Jamaica for any other purpose but to procure provisions, to his knowledge. They did not go into Falmouth, because they were not bound there. That they could not go in if they wished, being to leeward, and having no pilot. Mr. Hanson says he wrote the log under the direction of the chief mate. The entries were made every morning. It would have been dangerous to enter Falmouth. It could not have been done in the then state of the weather. The accounts (see evidence) show the amount of provisions gotten at Falmouth. Were greatly distressed for provisions at Margarita. They eat ship's bread at Jamaica. Sometimes pork and beef, which were difficult to be procured. Could not get provisions at the island. George Glover says the agent gave him a passage to New Orleans, where he intended to come. He is an Englishman, and did not intend to go to Jamaica. His intention was to go from New Orleans

to London. He came in this vessel from London, and, if he could not have got another vessel, he would have worked his passage back to London. John Drixon was a seaman on board. On the 8th of November last, sailed for this port. Had nothing but salt herrings to eat at Margarita. Took two passengers at Jamaica, and landed a doctor of some sort. When they arrived off Falmouth, were in great distress for provisions. Could not, with safety, have made New Orleans with their stock. They made St. Domingo after leaving Margarita. John Keen says they continued a long time at Margarita. Had but little provisions the latter part of the time. They were not on allowance at all on the voyage. Made St. Domingo. Got a barrel of beef off St. Domingo or Cuba. He believes the captain went ashore for provisions, and they were as near in as they could get when the boat went ashore. They had always something to eat, but the provisions were bad. Charles Jones Salmon was in Falmouth when the ship hove in sight. Pilot boat returned, and reported that she was bound to New Orleans. Capt. Coats came ashore, and went to a tavern kept by a relation, a Mr. Preston. He heard from the land waiter and searchers of the customs that she was from Margarita, was an armed vessel, and bound to New Orleans. The same day the captain purchased some provisions, which he saw taken to the wharf. Captain went aboard with Preston, and returned to Falmouth next day. That the captain and witness attempted to go aboard, but could not. Next morning, about 10, he descried the vessel from the upper part of a house, and supposed her to be off Montego Bay, about 25 miles. They got a boat, and boarded about 2 of the same day, and immediately made sail for New Orleans. The ship never entered Falmouth, nor was nearer than about four or five miles. He was on the quarter deck of the ship when hailed by Capt. Loomis. The pilot answered the hail that she was from Margarita and Jamaica. Capt. Coats was below. The revenue cutter sent her boat aboard with the lieutenant, who asked witness where she was from. Witness answered "From Margarita," but the boat went ashore at Jamaica. The only part of the conversation he heard was, Capt. Loomis asked Coats if he would not have taken freight at Jamaica. The captain laughed, and replied, "Yes." Charles Emlin embarked at Margarita to work his passage to New Orleans, as he was told. Did not hear that she was destined for any other port. That they were short of provisions. He heard Capt. Coats say on the voyage that he would put in at any port to get provisions, there being no provisions to be got at Margarita but bad flour. Capt. Thomas Coats says the ship in which he came from England was sold. That the owners of that vessel were interested in the house of Hanning & Richardson, to whom the Francis and Eliza belonged. That they were both under the control of Gold, the agent, who desired witness to take command of the Francis and Eliza, which he did on the 1st of October, at Margarita. That the agent gave him orders to proceed to New Orleans. The agent died, and she was obliged to remain to arrange his affairs. He did not sail from Margarita till 8th November. Prior to that, if he had been loaded with money,

he could not have got provisions from the shore. Every morning the boat went a fishing, and in fine weather went ashore with muskets to procure provisions. Left Margarita with 15 pieces of beef. Gave the people part of his own stores. Got one cask beef from an American vessel, and gave an order on R. D. Shepherd, of New Orleans. When off Jamaica, had not more than would last three days. Hove to off Falmouth. Refused a pilot, saying he only wanted provisions. Went ashore, and returned with a relation to see the ship. Was not able to make arrangements for ship's provisions on account of the smallness of the bill on London. Returned to Falmouth. Ship was blown off, and did not see her for two days. When he saw her, she was to the leeward of Montego Bay, where he joined her, and came here. He was ordered by Gold to take freight at New Orleans for England or the continent. At Margarita he obtained a letter for R. D. Shepherd & Co., which he delivered here. When hailed by the cutter, the pilot answered, "From Margarita and Jamaica." Does not know the original destination of the ship. His object in coming here was provisions and freight. Did not inquire for freight at Jamaica. If he had taken freight, he would have violated his orders. If freight had been offered, thinks he would have done the best for his owners. He had no written instructions from Gold, but was verbally directed to proceed to New Orleans. (See evidence.) He took a passenger from Margarita, and landed him at Falmouth. The passage was intended for New Orleans. He took a nephew at Falmouth, at the request of his cousin, and another young man, who was out of employ. He says that by the navigation laws of Great Britain the captain is obliged to have his register indorsed on change of master at the first port the ship arrives. It cannot be done at a foreign port. The certificate exhibited contains all the declaration he made at Falmouth.

Before we proceed to the examination of the merits of this case, it is proper to observe that the law upon which the libel is founded is a retaliatory law. It is intended to produce a great political effect; one of much importance to the trade and navigation of the United States. It is calculated so to operate upon Great Britain as to induce her to relax from her strict and rigid exclusion of American commerce and navigation from her ports on this continent and in the West Indies. In the construing of this law Great Britain cannot take it amiss if we apply in this case her own principles and rules of decision on similar subjects. In the case of *The Beaver* (April 28, 1812) 1 Dod. 155, Sir W. Scott observes:

"One cannot help feeling that in cases of this kind innocent parties may be exposed to great hazard and inconvenience. At the same time it must be recollected that the navigation laws are of great importance, and very inflexible in their nature. The national benefit must take precedence of the profit of individuals. The law presumes, too, that the party damaged has a remedy against him whose fault has caused the loss; and, although it may sometimes happen that the person from whom the remedy is to be sought is not, in point of solvency, able to make satisfaction, still that circumstance can make no difference in the legal principle, which remains unshaken."

On a subsequent day Sir William observes:

"There are circumstances in this case that would induce the court to regard it in the most favorable light, and to stretch as far as possible to give relief to the owners of this cargo. The parties have, I think, made out a case of perfect innocence of intention. Under these circumstances, it is impossible not to feel a desire to relieve from the penalties affixed by law upon illegal importation; but at the same time no door must be left open for the violation of the high interests which the navigation act was intended to protect."

He further observes:

"It was considered, I presume, that the object of the statute could not otherwise be attained than by imposing these penalties. The sacred rights of British navigation could not be upheld if these penalties could be avoided under the plea of ignorance. I am, therefore, clearly of opinion, if the strongest possible case of innocence were made out, it could not avail to protect the parties from the penalties imposed by this statute."

We here plainly discover that the policy of Great Britain is to secure to herself the monopoly of trade and navigation of her colonies. The policy of the United States, in passing this law, is no less obvious. It is to cut off and prevent all communication between the colonies of Great Britain and the United States until she shall consent to a mutual intercourse. It was not merely to prohibit the introduction of her produce from the islands and her other colonies that this measure was adopted, but to affect her navigation and trade. The law makes no difference whether the vessel be loaded or not:

"All British vessels coming or arriving from any port or place in a colony or territory of Great Britain, that is or shall be by the ordinary laws of navigation closed against vessels of the United States, such vessel shall be forfeited."

This being the evident intention of the law, let us examine the evidence that has been given. That the Francis & Eliza sailed from Margarita for Jamaica, I think, is pretty clearly shown. The first entry in the log book after leaving Margarita is, "Francis & Eliza, Captain Coats, from Margarita to Jamaica;" the next, "From Margarita towards Jamaica." Now, it appears from the testimony of William Hanson, who kept the log book, that it was kept under the direction of the chief mate; indeed, this is always the case. This entry, then, could not have been made without the direction of the chief mate, and he must have received his directions from Capt. Coats. Notwithstanding this, Mr. Heinds, the chief mate, swears that they sailed from Margarita to New Orleans. So much for Mr. Heinds. The next circumstance which goes to prove that the intention in the first place was to try some of the West India ports is the pass received from Admiral Brion. It is an order and request of Brion to all the revolutionary cruisers to respect the Francis and Eliza, going to the "colonies friendly to the republic." Now, if the real intention of Capt. Coats was to come to New Orleans immediately, the pass would not have been to the friendly colonies, but to the United States alone. Martin Thomas, who was a seaman on board, says he sailed with Capt. Coats from Margarita; were bound to Falmouth, in Jamaica. He heard they were bound to Falmouth from the people on board. He says on his cross-ex-

amination that he never heard the captain say they were bound for Falmouth. It is to be observed that a quarrel has taken place between the captain and this man, and perhaps his single unsupported testimony would not establish the fact of intention; but, taken in connection with other circumstances, it may have some weight. The next circumstance to show the destination of the vessel for Falmouth is the directness of the course for that port. The log book, on the 9th November, first announces the intention to proceed for Jamaica. Their course is N. E., E., E. N. E., etc. On the 12th St. Domingo was in sight; on the 15th, east end of Jamaica, S. W. by W., distance 6 leagues; people employed unbending small bower cable. On Tuesday, 16th, took in all small sails. Capt. Coats determined to send the boat ashore for provisions. At 2, hove to, with her head to the north. At daylight, made all possible sail. At 11, pilot came aboard, and showed us the harbor of Falmouth. Bore up, and at noon Capt. Coats went ashore with the passenger. On the 17th, captain was on shore. At 7, on the 18th, captain came aboard, and made all sail. At 11, captain went ashore, and the passenger left the ship. On 20th, Capt. Coats came on board with four bolts of canvas, and two small casks of pork; boat to return. On 24th, Capt. Coats came on board with a passenger. It was then that Capt. Coats determined to proceed to New Orleans, for, on the day after, the log book begins, "Francis and Eliza, Captain Coats, towards New Orleans." Another circumstance to show that it was the object of Capt. Coats to proceed from Margarita to Jamaica is the conversation between him and Capt. Loomis and Lieut. Taylor. Capt. Loomis says when he hailed the answer was, "From Jamaica." When on board, he asked the captain what he was doing off Jamaica. He said he went in to have his register indorsed, and for a freight. Crops not being in, he determined to proceed to New Orleans. After he was informed that the vessel must be seized, he endeavored to explain. He thinks the captain answered the hail. There seems to be some doubt as to this fact. Mr. Salmon says he is sure the pilot answered, and that the answer was "Margarita and Jamaica." Mr. Salmon states also that, when Capt. Loomis asked Capt. Coats if he would not have taken freight from Jamaica, he answered, laughing, "Yes." Lieut. Taylor says the answer to the hail was, "From Jamaica." Witness understood the master of the Francis and Eliza that he had put into Falmouth for a freight. The captain said nothing of distress. Understood from the captain that, not finding a freight at Jamaica, he came here. The collector says he was on board the revenue cutter, and heard the answer to the hail. It was, "From Jamaica," and was repeated. He heard no other. John Keen says they were as close in shore as they could get when the boat went ashore. That distress did not compel Capt. Coats to proceed to Falmouth can, I think, be easily shown. From the testimony and circumstances that I have detailed, it appears that he had views and motives to visit Falmouth. There is another circumstance which is a link in the chain: He had relatives in Falmouth. He lodged at his cousin's, and brought from Falmouth a nephew, with

an intention to carry him to England. I find no entry in the log book as to want of provisions on the voyage to Falmouth. It is only observed on the 14th of November. Capt. Coats saw an American schooner, went on board, and purchased one cask of beef. To establish the fact of distress, Mr. Heinds is examined. He says provisions were scarce, and could not get enough to proceed to New Orleans. Says they were without bread. Had nothing aboard fit to eat. That between east end of Jamaica and St. Domingo fell in with a brig, and solicited supplies, which were refused. No mention of the latter circumstance is in the log book. It is stated in the log book of Monday, 15th of November: "At noon boarded the brig Mary & Jane from Jamaica, bound to London. Several more vessels in sight." Now, it is to be recollected that this happened the day after they procured a cask of beef from the American schooner. No mention is made of the object of going on board, or that it was for provision; but the ingenious Mr. Heinds has positively sworn that they boarded for provisions, and that they were refused. If provisions had been their object, why did they not try some of the other vessels which were in sight? Some of their captains might not have been so uncharitable as the captain of the Mary and Jane. The true object of the visit was to make inquiry as to Jamaica, the east end of which was only six leagues off at daylight. John Keen says, in contradiction of Mr. Heinds' statement, that, although they had very little provision during the latter part of the time at Margarita, yet they were not at all allowanced on the voyage. Mr. Heinds is again contradicted by one of the seamen, William B. Hanson. Heinds says they had no bread on board, and nothing fit to eat but the cask of beef they got from the American schooner. Keen says they eat ship's bread at Jamaica; sometimes salt pork and beef. He says they could not get provisions at the island. The witnesses do not agree. One says they had nothing but salt herrings. Charles Emlin says there were no other provisions at Margarita than bad flour. Heinds says they had no bread. Hanson says they eat ship's bread. He, too, says that about a week before they left Margarita they were on half allowance. No mention is made of this in the log, or by the other witnesses. Now, in opposition to this, it appears that Capt. Coats, with a large crew, takes on board from mere motives of benevolence a Dr. Blair, to come to New Orleans; but, arriving at Jamaica, the doctor was put ashore, got employment there, and two more passengers were brought for New Orleans. But, if the necessity was so great, why did he not enter any of the friendly islands, for which he had a permission from Admiral Brion? Many of them were much nearer Margarita than Jamaica, which was the most distant in his route to New Orleans except Cuba. St. Domingo was in sight three days after leaving Margarita, two days before they met the American ship. No; it was not distress that drove him there. Was it to have his register indorsed, to endeavor to procure freight, and at the same time to visit his connections? I need not say that this plea of distress by mariners is always examined with a most scrutinizing eye. No instructions in writing are produced. The distress

which will excuse is well defined by Sir William Scott in the Case of the *Eleanor* in *Edward's*. "It must be urgent distress. It must be something of grave necessity when the party justifies the act upon the plea of distress. It must not be a distress created by himself, by putting on board an insufficient quantity of water or provisions for such a voyage; for there the distress is only part of the mechanism of the fraud, and cannot be set up in excuse for it." The same doctrine is held by the supreme court of the United States in the case of *The New York*, 3 *Wheaton*.

Distress being out of the question in the present case, let us inquire whether or not this voyage being intended by Capt. Coats from *Margarita* to *Jamaica*. His going in as close as he could get, his entering into the harbor with his boat, his landing a passenger there, his remaining there six days, his application to have the register indorsed there, and his actually bringing two passengers from there to this place, do not bring this vessel within the meaning of the law, which declares that any vessel owned by British subjects coming or arriving from any port or place in a colony of his Britannic majesty closed against the United States shall be subject to forfeiture. The captain must have considered the voyages as two distinct voyages; the log book stating the first from *Margarita* to *Jamaica*, and, after leaving there, for *New Orleans*. *Jamaica* then was the point of departure. So he answered when hailed. I have already stated that the policy of this law is to induce Great Britain to allow the United States to trade with her colonies. To effect this we say, "Your colonies shall have no communication with us until you change your system. You shall not import any produce to us. You shall bring no passengers to us in your ships." In this case, it appears that Capt. Coats brought two passengers from *Jamaica*. Suppose these passengers were asked, "From whence came you?" or, "From where did you arrive?" Their answer would be, "From *Jamaica*." "In what ship did you come?" "In the *Francis and Eliza*; but she did not come from *Jamaica*." "How so? You came in her from *Jamaica*, and she has not come from *Jamaica*?" "No. She was laying off, and we went aboard in the boat." Shall this be an excuse to evade our navigation laws? Suppose they had brought from thence a cargo of sugar, which had been put aboard from lighters and small vessels three leagues from the shore, would this have excused her? Does not the navigation of a country derive sometimes as much advantage from the carrying of a passenger as from carrying a cargo? Suppose Capt. Coats had heard that there were 200 more patriots at *Jamaica* anxious to join their compatriots at *New Orleans*, and he had brought them to this place, together with his nephew, *Charles Alexander*, and *Jones Salmon*, who were both landed here, would this be no violation of our navigation law? If the British had permitted American vessels to visit their colonial ports, our navigation might have shared, perhaps, the honor and profit, too, of conveying half of this patriotic band. Upon the whole, it is ordered, adjudged, and decreed that said vessel, her tackle, furniture, etc., be forfeited to the United States.

NICOLINI et al. v. LUTCHER & MOORE LUMBER CO.

(Circuit Court of Appeals, Fifth Circuit. April 23, 1901.)

No. 936.

SHIPPING—CONSTRUCTION OF CHARTER—TERMINATION.

Under the charter of a schooner, the charterers were to pay a per diem hire for a voyage and return to one of two designated ports. They selected the cargo and the voyage, within certain limits, and paid all expenses except the wages of the master. On the voyage the vessel met with a storm which drove her out of her course, resulted in the loss of a part of her cargo, and compelled her to seek a port of refuge, where the charterers, being involved in a controversy with the insurers of the cargo, ended the voyage, although the vessel, with slight repairs, requiring but a few days, could have proceeded with over half the cargo uninjured. *Held*, that the charter continued in force, and the charterers were liable for the hire of the vessel until her redelivery at the designated port; the delay and abandonment of the voyage resulting from ordinary perils of navigation, of which they assumed the risk, or from their own voluntary action.

Appeal from the District Court of the United States for the Eastern District of Texas.

The appellants, C. Nicolini and M. G. Guerrero, composing the Galveston Export & Import Company, on September 16, 1896, entered into an agreement with C. R. Harms, master of the schooner J. M. McInnis, which recited that the parties (Harms of the first part, and the company, of the second part) "do agree on the chartering of said vessel to the said party of the second part for a voyage from the port of Galveston to any port or ports of the Gulf of Mexico, as the party of the second part may direct, and to return to the port of Galveston or Sabine Pass, at the option of the party of the second part, with the privilege of loading said vessel with any cargo or cargoes of lawful merchandise under or on deck, on the following terms, viz.: First. The said party of the second part, in consideration of the agreements to be kept and to be performed by the said party of the first part, do agree to pay to the said party of the first part the sum of ten (\$10.00) dollars, U. S. currency, for each and every day of the period of this charter party, and until the termination of the same. Second. The said party of the second part do further agree to pay all the expenses of the said vessel, of whatsoever nature, during the period of this charter party, including all costs of loading and discharging of cargo and cargoes, port charges, provisions, and crew's wages, excepting only the master's salary. Third. It is further agreed that this charter party shall commence from the said aforementioned date (incl.), September 16th, 1896, and end from and after the release of the said vessel by the custom officials after her return to either of said aforementioned ports, viz. Galveston or Sabine Pass, Texas." The schooner reported on the 15th September without crew or provisions, which were furnished by charterers, who also loaded the vessel with a cargo of 1,460 sacks of corn, a part of which were on deck; and, under orders of the charterers, she set sail from the port of Galveston on September 19th, bound for Vera Cruz, Mexico. On September 23d she encountered a gale, and had to throw 485 sacks of corn overboard and cut away a sail; and she was compelled to change her course and enter a port of refuge (Point Isabel) on September 27th in distress. The master wired appellants September 28th, as follows: "McInnis at Point Isabel in distress. Lost deck load. Some cargo below damaged. Will have to discharge. Noted protest. Wire me your wishes under the circumstances." The next day, September 29th, he again telegraphed: "Corn in hold, steaming. What shall I do? Await your instructions." To which appellants replied the same day: "Prudently do whatever best. Understand from your dispatch cargo practically total loss, about 235 sacks insured on deck." The following day, September 30th, they instructed him as follows: "Surrender cargo to insurance agent,

who will be there. All wet corn positively total loss must be paid by insurance. In event insurance agent refuses to receive cargo there, handle same to best advantage for account whom concerned. Wire amount corn not damaged. Being vessel unfit proceed Vera Cruz, better wire Lutchter Moore, or try get her back here for repairs. Act with prudence, protecting all interests. Vessel being unfit proceed, insurance company should take charge cargo." The master replied the same day that the underwriters refused to take charge of cargo, and would only supervise proceedings so far as their interests required. On October 1st he telegraphed as follows: "Have discharged cargo. Find 750 sacks in good order, 485 thrown overboard, 225 damaged in bad order. Can repair and proceed in five days. Shall I do so, or complete voyage here? Need \$300 for expenses, immediate answer." On October 2d appellants wired the master: "Let underwriters' agent take charge of cargo. Your voyage is ended." He answered the next day, October 3d: "Cargo delivered as ordered. Need \$110.00 for port charges and expenses. Remit by wire, and instruct whether I shall proceed to Galveston or Sabine Pass." On October 5th he sent this message: "Vessel ready for sea. Am waiting for your orders." To which appellants replied on the 5th: "Peculiarly situated with insurance people regarding giving instructions, but think best for all parties that you return." The master responded on the 5th: "I am governed by charter party, and not interested in insurance. Remit \$110.00 for necessary expenses, so I can leave at once." On October 6th appellants sent him the following telegram: "Ask owner's vessel or insurance company funds. Charter party nothing further to do since vessel reached port of refuge." The same day this reply from the master: "You are mistaken. My vessel is under charter to you until arrival at port you name as per charter party. I am not concerned whether cargo is insured. I await your orders." On the 9th they wired him: "Will pay your sight draft for \$110.00." He did not draw on them, but paid the expenses himself, and the schooner sailed from Point Isabel on the 12th, arriving at Sabine Pass the 18th, and entering the custom house on the 19th. The libel was filed to recover 34 days' hire of vessel at \$10 per day, and wages of crew and other expenses from September 16th to October 19th, both inclusive (34 days); also expense of discharging cargo, pilotage, board of captain and crew, and other expenses after putting into port of refuge, and until the vessel was entered in the custom house at Sabine Pass. The defense was that the charter had terminated when the vessel was unable to proceed on the voyage and bore away from her course in distress into a port of refuge, and that the voyage ended September 30th, when appellants instructed the master to try to get the vessel back to Galveston for repairs. The district court rendered a decree in favor of appellee for the full amount claimed, \$576.90, with interest at 6 per cent. from January 1, 1897, to the date of the decree, March 13, 1900, making the sum of \$687.45, which it was decreed should bear interest at the same rate from that date, and for all costs, from which decree appellants perfected this appeal.

Jas. B. Stubbs, for appellants.

John C. Walker, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts). This case was not argued orally, but was submitted on briefs mainly devoted to a discussion as to whether the contract sued on was a technical demise of the ship, or a mere charter for the carrying of cargo on a specific voyage. We do not care to add to the literature on this subject by reviewing and distinguishing the authorities cited, as, in our opinion, the case does not require it. Under the contract sued on, the appellants hired the vessel for a voyage and return voyage, as they should direct, from the port of Galveston to any port or ports of the Gulf of Mexico, and they agreed to pay a per diem hire for the use thereof until she should return to either the port of Galves-

ton or Sabine Pass. Under the contract, they not only selected the voyage to be made, but they selected the cargo to be carried. They were at liberty to load the vessel for themselves, or take freight for others on such terms as they should think proper. They were to pay all expenses of the vessel of whatever nature, except the wages of the master. The whole earnings, whether they furnished cargo themselves or took freight for others, were for their use. If the vessel should perform her voyage in a short time, the gain would be theirs; and they would have the same benefit, whether as freight on their own goods or on the goods of others, as if the voyage were unusually prolonged, while the expenses of the ship for wages, provisions, etc., would be reduced. On the other hand, if the voyage should be delayed by adverse winds or any of the other casualties attending navigation, they were to sustain the loss. In no sense whatever was there any agreed or intended common venture between the owners of the vessel and the furnisher of cargo. On the voyage undertaken the vessel met with an ordinary peril of the sea, which resulted in loss of part of the cargo and some of the furniture of the ship. She was driven out of her course, and took refuge at Point Isabel. She was able, with a few days for slight repairs and attention to cargo, to proceed on her voyage with about two-thirds of her cargo undamaged. The appellee, complicated with insurance questions in which the vessel was not interested, saw fit to end the voyage at that port; but ending the voyage at that port did not end the period for which the charterers agreed to pay rent. That period was only to end, under the contract, when the vessel should have returned either to Galveston or Sabine Pass. The case indicates that a speedier return to Port Sabine could have been made if the charterers and master, instead of dealing with each other at arm's length, evidently for fear of waiving supposed rights, had acted together and with promptitude. Taking the case altogether, we see no reason to question the correctness of the decree rendered in the district court, and the same is affirmed.

THE DORIS.

THE NATHAN HALE.

(District Court, E. D. New York. April 16, 1901.)

COLLISION—TUG AND TOW OVERTAKING SCHOONER—NEGLIGENT NAVIGATION.

A schooner entering Hampton Roads in the night, and sailing free at a speed of 3 miles an hour, was overtaken and passed by a tug having a tow, on a 200-fathom line, and sailing at a speed of 6 miles on nearly a parallel course. The tug saw the schooner when 1,500 feet distant, and passed her at a distance of 300 feet or more, but the tow failed to see her until within 200 feet, and struck her directly astern. Held, that both tug and tow were in fault for the collision,—the former in not keeping watch to see that the tow was following properly in passing the schooner, and the latter because of the failure of her master to follow the tug; that the schooner could not be held in fault, since, even conceding the claim of the tug—which was denied—that she changed her course after the tug passed, she could not, by such change, have brought about the collision, considering the relative speed of the vessels.

In Admiralty. Suit for collision.**Hyland & Zabriskie, for libelant.****Carpenter & Park, for the Nathan Hale.****James J. Macklin, for the Doris.**

THOMAS, District Judge. On August 22, 1900, the schooner Florence Shay was passing through Hampton Roads with the intention of anchoring at the Middle Ground. The tide was flood, and the wind was northeast. The schooner was sailing free, on a W. S. W. course. Shortly previous to 3:30 a. m. the tug Nathan Hale, on a S. W. by W. course, and about 1,500 feet astern, made out the schooner by her form, not by a stern light. About the same time the captain of the schooner saw the tug. Upon seeing the schooner, the master of the tug put his own vessel half a point to starboard, and before the tug came up the captain of the schooner put her half a point to port, and, if this be so, the tug was sailing on a course S. W. by W. $\frac{1}{2}$ W., and the schooner on a course W. S. W. $\frac{1}{2}$ S. Hence the courses were parallel. The tug was going at the rate of six, and the schooner at about the rate of three, miles per hour. The tug passed the schooner off Hampton Bar, at a distance from the latter of 300 feet, as stated on the trial by the captain of the schooner, and at a distance of about 900 feet, as appears from the evidence of the respondents, and as is shown in the log and protest of the schooner. After discovering the tug, the captain of the schooner went to the after part of his vessel, and either held in his hand or placed upon the house a lantern, which the persons connected with the tug testify they did not see. Although the tug carried lights indicating that she had a tow, the captain of the schooner failed to discover the same until the coal barge Doris, which had been a propeller steamer with a sharp bow and sharp straight stern, carrying the usual sidelights and stern light, was seen by him about 150 feet astern. The master of the Doris did not discover the schooner until he was about 200 feet away from her. He immediately ordered the wheel hard a-port, but the Doris struck with great violence the schooner immediately in her stern, doing the damage for which the libel is filed. The force of the blow turned the schooner's bow to starboard, and the tug, unmindful of the collision, continued her course, so that the Doris struck the schooner again somewhere in the neighborhood of the bow, carrying away certain of the headgear. The tug continued on her course even after this time, and only stopped on a hail from the captain of the Doris. The green light of the Doris was seen on the schooner just previous to the collision, and the light of the schooner was not seen by those on the Doris, as such persons testified.

The first obvious fact is that a schooner, which had been seen by those on a tug 1,500 feet away, was struck squarely in her stern by the tow, which did not see the schooner until within about 200 feet of her. From this fact negligence should be inferred, both on the part of the tug and the barge, unless there is some fact which should modify or avoid that conclusion. A tug entering a harbor, and passing a schooner, with such absence of watchfulness as to permit

her tow on a hawser of 200 fathoms in length to collide with the latter, should be condemned (*The John H. May* [D. C.] 52 Fed. 884; *The Minnie*, 40 C. C. A. 312, 100 Fed. 128; *The City of St. Augustine* [D. C.] 52 Fed. 237; *The Robert Burnett* [D. C.] 46 Fed. 415; *The N. & W. No. 2* [D. C.] 102 Fed. 921); and certainly a barge upon a hawser of 200 fathoms, such as was used in this instance, which deflected from the course of her tug to such an extent as to come in collision, and whose navigators were so lacking in watchfulness as not to discover the danger until too late, should also be condemned. *The America*, 42 C. C. A. 617, 102 Fed. 767. To escape the accusation of fault, both the tug and the barge charge that the tug passed 900 feet to the starboard of the schooner, and that by no possibility could a barge upon a hawser of 200 yards deflect from her proper course to such distance, and thereby come into collision. Therefore, it is argued, the schooner must have changed her course by going to the starboard, and falling precisely into the wake of the tug, and thereby suffering the *Doris* to be drawn upon her. There are some manifest difficulties in a conception of the schooner crossing to the distance of 900 feet, and straightening herself up alongside and in close conjunction to the hawser, in such a manner as to permit the barge to be drawn upon her; and yet, if the claimants' theory is correct, such must be what she did. But, as the claimants state, there were 900 feet between the tug and the schooner, and the barge insists that she was directly in the wake of her tug; hence, pursuant to claimants' contention, the schooner must have gone to starboard for 900 feet, and then adjusted herself to receive the blow. If she had gone about, making directly for the course of the tug, the *Doris* would have gone forward 1,800 feet, while the schooner was going laterally 900 feet. Hence the barge would have been 600 feet ahead of the bow of the schooner before the latter reached the course of the barge. Moreover, if the schooner had taken any course short of a direct one to be the course of the tug, she would then have been much longer in reaching that course, and by so much more would the tow have been out of the way. It is, therefore, mathematically impossible that the distance could have been so great as 900 feet. But, assume that the distance was 300 feet, as claimed by the schooner, could she then have changed her course in such a manner as to have gotten into the way of the tug after the latter came up with her? If at that time the schooner had gone to starboard three points, still it would have been necessary for her to travel 1,200 feet before she would come at all near the tow, and even then the tow would have traveled 2,400 feet, and would have passed some 30 feet to the starboard, and would have been ahead of her. But for what ascribed or conceivable reason would the course of the schooner be changed three points to starboard? Whether she wished to anchor at the Middle Ground or Hampton Bar, she would not have made such sudden change, with a heading absolutely contrary to that suggested either in the pleadings or upon the trial by either party. The answer of the tug states that when the tug discovered the schooner both vessels were apparently upon the same course, and that the course of the *Hale* was S. W. by W. It was the intention of the schooner to anchor at the Middle

Ground. The course of W. S. W. on which she was sailing at the time she discovered the tug would take the schooner to the windward of Middle Ground and south of Hampton Bar. The captain of the schooner states that he intended to anchor beyond the bar, between the bar and Middle Ground light. He must have changed from this course nearly three points to come to the hawser of the Hale before the Doris reached the same point. Even in that case he must not only come upon the hawser of the Hale, but also must get directly over it, to permit the stern collision such as took place. This whole contention is beyond any mathematical probability, and is entirely beyond any reasonable conception. There is no evidence whatever that the schooner did change her course to starboard, but all the evidence is that she came a half a point to port. The court is asked to infer that she did change, because the barge did run into her, and those on the barge state that she did not change her course, and followed directly the wake of her tug. But, whether she changed her course or not, the physical fact is that she came up behind the schooner, and collided with her, and her negligence in that regard may not be gainsaid, unless she can give some affirmative evidence of fault on the part of the other vessel. The fact that she was where she was outweighs all her denials, affirmations, and accusations. From what has been said it is apparent that the schooner could not have changed her course so as to bring herself in the way of the barge, and the tug and barge remain with the collision unexplained. Hence the barge is found negligent for a lack of watchfulness and such unskillfulness in navigation as to allow the stern collision with a preceding vessel. The tug is found in fault for so negligently conducting the tow as to be unconscious of the fact that, either by accident or design, it was not following in a course that would enable it to clear the schooner. The libelant should have a decree for his damages and costs against both vessels, and, as between themselves, the barge and the tug will divide the damages.

THE BERGEN.

THE ROBERT HADDON.

THE RANZA.

(District Court, S. D. New York. April 30, 1901.)

COLLISION—FERRYBOAT AND STEAMER IN TOW—INSUFFICIENT LOOKOUT.

A ferryboat crossing North river in the evening *held* solely in fault for a collision with a steamship coming up the river in tow and disabled, where both tug and tow carried appropriate lights, but, through the insufficiency of the ferryboat's lookout, she failed to see the lights of the steamship until shortly before collision, and to keep out of the way, as she was bound to do, after receiving an alarm signal from the tug.

In Admiralty. Libel and cross libel for collision.

Convers & Kirlin, for the Ranza.

J. J. Macklin, for the Bergen.

Wing, Putnam & Burlingham, for the Haddon.

BROWN, District Judge. At about a quarter before 8 o'clock on the evening of January 23, 1901, as the large steamship Ranza, 439 feet long, was going up the North river in slack water at about the turn of the tide, in tow of the tug Robert Haddon ahead of her on a hawser about 130 feet long, with the assistance of two other tugs alongside of her the steamship came in collision with the ferryboat Bergen, about off Franklin street and nearly in mid-river, by which both the steamship and the ferryboat were damaged, and for which the above libel and cross libel were filed.

The ferryboat was on one of her regular trips from Hoboken to Barclay street, New York. She was proceeding somewhat diagonally across the river and downward. The tug and tow nearly up to the moment of collision had been proceeding about straight up river, a little on the New York side of mid-stream. The steamer was somewhat disabled. She had steam in only one boiler, sufficient only to turn around the propeller, so as to save its drag in the water; her helm could be moved by hand only; her whistle was wholly broken down. By herself she was not under command, and the masters of the tugs upon consultation before starting, considered that the appropriate signal lights to put up, besides the ordinary colored side lights, were two vertical red lights pursuant to article 41a of the international rules. These were accordingly put up on the halyards near the foremast, some 40 feet above water. The Haddon ahead exhibited, beside her colored side lights, three vertical white lights, indicating under the rules a tow above 600 feet in length.

The distance from Hoboken to Barclay street slip is about $1\frac{1}{2}$ nautical miles. The collision was not far from midway between the two landings. The Bergen was seen from the Haddon soon after the former left her slip at Hoboken. No signal whistle was then given by either. When the Bergen and the Haddon were from 800 to 1,500 feet apart, a signal of two whistles was given by the Bergen, which was answered with two from the Haddon, which the latter immediately followed up with an alarm signal. Up to that time the Haddon had been showing her red side light and the Bergen her green light. They were on crossing courses. The duty of the Bergen was to keep out of the way, and the duty of the Haddon to keep her course and speed. The Bergen was going at the rate of 8 or 9 knots, the Haddon and her tow, probably at about 4 knots. The Haddon gave the alarm whistle because her pilot considered that the proposed maneuver of the Bergen was dangerous, and he gave the signal of two whistles immediately before his alarm, because he supposed that he was bound to answer with two whistles the Bergen's signal of two whistles under inspectors' rule 3, which forbids giving contrary signals. No doubt this is a misconstruction of inspectors' rule 3, although I have found it to a large extent to be the understanding of pilots. In cases of danger contemplated by inspectors' rule 3, the answer should not be a signal like that received, but only of the short and rapid blasts provided by that rule.

It is claimed on behalf of the Bergen that the answering signal of two whistles immediately before the Haddon's danger signal, misled the Bergen; and the pilot of the Bergen claimed that that gave him

the right of way. This, however, is equally a mistake that has been many times condemned. The signal of two whistles in answer to the Bergen, I am satisfied, had no material influence on the result, for the immediate alarm signal was heard by the Bergen, and could not fail to be understood, notifying the Bergen of the risk of her attempt. The Haddon at the same time reversed and dropped back to the westward of the Ranza, thus giving all possible opportunity to the Bergen to avoid collision, and allowing her in fact 200 feet more space to clear the Ranza than by the rule of the ship she was entitled to. For the Bergen was bound to avoid the Haddon as well as her tow, and that too without the Haddon's surrendering control of her tow or dropping back, as she did in order to get out of the way of the Bergen. At the time the alarm signal was given there was abundant time for the Bergen to avoid both the Haddon and her tow, either by reversing at once, or by porting and going to the westward of the tow, or by starboarding and going to the northward and eastward. The Bergen did not reverse until after the Haddon dropped back and turned to the westward sufficiently to show her green light.

The lookout on the ferryboat was plainly deficient, and the red signal lights on the Ranza were not noticed until very shortly before collision, although some low white lights it was said were previously seen. The three vertical white lights on the Haddon, however, were sufficient to apprise the Bergen that there was a long tow and that the Bergen must keep out of the way. Neither the Haddon nor the Ranza in any way prevented her doing so, and she is, therefore, primarily liable for the collision.

I do not see any rational ground for holding either the Haddon or the Ranza in fault. They were seen at an abundant distance for the Bergen to perform her duty of keeping out of the way. The duty of the tug and tow was to hold their course and speed; and there was no material variation from this obligation, until the presence of immediate danger, when the Haddon dropped to the westward in aid of the Bergen, and the trifling turn of the Ranza's bow to the eastward was of no importance in the result.

A decree may be entered for the libellant in the first libel against the Bergen alone with costs, and dismissing the second libel with costs.

THE ARTHUR.

(District Court, S. D. New York. April 19, 1901.)

COLLISION—DREDGE AT ANCHOR—MISLEADING LIGHT.

A dredge anchored in the East river, while at work, besides her staff light, carried another white light, considerably lower down, not required by the rules, and which was mistaken by a tug coming up the river with a tow in the evening, the two lights being similar to those customarily carried by a tug in motion, but without a tow, the lower being visible only astern. The tug did not discover the mistake until within 300 feet, and her tow came into collision with the dredge, and injured it. *Held*, that both were in fault, the dredge for carrying a misleading light, and the tug in not sooner discovering that the dredge was stationary.

In Admiralty. Suit for collision.

Frederick W. Park, for libellant.
Hyland & Zabriskie, for claimant.

BROWN, District Judge. Between 7 and 8 o'clock in the evening of October 25, 1900, the derrick scow Daylight, while at anchor for the purpose of excavating, under government direction, a bed of rock in the East river off Third street, was run into by the scow Clingstone, which was coming up the East river in the flood tide in tow of the steam tug Arthur on a bridle hawser about 150 feet long, and received damages, to recover which the above libel was filed. There is some difference about the lights exhibited by the dredge to the Arthur as respects their position; but this seems to be not very material. She was showing one high light from 20 to 25 feet high, near her mast, and another light which I find upon the evidence was near her bow, about 10 or 12 feet above the deck. When the Arthur was about 1,500 feet below the dredge and about astern of her, she received a signal of one whistle from a heavy tow overtaking her from astern, which soon overhauled and passed her on her starboard side.

The Arthur claims to have been misled by the two white lights of the dredge into supposing that she was a tug underway and proceeding up river, and that she did not ascertain the fact that the dredge was at anchor until she had come within about 300 feet of the dredge, when the Arthur herself was able by porting to go on the starboard side of the dredge without difficulty, but not in time to swing her heavy tow astern so as to clear the dredge.

The Arthur's evidence shows that it has long been a common practice for tugs when under way without a tow not only to carry the single white staff light required by the rules, but also a white light on the rear side of the tug's house and beneath the overhanging roof, so that the low light will be seen astern, but obscured from all craft forward of her beam. The evidence also shows that this low light being usually about in the middle of the tug, presents with the high light the appearance of two vertical white lights more widely separated than the two towing lights, which are required to be about 3 feet apart; and that the Arthur supposed that the lower white light that was seen on the dredge nearly vertically beneath the higher one, was such a low aft light, indicating that the dredge was under way. This low light, however, is not provided for in the rules, though it does not seem to be forbidden by rule 11, because it is not likely to be mistaken for any other light.

This dredge was not authorized to carry two white lights while at anchor. She was but 75 feet long, and had therefore by articles 1 and 11 of the act of June 7, 1897, no right to carry more than one white light while at anchor. Under the common practice above referred to, this second white light, being seen about 10 feet below the other, would naturally be mistaken by the Arthur for the low light of a tug in motion while the Arthur was at some distance; and as the Arthur was at first and for some material period misled thereby, I think the dredge must be held in fault for carrying an unauthorized and misleading light. The Austin, 3 Ben. 11, Fed. Cas. No. 663; The Maurice B. Grover, 34 C. C. A. 616, 92 Fed. 678.

On considering the other evidence, however, I do not think this fault of the dredge is sufficient to acquit the Arthur of blame for inattention and negligence. The bow light of the dredge was in fact considerably higher than any such low aft light would naturally be upon any ordinary harbor tug, and this would have been perceived by the Arthur had reasonable attention been given to the dredge when much more than 300 feet distant. But besides this, the Arthur was proceeding slowly under one bell, and it was wholly inconsistent with the Arthur's supposition that the boat ahead was an unencumbered tug under way, that the Arthur, while proceeding so slowly with a heavy tow, should be overhauling the dredge so rapidly; and reasonable attention to the dredge would have shown this fact to the Arthur very soon after the dredge was first noticed 1,500 feet away. In both these ways reasonable attention to the dredge would have corrected any original mistake of the Arthur in supposing the dredge to be in motion, in ample season to enable the Arthur and her tow to avoid the dredge. As it was, the Arthur, according to her testimony, did not observe that she was gaining on the dredge until within 500 or 600 feet of her, and did not attempt to go to the starboard until within 300 feet. This, it seems to me, was such obvious negligence in proper attention to the dredge as to make the Arthur equally in fault; and the libelant should therefore have a decree for half his damages, and for the costs to be divided.

THE MERCEDES.

THE BUENA VENTURA.

(District Court, S. D. New York. April 20, 1901.)

COLLISION—ACTION FOR DAMAGES TO TOW—MASTER OF TUG AS LIBELANT.

The master of a tug is a common-law bailee of a tow and her cargo which are in his charge with a lien thereon for the towage services rendered, and as such he is entitled to maintain an action against another vessel for a collision in which his tow and her cargo are lost, and in such action to recover their full value, holding the amount remaining, after deducting his own loss, in trust for the owner. In such case the owners of the tow and cargo may intervene as co-libelants, if they desire, or the respondent may bring in the tug, under admiralty rule 59, by petition showing her to have been in fault, in which case a substitution of the owners of the tow and cargo as libelants is the proper course.

In Admiralty. Suit for collision. On exceptions to libel.

Wheeler & Cortis, for libelant.

Peter S. Carter, for claimant.

BROWN, District Judge. The libel excepted to alleges that the tug Mercedes of which the libelant was master, had in tow alongside on the 1st day of April, 1901, a barge called the Sampson, and that while towing her in the harbor of New York in the usual channel towards Forty-First street, South Brooklyn, the barge was run into by the steamship Buena Ventura solely through the negligence and fault of the latter; that the barge and cargo were thereby totally lost, and

that the owners have sustained damages thereby to the amount of \$9,000, for which judgment is asked. Exceptions to the libel are filed by the claimant of the Buena Ventura on the ground that the libellant as master does not state what interest he has in the barge or cargo, if any, or whether he is attorney for either.

Although a tug in the fulfillment of a towage contract, is not subject to the liability of a common carrier, but is responsible only for nautical skill and diligence, the master of the tug is in charge of the tow, and as such is a common-law bailee of the tow and her cargo with a lien for the services rendered. In the character of bailee he is entitled to maintain an action against a wrongdoer who destroys the property, and in such action to recover its whole value; and after deducting whatever may be his own loss under his contract for towage or other lawful charges, he will hold the residue in trust for the owner. The precise question arose in the case of *The Jersey City*, 2 C. C. A. 365, 51 Fed. 527, in which, upon appeal, the decree below was affirmed, without reference to any question of subrogation considered in the court below, upon the ground that the libellant, the Cornell Steamboat Company, as bailee, was entitled to maintain the action and to recover full damages for the loss of the tow. That decision is binding on this court. The general doctrine in this regard is reviewed more at length in *Knight v. Carriage Co.*, 18 C. C. A. 287, 71 Fed. 662.

In *Story, Bailm.* § 94, the general rule is stated:

"That either the bailor or the bailee may, in such a case, maintain a suit for redress; and a recovery of damages by either of them will be a full satisfaction, and may be pleaded in bar of any subsequent suit by the other."

In admiralty practice the owners of the barge and cargo may, if they choose, at any time intervene as co-libellants for the protection of their interests, and on discharge of the master's claims, if any, take upon themselves the sole prosecution of the suit.

On the other hand, the claimant of the Buena Ventura upon petition under the fifty-ninth rule, showing that the Mercedes was in fault, might bring the latter vessel into the suit as co-defendant, and in that case a substitution of the owner of the tow and cargo as libellant would be the proper course. *The Beaconsfield*, 158 U. S. 303, 309, 310, 15 Sup. Ct. 860, 39 L. Ed. 993. If no fault of the Mercedes should be claimed by the Buena Ventura, it is a matter of indifference to her owners whether the libel is by the master or by the owner of the tug and tow, since in no event could more than one satisfaction be had.

The other exceptions to the libel are plainly insufficient. Exceptions overruled.

PETERSON v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court, W. D. Missouri, W. D. May 6, 1901.)

1. PLEADING—AMENDMENT OF PETITION—MISSOURI STATUTE.

Rev. St. Mo. 1899, § 661, which provides that "a petition or answer may be amended by the proper party, of course, * * * at any time before the answer or reply thereto shall be filed," contemplates that such amendment shall be made in open court, or if in vacation by leave of court, and does not authorize a plaintiff to amend his petition in vacation before the return day of the summons; nor is such authority conferred by section 638, which merely provides that any party filing an amended pleading in vacation shall give written notice of the time of filing the same to the adverse party or his attorney.

2. GAME—NOTICE OF AMENDMENT—SERVICE ON ATTORNEY.

A statutory provision requiring notice of the filing of an amended pleading to be given to the adverse party "or his attorney" requires such service either upon the party or his attorney of record in the cause, and notice of the filing of an amended petition in vacation, before the return day of the summons, is not given, under such a provision, to a defendant who has not entered his appearance, by its service upon an attorney, although such attorney may thereafter appear for defendant in the cause.

3. REMOVAL OF CAUSES—AMOUNT IN CONTROVERSY—AMENDMENT OF PETITION.

An action to recover damages in the sum of \$10,000 was brought in a state court of Missouri in vacation, and summons, together with a copy of the petition, as required by statute, was served on defendant. Before the next term of court to which the summons was returnable, plaintiff filed with the clerk an amended petition in which he prayed judgment for less than \$2,000. Such amendment was not authorized by statute, nor was notice of its filing served on defendant as required when an amendment was properly filed in vacation. *Held*, that it was ineffectual to reduce the amount in controversy so as to prevent the removal of the cause on a petition filed on the return day by defendant, which was a nonresident of the state.¹

On Motion to Remand to State Court.

Scott J. Miller, for plaintiff.

Chas. A. Loomis, for defendant.

PHILIPS, District Judge. On the 24th day of November, 1900, the original petition was filed in this cause in the clerk's office of the circuit court of Livingston county, in which the suit was instituted. This, of course, was in vacation of court. The summons was returnable to the next term of court, which convened on the 14th day of January, 1901. Judgment was asked for \$10,000. On the 9th day of January, 1901, in vacation, and before the return day of the writ of summons, the plaintiff filed in the clerk's office of said court what purports to be an amended petition, in which the amount of the judgment prayed for is \$1,999. On the first day of the regular term of court to which the cause of action was returnable, the defendant appeared and filed its application, as a nonresident defendant, for a removal of the cause from the state circuit court to this court, which application was granted, and the cause is now docketed in this court.

¹ Jurisdiction of circuit courts as affected by amounts in controversy, see notes to Auer v. Lombard, 19 C. C. A. 75; Shoe Co. v. Roper, 36 C. C. A. 459.

The plaintiff has filed a motion to remand, based upon the contention that the amended petition so filed in vacation before the return day of the writ supplanted the original petition, and was the only cause of action pending in the state circuit court at the time of the removal, and therefore the amount in controversy is less than \$2,000, and this court is without jurisdiction over the subject-matter. In support of this contention plaintiff relies upon section 661 of the Revised Statutes of Missouri of 1899, which reads as follows:

"A petition or answer may be amended by the proper party, of course, without costs and without prejudice to the proceeding already had, at any time before the answer or reply thereto shall be filed."

It is observable that this section makes no provision for making such amendment in vacation, and especially none before the return day of the writ. It is claimed, however, by plaintiff's counsel that the authority for the course pursued is found in section 638 of the statute, which reads as follows:

"The party filing any replication, answer or amended or supplemental pleading, in vacation, shall give written notice of the time of filing the same to the adverse party, or his attorney; and until such notice is duly served, such adverse party shall not be deemed to have had notice thereof, for the purpose of pleading."

It is again to be observed that this section does not expressly confer upon the plaintiff the right to amend his pleading in vacation, of his own motion, simply by filing an amended petition in the clerk's office, but only provides that, when any such pleading is filed in vacation, notice thereof shall be given to the adverse party or his attorney. It will be found, on examination of the cases arising under this section of the practice act, that the instances arose where a party during term time had taken leave to file an amended pleading in vacation. In such case the statute imposes upon him the obligation of notifying the adverse party or his attorney of having availed himself of the leave obtained in term time, as he might or might not, at his pleasure, avail himself of the leave obtained from the court to file such pleading; and, without requiring the adversary to go to the clerk's office to ascertain whether the party had availed himself of the privilege accorded by the court, the statute makes it his duty to give notice of the filing of the amended pleading in vacation, so that the adversary may take notice thereof and make preparation for meeting the new pleading. I find no instance in the reported cases, nor have I ever known in practice, of the plaintiff, between the day of the summons on a petition filed in vacation and the return day thereof, filing an amended petition with the clerk, and requiring the defendant to plead thereto. The notice of the amended petition in this case was served, not upon the defendant railroad company, but upon Mr. Loomis, who was one of the attorneys who usually represented the defendant in court in suits against it in his locality. I take it that the meaning of the statute in providing that service of notice may be made on the defendant's attorney is the attorney of record, and until the return day of the summons it could not be known who would be the attor-

ney of record of the defendant,—a fact which could be authenticated by the court docket in the event of an amended pleading filed in vacation by leave of court taken after the return day of the writ. Since this motion was submitted, plaintiff's counsel calls the court's attention to the fact that the petition for removal is sworn to by Mr. Loomis, who describes himself as attorney for the defendant in this suit, and that this affidavit was made on the 12th day of January, 1901. The fact, however, remains that the notice of the filing of the amended petition was served upon Mr. Loomis on the 9th day of January, 1901, three days prior to any proper evidence of his attorneyship in this case; and, until his appearance was entered in court as attorney for the defendant, there was no evidence of his being attorney in this case when the notice was served upon him. The notice had by an attorney prior to his appearance as attorney in the case is not imputable to the client for whom he afterwards appears.

Section 674 of said statute requires that "no process, pleading or record shall be amended or impaired by the clerk or other officer of the court, or by any person, without the order of such court, or of some court of competent authority." The primary purpose, doubtless, of this provision may be said to prevent the clerk or any officer of the court or any other person from amending or changing a pleading after it has been filed, without leave of the court. But it is a universally recognized rule of procedure that, before an amended pleading can be filed in a cause after the institution of a suit, leave of court thereto is asked. And while, under section 661, the plaintiff has a right to amend his petition "of course" before the answer shall be filed, it must be done in open court, or, if he is not ready at the return term of the writ to file his amended petition, he may obtain leave of court to file the same in vacation. If the right to amend the pleading in vacation exists, without leave of court, merely by giving notice thereof to the adverse party, the party might do so by interlineation or by supplemental averment added thereto, which certainly would be a violation of the provision of said section 674. Section 661, which declares that "a petition may be amended by the proper party, of course," does not prescribe that it shall be by substitution of the petition, nor as to the manner of the amendment. As the practice act, in my judgment, contemplates the making of such amendments in open court, or, by leave of court in vacation, the manner of the amendment, whether by interlineation or supplemental averment, or wholly by substituted petition, is a matter of discretion with the court. Section 566 prescribes how the suit shall be instituted in courts of record:

"By filing in the office of the clerk of the proper court a petition," etc., "and by the voluntary appearance of the adverse party thereto; or by filing such petition in such office and suing out thereon a writ of summons against the person," etc. "The filing of a petition in a court of record, and the suing out of process therein, shall be taken and deemed the commencement of a suit."

Thereupon a writ of summons shall issue, with a copy of the petition, which is to be served upon the defendant. It is this petition

which the defendant is called upon to appear at the return day of the summons and answer. There is and can be no other cause of action pending against him prior to the return day of such writ of summons, to which he is required to appear and plead. Under the contention of plaintiff's counsel, within the 15 days after the service of the petition upon the defendant he could go to the clerk's office, day after day, and amend his petition as often as he pleased, and call the defendant into court simply by notice of the fact of another amended petition, even without serving a copy thereof on the defendant.

When the return day of the summons in this case transpired, the only legal notice the defendant company had of the institution of the suit against it was the service of the writ of summons, with a copy of the petition. It was not bound by the notice given to Mr. Loomis, who was not the attorney of record for the defendant in the case. No amended petition had been filed in the court when the defendant made its application for the removal of this cause. The matter in controversy in the suit instituted by the plaintiff to which the defendant was summoned to answer was a judgment prayed for for \$10,000. This was the only action properly pending against the defendant at the time the cause was removed to this court. The so-called amended petition was not then filed in court, and could not be filed therein thereafter, as the state circuit court lost jurisdiction of the cause the moment the defendant complied with the provisions of the federal statute entitling it to the order of removal. The motion to remand is denied.

OGDEN CITY v. WEAVER (two cases).

(Circuit Court of Appeals, Eighth Circuit. April 20, 1901.)

Nos. 1,492, 1,493.

1. APPEAL—REVIEW—ACTION TRIED TO COURT.

Where an action is tried by stipulation before the court without the intervention of a jury, and a general finding made, the only matters reviewable are the rulings made during the progress of the trial to which exception was taken and preserved by bill of exceptions. Unless so presented, questions discussed and determined by the opinion of the court cannot be reviewed.

2. JUDGMENT—EFFECT AS ADJUDICATION—INTERLOCUTORY DECREE.

A decree in a suit in equity which merely determines the invalidity of a contract, and refers the case to a master to state an account between the parties, is interlocutory, and not a final adjudication which can be pleaded in bar of a subsequent action between the same parties involving the validity of the same contract.

3. FEDERAL COURTS—JURISDICTION—PENDENCY OF SUIT IN STATE COURT.

The pendency in a state court of a suit in equity to determine the validity of a contract and the rights of the parties thereunder does not deprive the federal court of jurisdiction to entertain an action at law between the same parties brought by the defendant in the suit in the state court to recover a sum claimed to be due under such contract; the suit at law not being one which affects the custody of property, either actually or constructively.

4. MUNICIPAL CORPORATIONS—VALIDITY OF CONTRACTS—MANNER OF EXECUTION.

Where the statutes governing a city do not in terms require a contract to be entered into by ordinance, the city cannot avoid a contract which it recognized as valid and acted under for years on the ground that its execution was authorized only by a resolution of the council.

5. APPEAL—REVIEW—SUFFICIENCY OF OBJECTION TO EVIDENCE.

A general objection to the admission in evidence of a contract on the ground stated that it was "incompetent, irrelevant, and immaterial" is not sufficiently specific to raise the question of its validity in an appellate court.

6. PLEADING—SUFFICIENCY—WAIVER OF OBJECTION.

A defendant who answers a count of the complaint without objection to its sufficiency waives merely formal defects, and cannot raise the question of its insufficiency because it adopts allegations of a separate count without repeating them, by an objection to the introduction of evidence thereunder, the effect of which would be to compel a reformation of the pleading after the commencement of the trial.

In Error to the Circuit Court of the United States for the District of Utah.

This action was brought by William Adamson and Stanley L. Conklin, as receivers of the Bear River Irrigation & Ogden Waterworks Company, hereafter termed the "Irrigation Company," against Ogden City, the plaintiff in error, to recover the amount alleged to be due to the receivers from the city for water that had been supplied to it by the irrigation company and by the receivers subsequent to their appointment. William C. Weaver, the defendant in error, was substituted as plaintiff after the suit was instituted; the original receivers first above named having been removed, and said Weaver having been appointed as sole receiver in their place and stead. The complaint contained four causes of action, but two of these, namely, the third and fourth, were dismissed by the plaintiff prior to the trial below. The parties stipulated that the issues arising on the first and third causes of action should be tried before the court without the intervention of a jury, and a judgment entered according to the opinion of the court, "and that, if the opinion of the court is that the plaintiffs are not entitled to recover upon the first and third causes of action, then a trial shall be had to a jury, unless the parties agree to waive a jury, upon the issues joined on the second and fourth causes of action." On the trial of the first cause of action the lower court rendered a judgment in favor of the plaintiff below in the sum of \$11,734.06. Subsequently, acting upon the aforesaid stipulation, there was a trial on the second cause of action before a jury, which resulted in a verdict and judgment in favor of the plaintiff below for the sum of \$10,146.42. Two writs of error were sued out by the defendant below, which were addressed, respectively, to the two judgments last mentioned. By the first count in the complaint the receiver sought to recover the value of water which had been supplied to the city by the irrigation company prior to the appointment of receivers, between January 1, 1897, and May 17, 1898. By the second count he sought to recover the value of water that had been furnished by the receivers after they assumed charge of the waterworks; that is to say, from May 17, 1898, until July 29, 1899, when the action was commenced. Concerning the pleadings in the case, it will suffice for present purposes to say that the receiver claimed that the city was liable to pay the sums claimed both in the first and second causes of action under and by virtue of the terms of a certain contract which was entered into by the city with one John R. Bothwell on August 6, 1889, which contract had been assigned by Bothwell on September 25, 1889, to the Bear Lake & River Waterworks & Irrigation Company, all of whose rights under said contract were acquired on or about September 1, 1894, at a foreclosure sale, by the irrigation company first above named, to wit, the Bear River Irrigation & Ogden Waterworks Company. The complaint showed that water had been supplied to the city by the irrigation company under the terms of said contract from the time it acquired the same, in September, 1894, until May 17, 1898, when receivers were appointed, and that

thereafter water had been supplied by the receivers, and that the city had paid for the water so furnished at the contract rate until January 1, 1897, except a small amount (\$90) which was due for the use of three hydrants from July 1, 1896, to January 1, 1897. The principal defense that was interposed by the city in its answer, and on which it seems to have relied exclusively as a justification for its refusal to pay for water that had actually been received, was that the contract which was made by the city with Bothwell on August 6, 1889, and under which water had been continuously supplied down to the institution of the suit, was in excess of the city's powers, and was for that reason invalid.

C. S. Varian (Herbert R. MacMillan, H. H. Henderson, and F. S. Richards, on the brief), for plaintiff in error.

Andrew Howat (Lindsay R. Rogers, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

As the issues arising on the first cause of action were tried before the court without the intervention of a jury, and as the finding was general, the only question open for review is whether error was committed in the rejection or admission of evidence, or in rulings upon any motions made in the progress of the trial which are reviewable on appeal, to which an exception was duly saved. This court cannot review the decision of the trial judge upon questions of law which seem to have been considered by him, as appears by an opinion which has been incorporated into the transcript, unless the questions so considered are raised and presented by exceptions to the admission or exclusion of evidence which are duly preserved by the bill of exceptions. In the present case the opinion of the learned judge of the trial court is not contained in the bill of exceptions, and for that reason it forms no part of the record proper. It was inserted in the transcript, according to the usual practice in that behalf, for the convenience of counsel and for the information of this court; but assignments of error which are addressed to the views that were expressed by the learned judge of the trial court in deciding the case, even if his opinion had been incorporated into the bill of exceptions, cannot be noticed, unless a proper foundation was laid in the bill of exceptions for obtaining a review, based upon rulings which were made during the progress of the trial. It is to be further observed that errors which are specified in the assignment of errors cannot be noticed on appeal unless the action complained of is disclosed by the bill of exceptions, nor unless it appears by referring thereto that an exception to the action complained of was properly taken during the progress of the trial. These rules of procedure are well established by numerous adjudications, a few of which only need be cited: *Searcy Co. v. Thompson*, 27 U. S. App. 715, 13 C. C. A. 349, 66 Fed. 92; *Adkins v. W. & J. Sloane*, 19 U. S. App. 573, 8 C. C. A. 656, 60 Fed. 344; *Trust Co. v. Wood*, 19 U. S. App. 567, 8 C. C. A. 658, 60 Fed. 346; *Insurance Co. v. Folsom*, 18 Wall. 237, 253, 21 L. Ed. 827; *Stanley v. Supervisors*, 121 U. S. 535, 547, 7 Sup. Ct. 1234, 30 L. Ed. 1000; *Lehnen v. Dickson*, 148 U. S. 71, 73, 13 Sup. Ct. 481, 37 L. Ed.

373; Consolidated Coal Co. of St. Louis v. Polar Wave Ice Co., 106 Fed. 798. The application of the foregoing rules to the case in hand leaves but a few questions which are open for consideration and review.

The first point insisted upon by counsel for the plaintiff in error is that the trial court erred in holding that a decree which appears to have been rendered by the district court for the Third judicial district of the state of Utah in a case which was brought by Ogden City against the Bear Lake & River Waterworks & Irrigation Company and the Bear River Irrigation & Ogden Waterworks Company et al. was not a final decree, determinative of the rights of the plaintiff and the defendant in the present action. With reference to this contention it is to be observed that the record and decree in the case pending in the state court seem to have been offered in evidence on the trial of the case at bar by the defendant below; that is to say, by Ogden City. They were objected to at the time by the receiver, and the bill of exceptions recites that they were admitted "subject to objection," the trial court undertaking to rule on their admissibility afterwards. We are not advised by the bill of exceptions whether they were eventually admitted or rejected. Neither are we informed, except by the opinion of the trial judge, which, as already stated, forms no part of the record, what the view of the trial court was with respect to the finality of the decree. In this condition of the record, we might well decline to notice the contention above stated; but, as the record of the case in the state court is before us, we have examined it with some care, and are of opinion that the trial court was right in holding that the decree was not such a final adjudication of the receiver's rights as could be pleaded in bar of the present action. An inspection of the decree shows that it was entered in an equity case which appears to have been pending between the parties above named; that the state court determined one question, namely, that the contract between Ogden City and John R. Bothwell, of date August 6, 1889, was invalid; that after such adjudication the case was referred to a master, with directions to state an account between the parties with reference to the value of the waterworks property which was effected by the contract, and with reference to all the business transactions of the parties thereunder during a period of eight or nine years, while the contract was supposed to be valid; and that such accounting is still pending and undetermined before the master. We think it clear, from such examination as we have made of the decree, that it was merely interlocutory, and not such a final adjudication as will bar the plaintiff's right to a hearing in the present action, and that no error was committed by the trial court in excluding the decree for that reason, if we assume that it was in fact excluded. Perkins v. Fourniquet, 6 How. 206, 12 L. Ed. 406; Lodge v. Twell, 135 U. S. 232, 10 Sup. Ct. 745, 34 L. Ed. 153; McGourkey v. Railway Co., 146 U. S. 536, 13 Sup. Ct. 170, 36 L. Ed. 1079; Denison & N. R. Co. v. Ranney-Alton Mercantile Co. (C. C. A.) 104 Fed. 595, 605.

It is urged, however, in behalf of the defendant city that if the decree which it has secured in the state court is interlocutory and not

final, and for that reason cannot be invoked in support of its plea of *res judicata*, nevertheless the mere pendency of the case in the state court should have induced the trial court to suspend all proceedings in the case at bar until the action in the state court was finally heard and determined. This contention, however, is based upon a misconception of the character of the present proceeding, which is an action at law, in personam, to recover a sum of money due under a contract. It is not a case which affects the custody of any property over which the state court has first acquired jurisdiction. Neither is it a case which involves any interference with the orderly conduct of the litigation in the state court. It is simply one of those cases, such as frequently occur, where a state court and a federal court, in the exercise of a jurisdiction which rightfully belongs to each, are called upon to determine the same question, and the fact that they may disagree and decide the question differently in no wise interferes with the right of either to proceed. It is well settled that the fact that a suit upon a cause of action is pending in a state court will not sustain a plea of *lis pendens* to a suit upon the same cause of action subsequently filed in a federal court. *Stanton v. Embrey*, 93 U. S. 548, 23 L. Ed. 983; *Insurance Co. v. Harris*, 97 U. S. 331, 24 L. Ed. 959; *Buck v. Colbath*, 3 Wall. 334, 345, 18 L. Ed. 257; *Standley v. Roberts*, 19 U. S. App. 407, 421, 8 C. C. A. 305, 59 Fed. 836. The rule is quite different, of course, when, after a suit is brought in a state court which affects the custody of property, or at some stage of the proceeding may affect its custody, a suit of a like nature is subsequently brought in a federal court. In such cases the rule is well established that the court which first acquires jurisdiction of the *res*, actual or constructive, is entitled to proceed without let or hindrance on the part of any other court of co-ordinate jurisdiction. *Merritt v. Barge Co.*, 49 U. S. App. 85, 24 C. C. A. 530, 79 Fed. 228; *Zimmerman v. So Relle*, 49 U. S. App. 387, 25 C. C. A. 518, 80 Fed. 417; *Gates v. Bucki*, 12 U. S. App. 69, 4 C. C. A. 116, 53 Fed. 961. But the principle involved and the rule stated in these cases is not applicable to the case at bar, the action being at law and in personam to recover a sum of money claimed by the receiver to be due to him under the terms of a contract. Whether the contract is valid or invalid can be determined in an action at law as well as in equity, and a nonresident suing in a federal court is entitled to have the question determined by that tribunal unless it has been finally adjudicated by some other court in an action to which he was a party.

It is further claimed in behalf of the city that the trial court erred in holding that the contract with Bothwell which was set out in the first cause of action was valid, and in sustaining a recovery thereon. Concerning this contention it is only necessary to repeat what has already been said,—that error cannot be assigned as respects the opinion of the trial court, which has found its way into the record, and that, if counsel expected to raise the question respecting the validity of the contract, they should have stated their full objection to it when it was offered, and obtained a distinct ruling as respects its validity and admissibility. This was not done. The bill of exceptions shows that it was objected to when offered only on the

ground that the execution of the contract was authorized by a resolution of the city council, rather than by an ordinance, and that it was "incompetent, irrelevant, and immaterial." The bill of exceptions does not show any distinct ruling as respects these objections, the statement being that it was received "subject to objection." But, even if the bill of exceptions did disclose a distinct ruling upon the first of the above objections, we should be of the opinion that it was untenable, inasmuch as the statutes of Utah did not in terms provide that such agreements as the one here involved should be executed in pursuance of an ordinance and not otherwise, and inasmuch as the contract appears to have been spread at large upon the records of the city, and to have been treated by it as valid for a period of years. Under such circumstances, the fact that the council approved the contract and authorized its execution by a resolution, and not by an ordinance, cannot be regarded as affecting its validity after this lapse of time. *Board v. De Kay*, 148 U. S. 591, 13 Sup. Ct. 706, 37 L. Ed. 573; *Illinois Trust & Sav. Bank v. City of Arkansas City*, 40 U. S. App. 257, 22 C. C. A. 171, 76 Fed. 271, 286, and cases there cited. If the further objection to the admission of the contract that it was "incompetent, irrelevant, and immaterial" was intended to mean anything more than that it was incompetent because it had been authorized by resolution, and not by ordinance, then this objection, even if a definite ruling had been obtained thereon, was too general to be of any avail in an appellate tribunal, because it did not advise the trial judge for what further reason it was claimed to be incompetent. *Insurance Co. v. Miller*, 19 U. S. App. 588, 8 C. C. A. 612, 60 Fed. 254. Obviously, therefore, the question whether the Bothwell contract was invalid is not presented to this court in any such form as would justify us in considering and deciding it.

This disposes of all the objections which have been interposed to the judgment on the first cause of action which we deem it necessary to notice.

The judgment on the second cause of action (being the one involved in case No. 1,493) was obtained before a jury, as heretofore stated; and, as respects this latter judgment, we are of opinion, after an examination of the bill of exceptions which was settled in that case, that the only question open for review on writ of error is whether the second count stated a good cause of action. For convenience, evidently, as well as for the sake of brevity, the pleader who framed the second count adopted all the allegations of the first count up to a certain point, without repeating them in *hæc verba*. No objection was made to this pleading either by demurrer or otherwise, but in due course an answer was filed by the defendant below which was substantially the same as its answer to the first count; and the two counts were not essentially different, except that the second demanded a judgment for water that had been furnished after the receiver took charge of the waterworks plant. The pleadings remained in this form for more than one year, but after a jury had been impaneled for a trial of the second count the defendant below for the first time interposed an objection to the introduction of any evidence, upon the ground that the complaint did not state a cause

of action. This objection was founded entirely, as it seems, upon the fact that in the second count certain allegations contained in the first count had been adopted by the pleader without reiterating them. It is manifest, we think, that, whether the method of framing the second count was correct or otherwise, the defendant waived any objection thereto by failing to demur to the count, and by answering it precisely as if it had repeated in due form all of the allegations up to a certain point which were contained in the first count. A litigant who intends to object to a pleading on such grounds as the one now under consideration cannot hold the objection in reserve until a jury is impaneled, and then compel a reformation of the pleadings. If the mode of pleading which the plaintiff saw fit to adopt was for any reason unsatisfactory to the defendant, it should have challenged the count in due season by demurrer.

Finding no error in the record of either case, other than as above stated, which can be reviewed on writ of error, the judgments below are affirmed.

ZEHNDER v. BARBER ASPHALT PAV. CO.

(Circuit Court, D. Kentucky. May 11, 1901.)

MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS—CONSTITUTIONAL LAW.

The rule for making special assessments for street improvements prescribed by Ky. St. §§ 2832-2839, which provide that such improvements shall be made at the exclusive cost of the owners of lots in each fourth of a square, to be equally apportioned according to the number of square feet owned by the parties, respectively, within the abutting fourth square, or the limits fixed by ordinance, when the land is not defined into squares by bounding streets, is not unconstitutional.

Lane & Harrison, for plaintiff.

Wm. Furlong, for defendant.

EVANS, District Judge. When the motion in this case for an injunction pendente lite was sustained, the court, in the opinion then delivered (106 Fed. 103), expressed in strong terms its sense of the hardship of complainant's situation, though not thereby meaning to say that the powers under which the assessment in this case had been made might not easily be abused. But as the law of the country then stood, as pronounced by the supreme court of the United States in its opinion in the case of Village of Norwood v. Baker, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443, there was nothing left for this court to do but to obey it. The opinion in Village of Norwood v. Baker met this case fairly and fully, if its literal import and the interpretation of its meaning by every circuit court of the United States which had passed upon it were entitled to any weight. The instances in which this interpretation of that decision had previously been judicially upheld were numerous, and most of them were referred to in the opinion then written. The writer of the opinion of the court in Village of Norwood v. Baker, Mr. Justice Harlan, still emphatically insists that that interpretation was the correct one, and in this view he is supported by Mr. Justice White and Mr. Justice McKenna

in their dissenting opinions in the cases presently to be referred to. The supreme court, however, in its opinions delivered on the 29th of April, 1901, in several cases, of which that of *French v. Paving Co.*, 21 Sup. Ct. 625, is the most prominent, in speaking of this interpretation, has said that "such is not the necessary legal import of the decision in *Village of Norwood v. Baker*," and, while not in terms overruling that case, has put upon it, to say the least, a different complexion, and has explicitly announced a doctrine which requires at the hands of this court a dissolution of the temporary injunction heretofore granted, particularly as the assessment in this case appears to have been made by a procedure which the Kentucky courts have always held to be in due conformity to the legal processes of that state,—a fact to which the supreme court seems to attach importance. In the granting of that injunction this court followed *Village of Norwood v. Baker*, and the interpretation uniformly given to it by the circuit courts of the United States. This, at that time, appeared to be its duty. But, if the supreme court should change or modify a doctrine, this court must at once conform; and whether the supreme court has, in fact, changed its views or not, this court must now conform to its latest judgment, and to its express decision as to the proper rule of law applicable to the facts disclosed by the bill of complaint in this suit, whatever may be the natural or less binding interpretation of what the supreme court had said in *Village of Norwood v. Baker*. The result is that the motion to dissolve the temporary injunction must be granted.

AMERICAN SCHOOL-FURNITURE CO. v. VAUGHT et al.

(Circuit Court of Appeals, Seventh Circuit. May 8, 1901.)

No. 727.

APPEAL—APPEALABLE ORDER—DENIAL OF PRELIMINARY INJUNCTION.

Under section 7 of Act March 3, 1891, creating the circuit courts of appeals, as amended by Act June 6, 1900, an appeal to such court does not lie from an interlocutory order denying a preliminary injunction.

Appeal from the Circuit Court of the United States for the District of Indiana.

On Motion to Dismiss Appeal.

R. P. Elliott, for appellant.

V. H. Lockwood, for appellee.

Before WOODS, JENKINS, and GROSSCUP, Circuit Judges.

PER CURIAM. The appellee has moved to dismiss this appeal because it is from an interlocutory order denying a preliminary injunction, and the counsel for the appellant has signified his consent that the motion be sustained. The appeal is therefore dismissed on the authority of *Wire Co. v. Boyce* (C. C. A.) 104 Fed. 172, and *Westinghouse Air-Brake Co. v. Christensen Engineering Co.* (C. C. A.) 104 Fed. 622.

METROPOLITAN NAT. BANK v. JANSEN et al.

(Circuit Court of Appeals, Eighth Circuit. April 24, 1901.)

No. 1,446.

1. APPEAL—REVIEW—SPECIAL FINDINGS OF JURY.

Special findings made by a jury, as authorized by the state practice, have the same weight and effect as special findings of fact by the court where a jury has been waived, and cannot be reviewed by the appellate court, for the purpose of determining whether there was any evidence to support them, where the bill of exceptions does not state affirmatively that it contains all the evidence.

2. SALES—WAGERING CONTRACTS—VALIDITY.

Wagering contracts on the future market price of grain, where it is shown that, notwithstanding their terms, no actual delivery of the grain was contemplated by the parties, are generally held to be illegal and void in the United States, even in the absence of an express statute declaring them invalid.

3. NOTES—IMPEACHMENT OF CONSIDERATION—COMPETENCY OF PARTIES AS WITNESSES.

The maker and indorser of a promissory note are competent witnesses to testify to facts which render such note invalid between the parties thereto, as that the consideration was illegal, as against an indorsee after maturity who took the paper with knowledge of the facts.

In Error to the Circuit Court of the United States for the District of Nebraska.

The Metropolitan National Bank of Chicago, Ill., the plaintiff in error, sued Peter Jansen and John Jansen, the defendants in error, upon a note in the sum of \$5,000, dated at Jansen, Neb., November 4, 1895, but made payable at the office of C. B. Congdon & Co., the payee of the note, in Chicago, Ill. The complaint alleged a transfer of said note by C. B. Congdon & Co. to the plaintiff bank before the maturity of the note as collateral security for an indebtedness greater than the amount of the note, which Congdon & Co. owed to the bank. The defendants filed an answer to the complaint, in which they alleged, in substance, the following facts: That the only consideration for the note was a claim of Congdon & Co., the payee, that they were entitled to payment for certain advances made and commissions earned by them on account of certain alleged purchases and sales of wheat made on the Board of Trade in the city of Chicago, which purchases and sales they claimed to have made for account of Peter Jansen, one of the defendants, who was a farmer engaged in farming in Jefferson county, Neb.; that Congdon & Co. never, as a matter of fact, purchased or sold any wheat for account of Jansen, nor made any advances on account of any such purchases; that the alleged purchases and sales were mere wagers made upon the rise and fall of the market price of wheat; that at the time such alleged purchases were made it was not the intention of Jansen, or of Congdon & Co., or any of the parties who were connected with the different deals, that any wheat should be received or delivered, but that the contracts of purchase and sale so made were to be adjusted between the parties by settling the difference between the price at which the grain was purchased or sold and the market price thereof at the time said deals were closed or adjusted; and that all of said alleged contracts for the purchase and sale of wheat were merely colorable, and the contracts so made and all notes, bills, bonds, and other instruments made or given in the settlement of such colorable contracts, were utterly null and void under and by virtue of the laws of the state of Illinois. It was further alleged in the answer that the plaintiff bank was not the owner in good faith of the note sued upon, that it well knew for what purpose the note was given when it acquired the same, that the note grew out of wagering contracts on the rise and fall of grain made on the Chicago Board of Trade, and that such a note,

even in the hands of a bona fide holder or an innocent purchaser thereof, was made void by the statutes of the state of Illinois. The plaintiff bank by its reply denied the foregoing allegations of the answer, and further averred that, as Jansen had put the note in circulation, he was estopped to dispute the validity of the consideration for which the note was given so far as the plaintiff bank was concerned; it having acquired the note for value before its maturity.

On these issues the case was tried to a jury, who returned a general verdict in favor of the defendants, and by direction of the court, as permitted by the laws of Nebraska, a special verdict. By their special verdict the jury, among other things, made the following findings: That the consideration for the note was in part for moneys advanced by Congdon & Co. in settlement of differences on grain alleged to have been bought and sold by Congdon & Co. for account of Peter Jansen on the Board of Trade in the city of Chicago, and in part for commissions charged for such purchases and sales; that it was the intention of C. B. Congdon & Co., and the parties with whom they dealt for and on account of Peter Jansen, that all of the purchases and sales should be ultimately settled by an adjustment and payment of differences, instead of an actual delivery of the grain bought and sold; that in the purchase and sale of the grain on the Chicago Board of Trade by C. B. Congdon & Co. for the defendant Jansen it was the intention of the parties, regardless of the form of the agreement between them, that there was to be no actual delivery of the grain, but that such sales and purchases were to be settled by a payment of the difference between the purchase price and the market price at the date of settlement; that there was an agreement between Peter Jansen and the party or parties from or to whom the grain was purchased and sold by Congdon & Co. for account of Jansen, that there should be no actual delivery of the grain so bought and sold, but that the same should be settled by payment of differences between the purchase and selling price; that the contracts made by Congdon & Co. for account of Jansen were contracts to have or give Jansen the option to buy or sell at a future time; that the note in question was not indorsed by Congdon & Co., the payee, to the plaintiff bank before its maturity; that the original note, of which the note in suit was a renewal, was not indorsed by Congdon & Co. to the plaintiff bank before its maturity; that the plaintiff bank, at the time it received the note in suit from Congdon & Co., or the original note of which the note in suit was a renewal, had knowledge of the consideration for which the note was given, and of defenses thereto existing upon the part of Jansen against Congdon & Co. A judgment was entered in favor of the defendants below in pursuance of the special and general findings, and the case has been brought to this court for review on a writ of error.

Arnott C. Ricketts (Lowe A. Ricketts, on the brief), for plaintiff in error.

F. M. Hall and John Heasty (G. M. Lambertson, on the brief), for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The special findings of fact by the jury as above detailed have the same weight and must be given the same effect as like special findings by the court if a jury had been waived; and as the bill of exceptions does not state affirmatively that it contains all the testimony, but does disclose the fact that some evidence which was introduced on the trial below has been omitted and is not contained in the bill, the findings cannot be challenged in this court. It must accordingly be presumed that they rest upon sufficient evidence which was intro-

duced at the trial. *E. H. Rollins & Sons v. Gunnison Co. Com'rs*, 49 U. S. App. 399, 26 C. C. A. 91, 80 Fed. 692; *Taylor-Craig Corp. v. Hage*, 16 C. C. A. 339, 69 Fed. 581. It is to be further observed that no errors are assigned to the admission or exclusion of any items of testimony, except a general assignment that the court erred in permitting Peter Jansen, one of the makers of the note, and Charles B. Congdon, one of the indorsers of the same, to give evidence tending to impeach the consideration upon which the note was founded. A further claim is made in behalf of the plaintiff in error that the trial court erred in its instructions in assuming that the note in suit, because the same was payable in the state of Illinois, was an Illinois contract, and subject to the provisions of the statute of that state with reference to option or wager contracts. Rev. St. Ill. c. 38, §§ 130, 131. But, owing to the view that we have been compelled to adopt, it is wholly unnecessary to decide whether the trial court's opinion upon that point was right or wrong.

The special findings by the jury disclose a state of facts which would render the note uncollectible as between the original parties on general principles of law as understood and enforced at the present time. They further show that the plaintiff bank stands in the place of the payee, in that it acquired the note with full knowledge of the consideration upon which it was founded, and with knowledge of the defenses existing against it as between the makers and the payee. The special findings disclose that as between Congdon & Co. and the parties with whom they dealt in Chicago, and as between Peter Jansen and Congdon & Co., and as between him and the persons in Chicago from whom his agents made purchases or to whom they made sales, it was understood and agreed that no grain was to be delivered in fulfillment of the contracts of sale, but that such contracts were merely colorable, and were entered into simply as a device for laying wagers on the market price of wheat at a future day. Such contracts are generally held to be illegal and void in the United States, even in the absence of an express statute declaring them to be invalid. No court, we apprehend, would in these days enforce such contracts when their character is fully disclosed. *Irwin v. Williar*, 110 U. S. 499, 508, 509, 4 Sup. Ct. 160, 28 L. Ed. 225; *Embrey v. Jemison*, 131 U. S. 336, 344, 345, 9 Sup. Ct. 776, 33 L. Ed. 172; 2 Benj. Sales (6th Am. Ed.) p. 717. The only question, therefore, which arises upon the record, which we need to determine, is whether one of the makers of the note in suit and the indorser thereof were competent witnesses by whom to prove facts tending to show that the note was founded upon an illegal consideration.

In support of the contention that these witnesses were not competent, by virtue of their names being on the paper, to show that the consideration was illegal, learned counsel for the plaintiff below cite certain federal cases in which it has been held that a party to commercial paper cannot testify to an agreement made in connection therewith by which he was to assume a liability thereon different from that evidenced by the note or bill or no liability whatsoever. For example, they cite *Bank of U. S. v. Dunn*, 6 Pet. 51, 8 L. Ed.

316, where it was held that it could not be shown by an indorser that it was understood that his indorsement was a mere matter of form, and that he would incur no responsibility by indorsing the note upon which he had been sued; also the case of *Bank of Metropolis v. Jones*, 8 Pet. 12, 8 L. Ed. 850, where a similar ruling was made; also the case of *Saltmarsh v. Tuthill*, 13 How. 229, 14 L. Ed. 124, where it was held that in a suit between an indorsee and indorser of a bill the drawer could not be used as a witness to prove facts which, taken in connection with other facts, would invalidate the paper. But in a later case (*Davis v. Brown*, 94 U. S. 423, 24 L. Ed. 204) the supreme court clearly overruled certain broad statements contained in the earlier cases, last cited, which had approved the doctrine originally announced in *Walton v. Shelley*, 1 Term R. 296 (a case that has been overruled in England for more than 100 years), holding in the case then under consideration (that is, *Davis v. Brown*) that as between immediate parties to a note or bill—that is, between maker and payee, indorser and his immediate indorsee—an agreement may be shown which will exonerate one from a liability which he plainly assumed by drawing or indorsing the note or bill. In that case the court said, *inter alia*:

"The general tendency of decisions here is to disregard all objections to the competency of witnesses, and to allow their position and character to affect only their credibility. * * * The holders of commercial paper who enter into agreements or transactions with the makers or indorsers affecting its validity or negotiability cannot invoke protection against the infirmity which they have aided to create. There are no considerations of commercial policy which can exclude the parties in such cases from testifying to the facts."

Mr. Daniel, also, in his work on *Negotiable Instruments* (volume 2, § 1217), declares that:

"The better opinion is that negotiable instruments enjoy no immunity from the general doctrines of evidence, and that any party to a written contract, negotiable or otherwise, is competent to testify as to its invalidity."

In the case at bar the defendants wished to show, in accordance with their plea, that the note was founded upon an illegal consideration. Usually, when such a defense is made, it can only be established by some party to the instrument, and to deny the right of such persons to testify would in some, and perhaps many, cases, lead to the collection of notes and bills which are founded upon an illegal or an immoral consideration. Moreover, in the present case, the jury found that the plaintiff bank was not a bona fide holder of the paper, in that it did not acquire it before maturity, and in that it took it with knowledge of the defenses existing against it in the hands of the payee. This placed the plaintiff bank in the position occupied by the original payee. We are of opinion, therefore, that both Jansen and Congdon were competent witnesses to establish illegality of consideration, and that no error was committed in permitting them to testify to facts which tended to establish that defense. The judgment below is accordingly affirmed.

HARKINS, Collector of Internal Revenue, v. BROWN.
(Circuit Court of Appeals, Fourth Circuit. May 7, 1901.)

No. 394.

1. TRIAL—ERROR IN ADMITTING EVIDENCE—EFFECT OF INSTRUCTIONS.

Where a trial court erroneously admits in evidence unsworn written statements which are hearsay and inadmissible on any issue before the jury, but which may affect their determination of such issues, the error is not cured by a caution given the jury in the charge against being influenced by such statements, because they are not conclusive, but which permits the jury to consider them as evidence in the case.

2. APPEAL—ASSIGNMENTS OF ERROR.

While assignments of error relating to rulings on the admission of evidence cannot be broader than the exceptions taken on the trial, yet such exceptions must be construed with reference to the issues before the jury, and the evident understanding of court and counsel at the time they were made as to their grounds and scope.

In Error to the Circuit Court of the United States for the Western District of North Carolina.

A. E. Holton, U. S. Atty., for plaintiff in error.

E. J. Justice (D. E. Hudgins, on the brief), for defendant in error.

Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

SIMONTON, Circuit Judge. This case comes up by writ of error to the district court of the United States for the Western district of North Carolina. R. W. Brown, the plaintiff below (defendant in error here), had been engaged in conducting a registered United States distillery within the said district. There had been assessed against him by H. S. Harkins, collector of internal revenue, the plaintiff in error (defendant below), the sum of \$883.80 upon spirits alleged to have been produced, removed, and placed on the market without payment of the tax alleged to have been legally and properly assessed thereon. Brown paid this tax under protest, and thereupon brought his action in the superior court of McDowell county, N. C., to recover it back, as illegally assessed. The cause was removed by certiorari into the district court of the United States, and was tried in that court with a jury. The verdict was in favor of the plaintiff.

The complaint, among other things, alleged "that in the manner and within the time prescribed by law the plaintiff, after notice of said assessment, appealed to the commissioner of internal revenue to remit the said taxes so erroneously and illegally assessed against him, and upon such appeal his petition was denied, and the said commissioner of internal revenue declined to remit the taxes so illegally and wrongfully assessed." This allegation and the facts therein stated were essential to his right to recover the taxes so paid. Rev. St. § 3226. In code pleading, which prevails in North Carolina, the answer must be responsive to the complaint, and must contain a general or specific denial of each material allegation of the complaint controverted and put in issue by the defendant, or of

any knowledge or information thereof sufficient to form a belief. Code N. C. § 243. Every allegation of the complaint not thus denied is admitted. *Id.* § 268.

The defendant below, answering this paragraph of the complaint, used this language:

"Admits that the plaintiff applied to the commissioner of internal revenue for abatement of said tax, but he denies that the same was illegally or wrongfully assessed."

At the trial the plaintiff below, not content with this answer, which, if not expressly, certainly impliedly, admitted the allegation of his complaint, offered evidence of the action of the commissioner of internal revenue upon his application for the remission of the tax. To do this, he introduced papers containing the grounds of his application and proofs offered by him, as well as the letter of the commissioner containing his decision and the reasons therefor. Among these papers is a certified copy of a statement made by Asst. Dist. Atty. Motte, that in certain proceedings against Brown, by way of indictment for the offense charged (the basis of this assessment), compromise was effected by the payment of the penalty and costs imposed by the court, and that this was a finality of the whole matter. There was also in these papers a statement by W. J. English, storekeeper and gauger, that the stamps had been properly affixed to the packages on which the tax had been assessed. These statements were not verified by the oath either of Motte or of English. These persons were not produced, nor their absence accounted for. When the plaintiff offered these papers in evidence, all contained in one exhibit, the defendant objected thereto. His objection was overruled, and he then and there excepted. The district judge used this language: "To the ruling of the court in allowing said certified copies to be introduced in evidence, the defendant objected." In the assignments of error this objection is put in these ways:

"First, to the admission of the whole exhibit, a certified record from the treasury department, and allowing the said record to be admitted and read as evidence before the jury; second, in overruling the objection to that portion of the record giving the statement of Assistant District Attorney Motte; third, in overruling the objection to that portion of the exhibit purporting to give the statement of W. J. English, storekeeper and gauger."

In charging the jury the judge said that the certified copies had been admitted as evidence, but he cautioned the jury against being influenced by the declarations of Motte and others contained in the record; for these declarations, he said, were not conclusive, but that the jury must be controlled entirely, in reaching a conclusion, by the evidence in the case which they heard. To this, exception was taken and allowed. It appears in an assignment of error. This will be first considered. These copies of statements purporting to have been made by Motte and English were pure hearsay. They were contained in a paper in which somebody else said what they had said. They were not sworn to. Neither Motte nor English were parties to the case, nor privies to either party. Clearly, they were not the best evidence, nor were they admissible in evidence.

Yet the judge tells the jury that they had been admitted in evidence. It is true that the judge cautioned the jury against being influenced by these declarations of Motte and others,—not, however, because they were not evidence. He had already told the jury that they had been admitted in evidence. But because they were not conclusive; that it was the duty of the jury to be controlled entirely in reaching a conclusion by the evidence in the case. The natural import of these words—the inevitable conclusion to be drawn from them—was that, however strong these statements might be, they did not conclude the case and bar out the defendant. The jury must look to all the evidence, and draw their conclusion entirely from that. The charge tended to mislead the jury, and gave a prominence and weight to these unsworn, hearsay statements which they did not deserve.

The defendant in error insists that the assignments of error numbered 1, 2, and 3, quoted above, are too broad, that they are not sustained by the exception taken at the trial. There can be no doubt that the appellate court must confine itself to the exceptions actually taken at the trial, the objection having been made and exception taken and noted before the jury leave the bar. *Belk v. Meagher*, 104 U. S. 279, 26 L. Ed. 735; *Van Gunden v. Iron Co.*, 8 U. S. App. 229, 3 C. C. A. 294, 52 Fed. 838. And only such matters as have been so excepted to can be assigned as error. *Manufacturing Co. v. Joyce*, 8 U. S. App. 309, 4 C. C. A. 368, 54 Fed. 332. The complaint had averred that the plaintiff had appealed to the commissioner of internal revenue from the assessment of the collector, and that his appeal had been rejected. This averment was essential to the maintenance of his action. The answer admitted this. If it did not do so in *hæc verba*, it certainly did not deny it in any form, and under code pleading this was no longer an issue in the case, for it was admitted. The record proves this. The only issue submitted to the jury was:

"Is the defendant, as collector of internal revenue, indebted to the plaintiff as alleged in the complaint? If so, in what amount?"

When the plaintiff introduced this Exhibit A, record of the treasury department, in evidence, containing these statements of Motte and English, he did so in order to maintain and prove this issue. Both the judge and the counsel for the defendant so understood it. Indeed, these were the only parts of the exhibit to which the defendant could be construed as objecting. He could not deny the ruling of the commissioner. There was no reason or necessity for proving such ruling. It had been admitted. The objection was to the certificates introduced to show that, notwithstanding the ruling of the commissioner, the tax was illegally assessed. The bill of exceptions, signed by the judge, says:

"The attorneys for the plaintiff, to maintain and prove the issues settled by the court, offered in evidence alleged certified copies of the application of R. W. Brown to the commissioner of internal revenue for abatement of the tax wrongfully paid. These certified copies are herewith sent as part of this bill of exceptions. * * * To the ruling of the court in allowing said certified copies to be introduced in evidence, the defendant objected."

It is clear that the judge and the counsel for defendant both understood that these certified copies were offered by plaintiff to prove the issue settled by the court, and that they were allowed and admitted, and that to this allowance and admission exception was taken. The attention of the court was thus drawn to this fact, and so this case does not come within *U. S. v. McMasters*, 4 Wall. 680, 18 L. Ed. 311, and the other cases quoted by defendant in error. The assignments in error are fully sustained by the exception taken at the trial. The judgment of the circuit court is reversed. The cause is remanded to that court, with instructions to grant a new trial.

MOSS v. WHITZEL.

(Circuit Court, W. D. Missouri, W. D. May 6, 1901.)

1. NATIONAL BANKS—LIABILITY OF STOCKHOLDERS FOR ASSESSMENT—DEFENSES.

The officers of a national bank have no power to incur a liability on the part of such bank after it has gone into liquidation which will be binding on the shareholders, and a judgment on a liability so created, rendered against the bank by collusion of the officers, is not conclusive on the shareholders.

2. SAME—ACTION BY RECEIVER—CONCLUSIVENESS OF ASSESSMENT.

The fact of an assessment by the comptroller upon the stockholders of a national bank does not conclude such stockholders as to the validity of the debts to pay which the assessment is made, and they are entitled to their day in court upon that question before being required to pay the assessment in an action against them by the receiver. Where the defendants in such an action assert the invalidity of a judgment against the bank which is the basis of the assessment, the appropriate procedure would seem to be for them to file a bill in equity to determine the validity of such judgment, and to enjoin the action against them, giving bond for the payment of the judgment therein in case the injunction should be dissolved after hearing.

Altschuler & Leese, for plaintiff.

John D. Milliken, for defendant.

PHILIPS, District Judge. This is an action at law instituted by plaintiff, as receiver for the First National Bank of McPherson, Kan., to recover of the defendant, as a stockholder in an insolvent national bank placed by the comptroller of the currency in charge of the plaintiff as receiver. The second ground of defense to this action is that the liability of the insolvent bank, which recovery from the stockholders is sought to meet, is predicated of a judgment rendered in the state court of Kansas against said national bank in favor of one Bradley, receiver of the First State Bank of McPherson, for the sum of \$19,346.75, of which \$14,000 remains unpaid. Said judgment is assailed for invalidity on the ground that the transaction or contract on which the judgment was based was made by the officers of said First National Bank after it had gone into voluntary liquidation, and after it had ceased to do any and all business, of whatever kind, except the winding up and settlement of its affairs, and that said liability so attempted to be contracted by said bank officers was without the knowledge or consent of the stockholders of the bank. The

answer alleges collusion between the officers of the two banks, who were practically the same, by which said obligation was obtained; that the stockholders were unable to interpose to defend said action, for the reason that the president and cashier of said respective banks, for corrupt reasons, refused to defend said First National Bank against the action of the receiver of said First State Bank, but, on the contrary, aided and abetted and assisted said receiver in recovering judgment against the First National Bank. The answer further alleges that at the time said action was brought against the said First National Bank the statute of limitations had run against the cause of action; and the answer further alleges that said contract between the two banks upon which said judgment was obtained was without the basis of liability on the part of the First National Bank, and that these stockholders have a good and valid defense to said alleged cause of action.

The demurrer raises two questions: First, that the stockholders of the First National Bank of McPherson are concluded by said judgment in favor of the receiver of said State Bank; and, second, that the action of the comptroller in making the assessment upon the defendant stockholders is conclusive of the validity of said judgment debt. The contention of defendant's counsel is that the defense presented excepts the defendant from the operation of the general rule that a judgment against a corporation concludes the stockholders.

In *Richmond v. Irons*, 121 U. S. 27, 7 Sup. Ct. 788, 30 L. Ed. 864, it was ruled by the supreme court that when a national bank goes into liquidation it ceases to do business,—“after that there was no authority on the part of the officers of the bank to transact any business in the name of the bank, so as to bind its shareholders, except that which is implied in the duty of liquidation, unless such authority had been expressly conferred by the stockholders,”—and that, as no such express authority appeared in the case, the action of the bank officers in creating the liability of the bank imposed no obligation binding upon the stockholders, and that an adjudication on such liability against the bank did not conclude the stockholders from defending the action on the ground of the invalidity of such liability. This is reaffirmed in the case of *Schrader v. Bank*, 133 U. S. 67, 10 Sup. Ct. 238, 33 L. Ed. 564. The suit instituted in the foregoing cases was by the creditors of the insolvent bank to subject the stockholders to a double liability under the national banking act, so that the only difference in fact between the two cases is that of a suit instituted by the creditors of the bank to reach this fund in the hands of the stockholders, and the suit at bar, instituted by the receiver under direction of the comptroller of the currency. Both methods of procedure are expressly provided for by statute (Act June 30, 1876; 1 Supp. Rev. St. p. 216). When a suit is instituted by a creditor of the bank against a stockholder, the court, in the exercise of its equity powers, proceeds to ascertain what sum, within the limits of the stockholder's liability, is due and owing by the bank, and how much the stockholder should be required to contribute. As said by Mr. Justice Matthews, speaking for the court, in *Richmond v. Irons*, 121 U. S. 48, 7 Sup. Ct. 788, 30 L. Ed. 864:

"As all the shareholders are bound in that way to all the creditors, any proceeding to enforce this liability must be such as from its nature would enable the court to ascertain for what the stockholders ought to be made liable, to whom, and in what proportion as respects each other."

And inasmuch as the stockholder in resistance of a suit by a creditor is permitted to show that the judgment against the bank which the stockholder is thus called on to pay is based on an assumption by the officers of the bank after the bank had gone into voluntary liquidation, and therefore the consideration for the judgment was invalid, and that the judgment thereon between the creditor and the bank does not conclude the stockholder, it is hard to comprehend why the same measure of protection, under like conditions, should not be accorded to the stockholder when sued by the receiver acting under the comptroller. The distinction made by plaintiff's counsel is based upon the language of Mr. Justice Swayne in *Kennedy v. Gibson*, 8 Wall. 498-505, 19 L. Ed. 476, which is the leading case first discussed by the supreme court under the statute authorizing the comptroller to appoint a receiver and make an assessment upon the stockholders. This language is as follows:

"It is for the comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and, if only a part, how much, shall be collected. These questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders cannot controvert it. It is not to be questioned in the litigation that may ensue."

This has been reasserted in subsequent cases by the expressions that:

"Former decisions of this court have ruled that the determination of the comptroller of the currency and his order to the receiver are conclusive of the extent to which the liability of stockholders of insolvent banks may be enforced in suits against such stockholders." *Bank v. Case*, 99 U. S. 634. 635, 25 L. Ed. 448.

And in *Casey v. Galli*, 94 U. S. 677, 24 L. Ed. 168, the court, referring to the case of *Kennedy v. Gibson*, supra, said:

"It is there said that the amount to be paid rests in the judgment and discretion of the comptroller; that his determination cannot be controverted by the stockholders in suits against them."

These rulings go no further than what the language implies, and the language must be restrained to the subject-matter under consideration. The sense is that whether or not an assessment on the stockholder shall be made, and the amount thereof, in the first instance, are solely matters of administrative policy and determination, and are addressed to the discretion of the comptroller. But the supreme court has not held that a stockholder, when sued by the receiver, is precluded from defending on the ground that he is not a stockholder, or that he owes nothing as such stockholder, or that there is in fact no debt or obligation of the bank existing at the time of the suit against the stockholder. If this defense is not permitted to the stockholder when called upon to pay an assessment based upon such judgment not conclusive against him, when, where, and how is he to find relief from the unjust exaction demanded of him? He has not hitherto had his day in court. He had no hearing before the

comptroller prior to the assessment. The statute makes no provision for such hearing before the comptroller. The comptroller acts upon reports laid before him by the receiver respecting the liabilities of the bank and its assets. On this *ex parte* showing he decides as to the necessity and amount of the assessment. This action of his is not reviewable. If the stockholder when sued by the receiver stands mute and suffers judgment to go by default, has he not had his day in court? Could he pay the judgment against him, and then have any standing anywhere in court to restrain the receiver from paying over the fund to the judgment creditor of the bank? It is said that the statute provides that, if there is any surplus in the hands of the receiver after the debts of the insolvent bank are paid, it would go back, *pro rata*, to the stockholders who paid their assessment. This would afford very little consolation to the stockholder after the money collected from him had been paid over in satisfaction of the debt for which the stockholder is not in law and conscience bound. On the other hand, the receiver (so says the supreme court) "represents both the creditors and the association." *Kennedy v. Gibson*, 8 Wall. 506, 19 L. Ed. 476. And therefore the judgment against him in this action would conclude him both as to the receiver and the creditor. *Cromwell v. Sac. Co.*, 94 U. S. 351, 24 L. Ed. 195. It seems to me that, to sustain the contention of plaintiff, the court must read into the statute not only that congress intended that the comptroller should be the exclusive judge as to when an assessment on the shareholders should be made, and the amount thereof, but that he is also so far clothed with judicial functions as to conclude the shareholder from contesting the fact as to the validity or existence of any liability which the property of the shareholder is taxed to pay. This would carry the representative character of the receiver beyond what the supreme court has said,—that he represents the creditors and the association,—by holding that he also represents the shareholders, when called upon to pay the assessment. It seems to me that this would overturn the maxim that every man is entitled to his day in court, and would violate the fifth amendment to the federal constitution, in depriving the shareholder of property "without due process of law." While the phrase "due process of law," as applied in this country, is more or less controlled by its application to the facts and conditions of the particular case, yet in its universality it implies the right of the person to be affected by a judicial proceeding against him "to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property, in its most comprehensive sense; to be heard by testimony or otherwise, and to have the right of controverting by proof every material fact which bears on the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him, this is not due process of law." *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780; *Zeigler v. Railroad Co.*, 58 Ala. 599. "It is essential to due process of law that there shall not only be notice of the time and place for the hearing, but, what is more important, that there shall be a tribunal clothed with power by methods and rules prescribed by law to hear and determine the question involved." *Charles v. City*

of Marion (C. C.) 98 Fed. 166. As applied to the conditions under which the comptroller makes the assessment, and the right of the shareholder when sued to contest the existence of the debts which constitute the basis of the assessment, the distinction drawn by the court in *Gabriel v. Mullen*, 111 Mo. 119-124, 19 S. W. 1099, is not inapplicable. The statute of the state provided that the wife's personality should be her separate property, and shall not be liable to be taken for the debts of her husband, but shall be subject to execution for any of the debts of the husband for necessities for the wife and family. While the court held that this separate property of hers might be seized on execution on a judgment against the husband alone, it also held that the wife, notwithstanding, had the right to a trial of the issue whether or not the execution debt was in fact created for such necessities, and that she is not concluded on that issue by a judgment against her husband to which she is not a party. It occurs to the court that the spirit of the statute authorizing the comptroller to order an assessment and determine the amount thereof will be best observed, and the ultimate rights of the creditors and stockholders will be best subserved, if, instead of interposing this defense at law, the effect of which is to avoid paying any assessment whatever, the defendant would file herein a cross bill in equity setting up the pendency of the action at law, and the grounds of relief sought by him in detail, according to equity practice, asking that the action at law be stayed until the rights of the parties are determined in the equitable proceeding. The court could stay the suit at law until the termination of the proceeding in equity; the complainant in the cross bill tendering therewith a bond, to be approved by the court, conditioned that, in the event of the dissolution of the injunction, judgment for the amount of the assessment against him, with interest and costs, might go against the principal and sureties on the bond. After much consideration, this seems to the court to be the better course of procedure, as applied to the situation of this controversy. *Springfield Mill. Co. v. Barnard & Leas Mfg. Co.*, 81 Fed. 261, 26 C. C. A. 389. If the defendant sees fit to adopt this suggestion of the court, he will be given 10 days in which to file such cross bill and tender such bond.

NOTE. After the filing of this opinion the suit was compromised.

GRAYSON v. BRECKENRIDGE.

(Circuit Court of Appeals, Fifth Circuit. April 23, 1901.)

No. 946.

TRESPASS TO TRY TITLE—EVIDENCE OF TITLE CONSIDERED.

Plaintiff, as residuary devisee of a testator who died in 1838, brought action to recover certain lands in Texas, claimed by defendant. By his will the testator devised to two persons "all the lands held under title made to me, or secured to be conveyed to me by bond or otherwise, upon purchases made on our joint account in the years 1836 and 1837." Among purchases made by testator in 1836 was one from one Henry C. G. S., for

which a title bond was given, reciting full payment of the consideration. By a decree entered in 1843, in a suit by the devisees against the executors, the purchases included in the specific devise were determined and enumerated, and among others one stated to have been made from "William S."; but the purchase from Henry C. G. S. was not mentioned, and the executors were required to cause title to the tracts held by bond to be conveyed to such devisees. Subsequently the executors brought suit against Henry C. G. S., and in 1849 obtained a decree for the conveyance to them of the land embraced in his bond to testator. Defendant claimed title to a part of this tract, through mesne conveyances, under a deed to the same made by the devisees in 1851; and it was shown that he and his grantors had paid the taxes thereon since 1850, while plaintiff had paid no taxes thereon, nor made any claim thereto, until just prior to the commencement of the action. There was a William S. who owned a tract in the same county in 1836; but it did not appear that it had been purchased by testator, or that it was ever claimed by any one under him. By the law of Texas in force in 1836 a bond for a deed reciting payment of the consideration operated to convey the legal title to the purchaser, so that the will operated to pass title to the Henry C. G. S. tract directly to the devisees, provided the tract was embraced in the devise, although the effect of such bond was apparently misapprehended by the testator and all parties in interest, as well as by the court, which required the executors to procure conveyances in such cases. *Held* that, presumably, the court's decree through mistake used the name "William S.," instead of "Henry C. G. S.," in describing the tract intended to be assigned to the devisees, but that in any event it was clear, from all the evidence, that the tract in controversy was allotted to the devisees, either by the court or by agreement of the parties in interest, as being within the devise, and that the trial court did not err in directing a verdict for defendant.

In Error to the Circuit Court of the United States for the Western District of Texas.

Chas. W. Ogden, for plaintiff in error.

Leroy G. Denman, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. This was an action of trespass to try title to land. The pleadings are formal. The land, the title to which is involved in this suit, was granted by the government to Henry C. G. Summers. On April 13, 1836, Peter W. Grayson purchased the land from Summers, paying cash and receiving a bond for title. On the 8th of June, 1838, Grayson made and wrote with his own hand his last will and testament. The testator died in 1838, and his will was duly probated in Galveston county, Tex., on April 24, 1840. It has (with other provisions not necessary to note) the following:

"First. I give and bequeath to my three nephews, Frederick W. Grayson, John C. Grayson, and Alfred Grayson, and to my niece, Mary E. Breckenridge, now living in the United States, to be divided equally among them, all that I may be worth in lands or in other property, after the payment of my just debts and following legacies, namely: To Doct. Levi Jones, of Texas, and Albert T. Burnley, of Kentucky, I give and bequeath all the lands held under title made to me, or secured to be conveyed to me by bond or otherwise, upon purchases made on our joint account in the years 1836 and 1837. Said lands may be ascertained by writings under my hand executed to the aforesaid Burnley. * * * With respect to the lands hereby bequeathed to the said Jones and Burnley, I make this exception, and direct that a certain portion of them be conveyed to William M. Lambeth, of New Orleans, or any one he

may appoint to receive title to the same, their quantity and location to be ascertained by a writing which I have made to the said Lambeth, obligating myself to convey them to him. * * * Lastly, I hereby appoint my friends, Gail Borden, Jr., James Love, John Borden, and Oscar Farish, executors of this, my last will and testament."

Of the executors named Gail Borden, Jr., and John P. Borden duly qualified, and continued in charge of the estate of the testator certainly until the 26th day of September, 1845. How much longer the testimony does not show. On the day last named they brought suit in the district court for the county of Victoria against Henry C. G. Summers, in which they prayed that he may be compelled by a decree of the court to convey to the petitioners, as the representatives of Grayson, a good and indefeasible title to the land described in his bond for title. The plaintiff testified:

"Gail and J. P. Borden, executors of Grayson, had the estate in charge until about 1846. On May 25, 1843, the district court for Galveston county had rendered a decree, in a suit wherein Levi Jones and Albert T. Burnley were plaintiffs, and Gail Borden, Jr., and John P. Borden, executors of Peter W. Grayson, were defendants, in which it is recited that: 'This cause came on to be heard on the petition, answer, and the exhibits filed in the cause. Whereupon, it appearing to the satisfaction of the court * * * that the said plaintiffs are entitled to the lands specified, viz. all the lands purchased by said Peter W. Grayson of the following persons, to wit, James B. Miller, Leonard Manso, William Summers, Joseph McCoy, William Arrington, Valentine Garcia, Dugo Garcia, Samuel Williams, John Coffin and Sarah (his wife), and Thomas Jackson and wife, * * * and it also appearing that it was the intention of the said testator of the said defendants that they, as his executors, should convey the said lands to the plaintiffs, it is therefore adjudged, ordered, and decreed that the said defendants do convey, in their said characters of executors, to the said Jones and Burnley, all of the said lands so purchased as aforesaid by their said testator from the persons named, so far as they have made titles to them or their testator, and that so soon as titles can be procured of those lands so purchased as aforesaid, which were held by their said testator by title bonds or otherwise, that they convey the same or cause them to be conveyed by the original vendees of their said testator to the said plaintiffs; the conveyance by the said executors of the lands purchased from Leonard Manso to express that the said Levi Jones and Albert T. Burnley receive the title therefor without prejudice to the rights of William M. Lambeth, before referred to in this decree and mentioned in said will.'"

It would seem from these proceedings that the testator, his devisees, and his executors, and the district court of Galveston county, were of opinion that title to the land did not pass by the execution and delivery of a bond for title and the payment of the purchase price. It is to be observed, further, that the will of the testator does not vest in his executors the title to the land he had purchased on joint account for himself and Jones and Burnley, but devises the same to, and vests the title thereto in, Jones and Burnley. The action of Grayson's executors against Henry C. G. Summers proceeded to judgment and decree by default on March 14, 1849, in which Summers was required to convey the land to the complainants by a good and indefeasible title. A. T. Burnley had executed and delivered his power of attorney to Levi Jones (June 23, 1845), authorizing him to sell and convey, by or with quitclaim warranty only, all the lands belonging to or claimed by Burnley situated in Texas. On September 7, 1851, Levi Jones, acting under power of attorney from Burnley,

conveyed to Fielding Jones (a brother of Levi Jones) the league of land (embracing the land in this suit) for a recited consideration of \$5,000 in hand paid—

"To have and to hold the said tract or parcel of land, with all the privileges and appurtenances thereto belonging or in any wise appertaining, unto him, the said Fielding Jones, his heirs and assigns, forever. And the said Burnley hereby binds himself, his heirs, executors, and administrators, against the claim or claims of all persons whatsoever claiming the same, or any part thereof, under him or them, to warrant and forever defend; it being understood between the parties hereto that this conveyance is intended to be one in the nature of quitclaim only, the party purchasing being satisfied of the validity of the title of said Burnley."

The defendant shows a chain of title from Fielding Jones to himself, through mesne conveyances, for the land in controversy. The proof shows that the taxes were paid in 1850 by Levi Jones for Burnley on the entire Henry C. G. Summers league; that from 1852 to 1859, inclusive, Fielding Jones assessed and paid the taxes on the entire league; that from 1860 to 1866 J. S. Turner, under whom the defendant holds, assessed and paid the taxes on the entire league; that the persons in the defendant's chain of title have since annually assessed and paid the taxes on the land claimed by him in this action; and that the taxes on the balance of said league, since 1866, have been assessed and paid by various other persons claiming under Turner. There is no evidence tending to show that the plaintiff, or the executors of Grayson's will, or any one else acting for the plaintiff, had rendered this land for taxes, or paid taxes thereon at or for any time. There is no evidence tending to show that the plaintiff, or any person for him, asserted any title to the land in controversy until just before the bringing of this suit.

One of the attorneys for the plaintiff testified on the trial that during the 20 odd years he had lived in Lavaca county the plaintiff had claimed other land in the county, but not this land; that this witness was agent for the plaintiff under Judge W. P. Ballinger, and represented him in connection with the Muldoon land (owned by the plaintiff) and a number of these tracts in Lavaca county. Ballinger never told him to assert any claim to the land in controversy in this suit. Witness knew nothing about it. In reference to use and occupation this witness testified:

"It would be difficult for me to say how many people are living on the land. There are a number of people living there.—a dozen or more. Some of them have been living there a good while. I know that a number of them have been there quite a while. I do not know exactly the number of years."

He also testified:

"There is also in Lavaca county a William Summers survey. I do not think I can answer positively the question as to whether I have ever been able to trace any claim Grayson ever asserted to the William Summers survey. I could not give an idea as to how many people lived on the William Summers survey. It is a settled survey. I do not know anything about the title to the people who are living on the William Summers survey. I attended to what Judge Ballinger sent me in charge. I had no correspondence with him about this survey [Henry C. G. Summers]. He never intimated to me that his client claimed the Henry C. G. Summers survey. My agency with him was in connection with the Muldoon land. The Muldoon lands were not very valuable; worth about five or six dollars per acre."

On cross-examination he testified:

"I do not know that I can make anything like a fair estimate as to what portion of the Henry C. G. Summers league is inclosed. Until recently most of it has been outlying. The principal part of this league was uninclosed prior to the institution of this suit. The people that lived on it were on small places,—small tracts,—and were poor people. I cannot say what portion of the league has been up to recently uninclosed, but a large portion. I could identify on the land the portion of the Henry C. G. Summers league which is claimed by the defendant. The portion of the league has not been occupied until recently."

On re-direct examination he said:

"I did not represent any other land for the Grayson estate, except the Muldoon land. I frequently saw Judge Ballinger in connection with the Muldoon land, and he never mentioned any claim his client had for the land in controversy in this case."

We only notice the tenth assignment of error, which is to the effect that:

"The court below erred in peremptorily instructing the jury to return a verdict for the defendant, R. J. Breckenridge."

While the testator, his devisees and executors, and the district court of Galveston county seem to have concurred in the opinion that title to land did not pass by the execution and delivery of a bond for title and the payment of the purchase money, it is now, and has long been, settled law in Texas that a title bond (such as that from Summers to Grayson, dated April 13, 1836), showing upon its face that the purchase money had been paid, vested full title in Grayson under the law then in force. This erroneous view or the doubts then entertained by the parties interested in Grayson's estate, including Grayson himself, touching the character of his claim to lands held under such title bonds, aids us in the construction of the language of his will, and of the action of the court thereon and of the executors thereunder. The testator was a man of conspicuous prominence in Texas at and before the time of the making of his will and up to the time of his decease. The executors he appointed were leading historic figures in Texas in 1838. The two who qualified, Gail Borden, Jr., and John P. Borden, were most intimately acquainted with the whole subject of the grants and locations of lands in Texas, especially of surveys west of the Trinity river. As eminent lawyer and large planter, residing at Galveston and having his plantation in Brazoria county, Col. James Love was widely known, and enjoyed and deserved the esteem of the great majority of the residents in the Brazos and Colorado valleys. He was the uncle of Mr. William P. Ballinger, and on the organization of the state government after annexation was appointed the first district judge of the First judicial district of Texas, then including the county of Galveston and all of the counties on the Colorado below Bastrop and on the Brazos below Washington. His immediate predecessor was that helpful friend and worthy model for young lawyers, Judge John B. Jones. On the day that Mr. Ballinger enlisted for the Mexican War, though not then 21 years of age, Judge Jones, *ex mero motu*, issued to him his license to practice law, and, on Mr.

Ballinger's return from the war, admitted him into partnership with himself in the practice of law. From this auspicious entry into the legal profession Mr. Ballinger steadily grew in strength and reputation as a citizen and a lawyer, early attaining and ever holding his place in the highest rank. Dr. Levi Jones was one of the original, and perhaps the most active and the best known and most generally esteemed of the founders of the city of Galveston. He suffered business reverses in 1848, but his reputation for integrity, intelligence, and energy was never impaired. Fielding Jones was judge of the district court for the district which embraced the land involved in this case at the time the writer of this opinion came to the bar. One of the writer's earliest experiences as a lawyer was had as counsel for a party plaintiff in the trial of an action of trespass to try title to a league of land before that honorable and honored judge in the district court for Calhoun county, Tex. These are the men who were friends of the testator, connected with him in business and with each other in the faithful administration of his estate under his will.

The distinguished counsel who represents the plaintiff contends that the grant to Levi Jones and Albert T. Burnley is limited by this language in the will:

"Said lands may be ascertained by writings under my hand executed to the aforesaid Burnley."

The language of the devise is:

"I give and bequeath all the land held under title made to me, or secured to be conveyed to me by bond or otherwise, upon purchases made on our joint account in the years 1836 and 1837."

That is complete in itself, and the reasonable construction is that the lands purchased in 1836 and 1837 were purchased on joint account. It is to be remembered that on the 13th of April, 1836, the war between the Texas colonists (then provisionally organized as the republic of Texas) and the republic of Mexico was flagrant in the field where this land is situated. The Alamo had fallen, the little Texas army had retired from Gonzales across the Colorado, and then had crossed the Brazos, and all of the country west of the Brazos was fully occupied and being scoured by military forces hostile to the American settlers. These settlers, men, women, and children, had all retired, or were retiring, before the invading army. Nearly all of the men were in the retreating army. It was then that these purchases on joint account began. Many of them were doubtless made in the camp by patriots of strongest faith from patriots whose faith was shaken or lost. At that time, and for several years thereafter, extending beyond the time of the probate of Mr. Grayson's will, more than nine-tenths of all the land that had been granted and surveyed in that section of the country was entirely unoccupied by or for the grantees. It is not only reasonable to suppose, but almost absolutely certain, that most of the purchases made in the spring of 1836 by Mr. Grayson on joint account for himself and Jones and Burnley were made from persons who were leaving the country, or from those who did not then expect to be able to hold their lands. The vendors had been sparsely scattered over a wide

extent of territory, and their land grants were equally widely scattered. It does not appear on the face of the will, or anywhere in the record, whether the testator was at the time of making the will at his home in Texas, or was in the state of Kentucky. The proof shows that he died in Kentucky, in which state Mr. Burnley resided, and among the opening words of the will are these: "Feeling at the present moment the uncertainty of life." The fact is not mentioned in the record, but it is matter of public history that Mr. Grayson died by his own hand, and very soon after the date of the execution of this will.

The memorandum given to Mr. Burnley, and referred to in the will, would be useful to aid his executors and devisees in discovering the location of the different tracts of land constituting parts of his estate, and useful to Mr. Burnley to aid him in ascertaining the location of the lands purchased on joint account. It appears from the judgment in the case of Jones and Burnley against Grayson's executors that there were two exhibits attached to their petition,—one of which, marked "Exhibit B," appears to have been the "writings under my hand executed to the aforesaid Burnley," and the other, marked "Exhibit C," to have been the paper described in the will as "a writing which I have made to the said Lambeth, obligating myself to convey them [lands] to him," which has respect to the lands bequeathed to Jones and Burnley, and expresses a limitation thereon to the effect "that a certain portion of them be conveyed to William M. Lambeth, of New Orleans, or any one he may appoint to receive title to the same; their quantity and location to be ascertained by a writing which I have made to the said Lambeth." The petition and these exhibits thereto have been lost, but the judgment shows that Exhibit C embraced the one-fourth part of the lands purchased of Leonard Manso, and the judgment ordered and decreed that Grayson's executors convey to Jones and Burnley the lands purchased by their testator from the persons named in the decree, so far as they had made titles to them or their testator, and that, so soon as titles could be produced of those lands which were held by their testator by title bonds or otherwise, they convey the same, or cause them to be conveyed by the original vendees of their testator, to the plaintiffs,—the conveyance by the executors of the lands purchased from Leonard Manso to express that the said Levi Jones and Albert T. Burnley receive the title therefor without prejudice to the rights of William M. Lambeth, before referred to in the decree and mentioned in the will.

Among the parties named in the decree as those from whom purchases had been made by the testator on joint account appears the name of William Summers, and the name of Henry C. G. Summers does not appear. This decree was made on May 25, 1843. The minute entry of the judgment is all that now remains in existence of the record in that case. It may be that Mr. Grayson had known both Henry C. G. Summers and William Summers, and by inadvertence or lapse of memory wrote the wrong name in the memorandum of vendors which he gave to Mr. Burnley; or it may be that the parties to the suit of Jones and Burnley against Grayson's executors,

and the clerk who made the minute entry of the judgment, knew both William Summers and Henry C. G. Summers, and, without accurately comparing the entry of the names in the decree with the names in the memorandum, by oversight or inadvertence wrote the name of William Summers in the decree. However this may have been, what seems to us from the whole proof to be certain is that Jones, representing himself and Burnley, and the executors, representing impartially all the beneficiaries under the will of Grayson, made a classification and allotment of the lands bequeathed to the special devisees, and that in this adjustment and settlement the land purchased by the testator from Henry C. G. Summers was by them found to be a part of the lands purchased by the testator on joint account with Jones and Burnley, and was set aside to them and taken charge of by Jones as soon as the action by the executors on the bond for title, which was brought in 1845 in Victoria county, had proceeded to judgment; that he paid the taxes on the whole league for the year 1850, and that his vendee, Fielding Jones, paid the taxes on the entire league for the years 1852 to 1859, inclusive; that on February 1, 1859, Fielding Jones mortgaged the entire league to secure a loan of \$2,000; that on May 4, 1860, he sold the entire league by general warranty to J. S. Turner; that Turner paid the taxes on the entire league from 1860 to 1866, and the defendant and those under whom he holds title have annually paid the taxes on the land involved in this case; that neither the plaintiff nor any person for him set up any claim to any part of the Henry C. G. Summers league of land until a short time before the filing of this suit. It is not shown that either he or any person for him paid taxes on any part of the Henry C. G. Summers league of land. It is shown that a league granted to William Summers, located in the same county, is, and for many years has been, fully occupied by numerous settlers. There is no evidence tending to show that the plaintiff, or any person for him, has ever claimed any part of the William Summers survey.

We refrain from any discussion of authority on the subject of the presumption of a grant, as, in our view, the learning on that subject has no application to this case. The proof satisfies us that a reasonable and impartial mind must conclude and presume therefrom that the league of land granted to Henry C. G. Summers, and by him sold by title bond in April, 1836, to the testator, was purchased by the testator on joint account for himself and Burnley and Jones, and that at some time prior to September 7, 1851, the date of the conveyance to Fielding Jones, this league had been duly allotted to the portion of lands devised to Jones and Burnley. We therefore conclude that the circuit court did not err in its instruction to the jury to find for the defendant. The judgment of the circuit court is affirmed.

In re LORILLARD.

(Circuit Court of Appeals, Second Circuit. April 13, 1901.)

No. 137.

On Petition for Rehearing. Denied.
For former opinion, see 107 Fed. 677.

Before LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The points suggested were not overlooked by the court, as may be inferred from a perusal of the opinion. The contention of the appellant is not only highly technical, but unmeritorious and inequitable. Petition for rehearing denied.

In re SCHULLER.

(District Court, E. D. Wisconsin. May 13, 1901.)

BANKRUPTCY—VALIDITY OF LIEN—BANKRUPT'S RIGHT OF EXEMPTION.

Under the laws of Wisconsin, which give a right of exemption from a stock in trade to the value of \$200, the goods to be selected by the debtor, a mortgage taken by a creditor on the entire stock of an insolvent debtor, which exceeds \$200 in value, within four months prior to the debtor's bankruptcy, and with knowledge of the insolvency, is avoided as a preference by the bankrupt as to all the goods, where the right of exemption is waived by the bankrupt, both on the ground that the mortgagee cannot claim the exemption on behalf of the debtor under the state law, and for the further reason that, the exempt goods never having been selected, if the mortgage be treated as applying to them alone it is void for uncertainty of description.

In Bankruptcy. On question certified by referee.

The bankrupt was the owner when she filed her voluntary petition in bankruptcy of a stock of millinery goods, of which the actual value was only about \$30 in excess of the exemption of \$200 allowed by the Wisconsin statute. Nineteen days prior to such filing the bankrupt made a chattel mortgage, to secure her pre-existing indebtedness, to Gage Brothers & Co., upon certain household furniture and "all her millinery stock" then in the store, for \$449.31. In the schedule which accompanied her petition the stock of goods was mentioned, and her claim noted for an exemption of \$200 in amount, but subsequently she filed a notice that she claimed only the household goods enumerated, and that she renounced and surrendered "any right or claim to any other goods or articles" as exempt; and the stock of goods was thereupon sold by the trustee under stipulation whereby the claim made by the mortgagee to the portion which was subject to exemption was reserved for the court to determine on an application for distribution of the proceeds. The question certified by the referee thereupon is, in substance, whether the mortgage is valid to the extent of the mortgagor's exemption, notwithstanding the waiver and surrender of such exemption by the latter. On behalf of the mortgagee it is expressly conceded that the terms of the bankrupt act render the mortgage "void as to creditors so far as it covered non-exempt property," and that it was taken for a pre-existing indebtedness, and with knowledge that the debtor was insolvent.

Bloodgood, Kemper & Bloodgood, for Gage Bros. & Co., mortgagees.

Burke, Price & Cowen, for trustee.

SEAMAN, District Judge (after stating the facts). For the purpose of ascertaining the rights of the bankrupt to exemptions, the act of congress adopts the provisions of the state statute (section 6), and then requires that the exempt property be set apart by the trustee, and that he "report the items and estimated value thereof to the court." Section 47, subd. 11. Questions as to the rights of creditors who have obtained preferences in security upon exempt property, or by an express waiver of exemption in favor of certain creditors, are not well settled; and if the case presented were one of a mortgage given under like circumstances upon property which was specifically exempt, or even upon stock in trade not exceeding \$200 in value, the solution would not be free from difficulty. In this instance, however, the inquiry is simplified by the fact that the mortgage covers the entire stock, without specifying any claim of exemption or any exempt portion, and the value exceeded the amount of \$200 allowed for an exemption under the Wisconsin statute. Section 2982, subd. 8, St. Wis. 1898. Conceding it to be an unlawful preference, within the terms of the bankrupt act, when applied to the stock of goods as described, the mortgagee claims that the lien is valid, nevertheless, to the extent of an exemption allowance, and confers the right to have such portion set apart for his benefit, though the mortgagor refuses to exercise her exemption rights in the property. I am of opinion that this claim is untenable, upon either of two grounds:

1. The right of exemption is a personal privilege granted to the debtor, which he can exercise or waive, and, unless otherwise provided by the statute, it cannot be exercised by any other person; and the Wisconsin statute *supra* requires the claim and selection to be made by the debtor, or on his behalf, with an exception in favor of a wife, and confers no such right on a mortgagee. In *Edmonson v. Hyde*, 2 Sawy. 205, Fed. Cas. No. 4,285, the right of a mortgagee to set up such claim as against an assignee in bankruptcy was considered,—the case being one of a fraudulent conveyance which included exempt property,—and the court held: "If the bankrupt does not choose to assert any claim to have it exempted, * * * the mortgagee is in no position to claim it as against the assignee." See *Thomp. Exemp.* § 438.

2. The second ground, however, goes to the substance of the mortgage, and renders it void for uncertainty if interpreted as a separate mortgage of the exempt stock. The decisions of the supreme court of Wisconsin furnish definitions of the nature of this exemption, and of the effect of reserving it in general terms from a mortgage upon the stock of goods, from which no other deduction is admissible. The contention is that the mortgage must be treated as covering the exemptions alone,—in effect, as describing "all of the exempt share of said stock of goods." But, so read, no specific goods would be described, and the mortgaged property could be ascertained only when a selection was made by the mortgagor out of the mass. With no such selection and separation made at or before the time of making the mortgage, and thus described in its terms, the mortgaged property was neither specifically described, nor was it capable of identification until the mortgagor exercised his option by setting it apart.

In *Fowler v. Hunt*, 48 Wis. 345, 4 N. W. 481, the like question arose in respect of a mortgage which described "the entire stock," excepting therefrom certain articles "and stock in trade to the amount of two hundred dollars," and the court thereupon holds:

"This exception leaves in the mortgagor a proportionate interest in each article mortgaged as \$200 is to the whole value of the property, uncertain and unsevered, and which is unseverable and incommutable, except by some future act of the parties, or the mortgage leaves a right of future selection of any of the property to the mortgagor of the value of \$200, the residue of which can be ascertained only by such selection; and, in either view, such uncertainty of description renders the mortgage void."

In *Zielke v. Morgan*, 50 Wis. 560, 7 N. W. 651, this provision for exemption is thus characterized:

"This is not a specific exemption, which, it has been held by this court, need not be claimed by the debtor, but which the officer takes at his risk, as in *Gilman v. Williams*, 7 Wis. 329, 76 Am. Dec. 219, and many other cases; nor is it a case where all the property does not exceed the exemption, and which is therefore specific. It is an exemption of goods, as stock in trade, of the value of \$200, part and parcel of a stock of goods of the value of several thousand dollars, which must necessarily be selected and set apart, and rendered specific and certain, by some one; and the question is, by whom? Such an exemption has been recently held by this court to be so uncertain and undetermined as to render a chattel mortgage absolutely void for uncertainty, in which such an exemption is excepted and reserved. *Fowler v. Hunt*, 48 Wis. 345, 4 N. W. 481. Within the reason of that case, it might properly be held that such an exemption is void and inoperative until made certain by selection."

And in *Bong v. Parmentier*, 87 Wis. 129, 58 N. W. 243, the authorities are reviewed, and this doctrine reaffirmed as to the nature of such exemption.

On the view thus indicated, the mortgage must be held inoperative, and the claim of the mortgagee to be paid out of the proceeds in the hands of the trustee is overruled. The answer, accordingly, is certified to the referee for further proceeding in conformity with this opinion.

In re WITTENBERG VENEER & PANEL CO.

(District Court, E. D. Wisconsin. May 4, 1901.)

1. BANKRUPTCY—PREFERENCE—TRANSFER WHILE SOLVENT.

An assignment or transfer of fire insurance policies by the insured as collateral security for an antecedent debt is not rendered void as a preference by the bankruptcy of the insured within four months thereafter, under Bankr. Act 1898, § 60, where at the time the transfer was made the insured was solvent, within the meaning of the act, and became insolvent only by reason of the fire which destroyed the insured property.

2. INSURANCE—TRANSFER OF INTEREST IN POLICY—VALIDITY.

A corporation mortgagor procured a further loan from the mortgagee, and at the time agreed that policies of insurance on the mortgaged property, which were payable to the mortgagee as his interest might appear, should be kept in force, the premiums to be paid by him if the mortgagor was unable to pay them, and should stand as collateral security for the new loan. A note for such loan was executed containing a clause reciting the deposit with the payee of "certain property as stated below, as collateral security," and the further description, "Fire Insur-

ance policies should fire occur." The policies on the property were not in the possession of either of the parties, but were in the custody of the agent through whom they were procured, and who was to renew them as occasion required. *Held*, that the transaction was not a common-law pledge, to the validity of which an actual delivery of the policies was essential, but an agreement giving the creditor a beneficial interest in the personal contract of insurance, from which arose an equitable lien upon the proceeds of the policies in his favor, a loss having occurred, and the companies having paid the same without objection.

8. SAME—TRANSFER AFTER LOSS—PRIOR EQUITIES.

The attaching of riders to insurance policies under which a loss had occurred, by direction of the assured, making such loss payable to a creditor holding notes of prior date, where there had been no definite agreement previously for such security, gave the creditor only such interest in the proceeds as the assured then possessed, and subject to all equities outstanding against such proceeds in favor of others before the loss occurred.

In Bankruptcy. On review of a portion of the order made by the referee respecting the disposition of a fund arising out of fire insurance placed upon the property of the bankrupt, and the payment of the loss thereunder.

The fire occurred shortly before the commencement of the proceedings in bankruptcy, and, the general liability of the insurers being undisputed, they have paid in the amount of the insurance as adjusted, \$11,833.35, to be awarded to each claimant as the court shall decree. It is further undisputed that the Wittenberg Veneer & Panel Company was not insolvent, within the meaning of the bankrupt act, prior to the loss by fire, but became insolvent through such loss. Claims allowed in favor of Edward Daskam, as mortgagee, for \$6,000 and interest, and for \$736.10 and interest, covering payments made on his behalf for insurance premiums, are not contested. The remaining sum is claimed (1) by the trustee as belonging to the estate in bankruptcy; (2) by Edward Daskam on an indebtedness for which he alleges the insurance was held as collateral; and (3) by R. W. Roberts on an indebtedness for which two of the policies are alleged to be held as collateral; and either of these claims by way of lien is in excess of the fund so remaining. The finding by the referee upon this issue is in favor of Roberts, and each of the other claimants petitions for review of this portion of the order.

Felker, Stewart & McDonald, for trustee.

Goodrick & Hay, for R. W. Roberts.

Mylrea & Bird, for Insurance Co.

T. W. Hogan, for Edward Daskam.

SEAMAN, District Judge (after stating the facts as above). The manufacturing plant and stock of the Wittenberg Veneer & Panel Company were destroyed by fire on July 23, 1899, and the corporation, becoming insolvent thereby, made an assignment for the benefit of creditors, August 1, 1899. Proceedings for involuntary bankruptcy were commenced October 19, 1899. When the fire occurred six insurance policies remained in force, aggregating \$12,500,—two written in 1898, covering \$3,500, and four renewals made June 1, 1899, for \$9,000,—and each containing a clause for payment of loss to the mortgagee as its or his interest may appear. Other policies to the amount of \$2,500 had lapsed. After the adjudication of bankruptcy, the loss was adjusted at \$11,833.35, and was paid to the trustee for distribution herein, as ordered by the court. The triangular

controversy over the portion of this fund which remains, after paying up the mortgage and the advances for insurance premiums, is substantially this: (1) The trustee contends—First, that no pledge of the insurance or lien of any character was created in fact to secure either Daskam or Roberts as creditors; and, second, that both transactions are void as preferences, within the terms of the bankruptcy act, in any view of the testimony. (2) Edward Daskam claims an equitable assignment or lien, based upon contract, whereby the insurance was to stand as security for a loan of \$4,000 made by him through the First National Bank of Antigo, but with no manual delivery of the policies, no policies specified, and no clause inserted to make the loss thus payable. (3) R. W. Roberts bases his claim upon notes made by the corporation, and renewed from time to time, amounting to about \$3,600, and upon a clause made July 21, 1899, when all the notes were past due, annexed to the two policies issued in 1898, providing for payment of loss to Roberts.

1. The first question raised by the trustee, whether a lien was created in either transaction, involves the consideration of each claim upon the merits; but the second objection challenges the validity of the alleged liens, under the provisions of section 60 of the bankrupt law, and the bearing of the statute may well be considered at the threshold of inquiry. It is true that the transaction on which the creation of a lien depends in each claim falls within the period of four months preceding the filing of the petition in bankruptcy; but it is equally true, under the testimony, that the corporation was solvent, within the definition of the act, up to the occurrence of the fire, on July 23d. The inhibitions of section 60 apply only to preferences given when the debtor is insolvent in fact, and if a lien was perfected before the fire, in the case as presented, it is not affected by that section, although it may remain open to question under section 67, as to “a present consideration.” On the other hand, if actual delivery and possession of the insurance policies was essential to the creation of the lien in either case, the testimony is satisfactory, if not in all particulars clear, that the policies remained in the hands of the insurance agent, and there was no manual delivery to either claimant until after the fire. Unless the agent can be regarded as the custodian for these claimants, there was no actual delivery, and, on the view assumed, the lien would become effective only after the existence of the insolvency produced by the fire. If such is the case found under either claim, the question would remain whether the claimant then “had reasonable cause to believe his debtor to be insolvent” as the result of the fire (vide *In re Eggert*, 43 C. C. A. 1, 102 Fed. 735, 741), and the answer would not be difficult under the circumstances disclosed. It becomes necessary, therefore, to ascertain the character and constituents of the claims, respectively, to determine their status, both under the general rule and under the bankrupt act.

2. Edward Daskam held a mortgage on the plant of the corporation for the principal sum of \$6,000, which covenanted for insurance to be made payable to the extent of his interest, and all policies so provided. In the spring of 1899 he made a further loan of \$4,000 to the corporation, through the First National Bank of Antigo, under

circumstances and terms which are shown by the testimony substantially as follows: In January, 1899, the corporation required means for its operation, and the president, together with Edward Daskam, applied to the bank above mentioned for a loan of \$5,000. A tripartite parol arrangement was then made—and on the part of the bank recited in a letter of January 12th—that the bank would loan that amount, upon indorsements to be given by Daskam, together with his mortgage on the plant to be placed as collateral, and insurance on the plant to be payable to the bank in case of loss. When the money was furnished, however, the amount was made \$4,000 instead of \$5,000, advanced at several times on the personal notes of Edward Daskam to the bank, with the mortgage and insurance as collaterals, and without notes on the part of the corporation; so that the transaction was carried out as (1) a loan by the bank to Daskam, and (2) a simultaneous loan by Daskam to the corporation. In accordance with this final arrangement, after completion of the advances, on May 15, 1899, the corporation debtor made a promissory note for \$4,106 (covering the accrued interest), payable to the order of Edward Daskam on or before August 10th, containing a printed clause which recited the deposit with the payee of "certain property as stated below, as collateral security to this note," with provision for sale in case of default, followed by this description only in writing: "Fire insurance policies should fire occur." And this instrument was likewise deposited with the bank as further collateral. The testimony of the three parties to these transactions concurs in showing the oral agreements which led up to the making of the instrument of May 15th; that they expressly agreed that insurance was to be kept up on the property of the corporation as security for this loan; that the agent was "to renew the policies from time to time," and, if the corporation "was not able to take care of the premiums," the bank and Edward Daskam "were to look after it and pay." In the opinion filed by the referee, it is held that these oral agreements were merged in the writing of May 15th, and that the testimony referred to was inadmissible (citing *Godkin v. Monahan*, 27 C. C. A. 410, 83 Fed. 116); but I am of opinion that this testimony does not tend to contradict or vary the writing; that it is needful to explain the terms which are otherwise indefinite, and thus becomes admissible to show the meaning of the transaction. No policies are pointed out and none appear to have been delivered with the writing, and, while there is testimony tending to show that some of the policies of insurance were at indefinite times in the course of the transaction in the hands of the bank, it clearly appears that all of the policies were in the hands of the insurance agent at and before the time of the fire. It further appears that the premiums were not paid up until after the fire, and then by the bank, presumably under the pre-existing understanding with the agent; that immediately after the fire the agent sent the two policies of 1898, containing the clause in favor of Roberts, to the insured, by mail, pursuant to the direction given July 21st, and delivered the other policies to the bank on its demand; and that no objection is raised by the insurance companies upon either of these facts.

The testimony shows, therefore, that it was the intention of the parties in making and accepting the loan that insurance was to be kept up on the property of the debtor to stand as security for the advances so made, and the further question to be considered is this: Was a contract made to that end which is enforceable against the insurance proceeds? The referee held that the contract was one of pledge only; that "the thing pledged was not taken possession of"; and concluded that no pledge was perfected. If these premises were rightly assumed, the conclusion was inevitable, as possession is "of the very essence" of such contract. *Casey v. Cavaroc*, 96 U. S. 467, 477, 24 L. Ed. 779. I am of opinion, however, that the transaction was not a "pledge," within the common-law definition of that term, but was an agreement for a beneficial interest in the personal contract of insurance,—a mere chose in action,—from which an equitable lien arises in favor of the promisee against the proceeds. 1 *Jones, Liens*, c. 2; *Wylie v. Coxe*, 15 How. 415, 14 L. Ed. 753. These propositions are well established by the authorities: That the policy of insurance is a mere personal contract between the assured and the underwriter, to indemnify the former against any loss he may sustain by the destruction of the insured property; that it is a chose in action, and an interest in the proceeds may be assigned by parol as well as by deed; that no right to the benefits of the policy attaches in favor of either mortgagees or creditors, in the absence of a trust or contract to that effect; and that an equitable lien arises in favor of either mortgagee or creditor when the assured enters into contract in any form that the proceeds shall be so applied, no valid objection to the transaction being raised by the insurer under any provision of the policy. This general doctrine as to the nature of the insurance contract, and an appropriation of payment by the assured, is stated in the text-books, and many cases cited on the argument,—most frequently in reference to the claims of mortgagees to the proceeds,—and with the remark, in some instances, that "third persons, having an insurable interest in the property," may thus receive the benefits of the insurance. If the possession by the substitute payee of an insurable interest was thus intended to be recognized in the earlier cases as a requisite for the lien, aside from restrictions made in the policy, that distinction no longer prevails, and is clearly set aside by the decision in *Wheeler v. Insurance Co.*, 101 U. S. 439, 441, 25 L. Ed. 1055. Indeed, the rule upheld in that case seems to be decisive in favor of the claim under consideration here, and the following are deemed sufficient additional citations for the several propositions stated above: *Carter v. Rockett*, 8 Paige, 437; *Nordyke & Marmon Co. v. Gery*, 112 Ind. 535, 13 N. E. 683; *Merrill v. Insurance Co. (Mass.)* 47 N. E. 439; *Richardson v. White (Mass.)* 44 N. E. 1072; *Dickey v. Bank (Md.)* 43 Atl. 33; *Heller v. Bank (Md.)* 43 Atl. 800, 45 L. R. A. 438; *Williams v. Ingersoll*, 89 N. Y. 508, 521; *Griffey v. Insurance Co.*, 100 N. Y. 417, 3 N. E. 309; *Miller v. Aldrich*, 31 Mich. 408; *Swearingen v. Insurance Co.*, 52 S. C. 316, 29 S. E. 723; *Carrington v. Eastman*, 1 Pin. 650; *Baillie v. Stephenson*, 95 Wis. 500, 70 N. W. 660. And these federal cases, which are well in point on all phases: *Stout v. Milling Co. (C. C.)* 13 Fed. 802;

Aultman v. McConnell (C. C.) 34 Fed. 724; *In re Little River Lumber Co.* (D. C.) 92 Fed. 585.

On my understanding of the doctrine thus sustained, the claimant Daskam is entitled to an equitable lien, of rank dating from May 15th, when the written instrument was made, if not of the prior date of the oral agreement. Actual delivery of the policies, and continuous possession by the transferee, are not indispensable to create and preserve such lien (*Spring v. Insurance Co.*, 8 Wheat. 267, 5 L. Ed. 614, and cases cited), as in the case of the common-law pledge, although the fact of delivery or nondelivery may be important in many instances as evidence bearing upon the question of complete execution of the agreement for a lien. In the present case the policies were not in the hands of the assured, but were held by the insurance agent,—with the possible exception, before mentioned, of policies deposited for a time in the bank under the agreement,—and it is obvious that the custody of the agent was there treated by the parties as sufficient performance of that part of the agreement. Equity will so regard the possession on this inquiry as to the true intention of the transaction.

3. The claim of R. W. Roberts remains to be examined, and the primary question is whether it presents equities which outrank the lien found in favor of Daskam, as above indicated. If not, the existence of a lien in fact, and its standing under the bankruptcy act, are immaterial, for the reason that precedent allowance of the Daskam claim exhausts the insurance fund. Solution of the inquiry in that view is not difficult. There is no proof that any equity attached in favor of Roberts prior to July 21, 1899, when the agent placed on the two policies of 1898, by direction of the assured, the clauses or riders that loss was payable to Roberts. This was by way of security for past-due notes, and with no definite agreement for such security when the notes were made or when the indebtedness was contracted. It is true that preliminary talk appears about insurance, coupled with a mortgage to secure the loan, but it was of indefinite suggestions only, and neither the original loans nor renewals of the notes were made upon the condition or promise of such insurance. Up to July 21st, for aught that appears, there was neither express request on one side nor promise on the other for such security. The mere fact that the assured directed the making of such provision at that time, either voluntarily or by solicitation, can give Roberts no standing in equity over the pre-existing lien of Daskam. He acquired, at the utmost, such interest only as the assured possessed and had the right to give,—a mere equitable interest, and subject to all the equities outstanding against it. *Fairbanks v. Sargent*, 104 N. Y. 108, 115, 9 N. E. 870, and authorities cited. Surely, that must be the rule applicable here, where there was no new consideration for the arrangement, and no act of delivery or acceptance of the provision before the loss occurred. The policies were not negotiable instruments, were not even assignable at common law, and, while their face appearance and possession may have carried the import of ownership, such import is of *prima facie* value only. The mere bona fides of an equitable transferee of the policy will not over-

ride a prior equity of like bona fides. On this view, the Roberts claim is subordinate to that of Daskam, and the order of the referee must be overruled, with direction to enter an order in favor of the claimant Daskam in accordance with this opinion. Let the ruling be so certified:

In re MAYER.

(Circuit Court of Appeals, Seventh Circuit. May 9, 1901.)

No. 747.

1. **BANKRUPTCY—ORDER DETERMINING CLAIM TO HOMESTEAD EXEMPTION—FINALITY—ABSCONDING OF BANKRUPT IN CONTEMPT.**

An order made by a court of bankruptcy under the authority conferred by Bankr. Act, § 2, cl. 11, determining in general terms the location and extent of a bankrupt's homestead exemption, but committing the matter to the referee to fix its boundaries, is interlocutory, and not a final adjudication; but, even if final, it remains subject to the power of the court to set it aside during the term, and the court is justified in exercising such power where it is made to appear that the bankrupt is in contempt of an order requiring him to pay to the trustee a sum of money which he is wrongfully withholding, that he failed to include in his schedule other money and property of large amount which he fraudulently transferred, and that since the making of the order he, with his wife and family, has abandoned his residence in the alleged homestead and left the country; and upon a rehearing of the claim to the homestead exemption such acts of the bankrupt may properly be considered upon the question of his good faith in relation to such claim. Whether the bankrupt in such case has such standing in court as entitles him to be heard by counsel, or to maintain a petition for review, *quære*.

2. **SAME—TITLE TO HOMESTEAD—ABANDONMENT AFTER ADJUDICATION.**

Under the provision of Bankr. Act, § 70a, that the trustee shall be vested with the title of the bankrupt as of the date he was adjudged a bankrupt, "except in so far as it is to property which is exempt," where the location and extent of a bankrupt's homestead are uncertain and in dispute because of his excessive claim, the title to all the property may properly be treated as vesting in the trustee *sub modo*, subject to such exemption as shall finally be awarded and defined, and especially where, as under the laws of Wisconsin, the bankrupt had power to alienate the property by his individual conveyance, subject, in case he was married, only to a reservation of the homestead right; and where, before such award or setting aside of the homestead has been made, it is abandoned by the bankrupt and his family, the title of the trustee becomes absolute for the benefit of the estate.

Jenkins, Circuit Judge, dissenting.

In Review of an Order of the District Court of the United States for the Eastern District of Wisconsin.

On August 19, 1899, Charles Mayer was duly adjudged an involuntary bankrupt, and ten days later filed in the proceeding a schedule, in which he claimed the exemption of certain real estate, on which were a double brick building and a frame dwelling, as a homestead under the laws of Wisconsin. This claim the trustee declined to allow, and the referee, being in doubt "whether the bankrupt is entitled to claim the entire property as exempt, or whether the dwelling house alone should be set apart to him as exempt, or whether the north half of the building which he now occupies should be alone set apart to him as his homestead," on November 17, 1899, certified the question, with the evidence taken and his findings thereon, to the judge of the court for determination, and upon consideration thereof the judge, on

February 8, 1900, handed down an opinion, in pursuance of which on the same day an order was entered "that the north half of the flat claimed by the bankrupt as exempt be so set apart as the homestead of the bankrupt pursuant to the opinion of the court this day filed." From that opinion we quote the following:

"In June, 1899, a few weeks prior to the commencement of the involuntary proceedings in bankruptcy, the lower north flat being vacated by its tenant, the bankrupt and his wife moved into and have since occupied that portion, the frame building being occupied by his brother and son, who were constant members of the family, and further used for storage purposes. The bankrupt testifies in substance that he built the flats with intention to occupy them as a homestead, that he moved in pursuance to such purpose, and further intended to open an entrance through the party wall between the north and south flats; also, that he never abandoned the frame building as a homestead, and now claims the same as part thereof. The question certified presents the following phases: (1) Whether exemption can be applied to the whole lot, and, if not, whether it must be set apart (2) in the frame dwelling house alone, (3) in the double flat building as a whole, or (4) in the north half only. Decisions of the supreme court of the state are controlling in the solution of these inquiries, and I am of opinion that they cover each phase to such extent, at least, that no aid can be derived from the cases cited by counsel from other jurisdictions. My conclusions are: (1) On the authority of *Casselman v. Packard*, 16 Wis. 114, 82 Am. Dec. 710, *Jarvais v. Moe*, 38 Wis. 440, and *Schoffen v. Landauer*, 60 Wis. 334, 19 N. W. 95, it is clear that the exemption cannot embrace more than one dwelling house and so much of the lot as is separately used therewith within the quarter acre, and that buildings not occupied in that connection, with the appurtenant land, are excluded, although both buildings are within the quarter-acre limit. (2) The only difficulty in disposing of the contention of the trustee that the frame dwelling should be set apart for homestead arises out of the rapacious claim of the bankrupt that he retained its use as such while entering into occupancy of the new building for like purpose." The following cases are also cited and commented upon: *Palmer v. Hawes*, 80 Wis. 474, 50 N. W. 341; *In re Lammer*, 7 Biss. 269, Fed. Cas. No. 8,031; *Phelps v. Rooney*, 9 Wis. 70, 78 Am. Dec. 244; *Harriman v. Insurance Co.*, 49 Wis. 71, 5 N. W. 12. And the opinion concludes in this wise: "But the south half is clearly made a distinct structure on the center line of the party wall extended to the rear of the unoccupied portion of the lot, and cannot be included in the exemption. It is therefore certified to the referee that the homestead be so set apart in the north half of the flat upon the center line so extended."

On January 20, 1900, the referee had made an order requiring the bankrupt to pay to the trustee the sum of \$3,599.02, and for disobedience thereof had adjudged him guilty of contempt of court; and the court, on February 6th, having affirmed that order on review, and having directed the marshal to commit the bankrupt to jail and hold him until he had obeyed the order, he left the country. Thereupon the trustee, instead of executing the order to set apart the homestead, on March 17, 1900, filed his petition, setting forth the facts stated and alleging besides that the bankrupt had not scheduled all his property, but in addition to the real estate claimed as exempt had in his own control or in the possession of his wife and brother-in-law, who held for his use, moneys and property to the amount of thirty thousand dollars and more, and that, upon the commencement of an action in the circuit court of Milwaukee county against the bankrupt and his wife to obtain a discovery and to recover sums fraudulently transferred, the wife had left the state and had gone to join her husband in some unknown place outside of the United States; recommending that the claim for a homestead exemption be dismissed, because, being in contempt of the court, the bankrupt had no standing in court, and because he and his wife "have actually removed and have abandoned the property herein described, and the whole thereof, without any certain and abiding intention of returning to the same as a home or place of abode" (see *Moore v. Smead*, 89 Wis. 553, 62 N. W. 426); and, after a statement (manifestly referring to the order of February 8th) that for the reason set forth he had refused to set apart any portion of the property to

the bankrupt as a homestead, and claimed title to the whole of the property free of all right or claim of exemption, concluding with a prayer for an order upon the bankrupt to appear and show cause, if any, why his claim to exemption in the property ought not to be disallowed, and why the trustee should not be authorized to take possession and dispose of the property as part of the bankrupt estate. This petition was verified by one of the attorneys for the trustee, and was supported by affidavits of the marshal of the district and of a deputy sheriff. The attorneys for the bankrupt filed an answer, denying abandonment of the homestead, and denying the right of the trustee to "assert title to the said property or any part thereof." A hearing was had before the referee, who, upon findings to the effect that, having been adjudged in contempt of court, the bankrupt had fled the country "with no certain or abiding intention of returning thereto, and left with the intent and design to take up his residence outside of the state of Wisconsin," and that in March following his wife and children had gone out of the United States to join him, adjudged and decreed "that the bankrupt had lost and abandoned any and all right to the homestead provided by the laws of Wisconsin, and that the trustee in bankruptcy is vested with full and complete title to the premises heretofore claimed by the said Charles Mayer," etc. This order, on a petition for review, the district court approved and made an order of the court, and on the record so made is based the petition to this court intended to present questions of law stated as follows: (1) Does the title to property exempt by the laws of the state of Wisconsin to a bankrupt as a homestead, and which is owned and occupied by the bankrupt as his homestead at the time of his adjudication as such, and which property is subsequently, in the bankruptcy proceedings, determined to be such homestead, upon being abandoned as a homestead by the bankrupt after such adjudication of bankruptcy, pass to the trustee and become property which he may administer as a part of the bankrupt estate? (2) Has the court of bankruptcy, after such adjudication of bankruptcy and determination as to the property constituting such homestead, any jurisdiction of the same? The trustee has moved to dismiss the petition, chiefly upon the ground that the bankrupt, at the time of making the order complained of, was and still is in contempt of the bankruptcy court, is a fugitive from justice, and therefore should not be permitted to ask of this court a review of the order.

The statutes of Wisconsin contain the following provisions touching the homestead right. Section 2983 (2 Sanb. & B. Ann. St. 1898, p. 2091) provides: "A homestead, to be selected by the owner thereof, * * * owned and occupied by any resident of this state, shall be exempt from seizure or sale on execution, from the lien of every judgment and from liability in any form for the debts of such owner, * * * and such exemption shall not be impaired by temporary removal with the intention to reoccupy the same as a homestead, nor by a sale thereof, but shall extend to the proceeds derived from such sale while held with the intention to procure another homestead therewith, for a period not exceeding two years." Section 2203 of the same revision (volume 1, p. 1602) provides that "no mortgage or other alienation by a married man of a homestead exempt by law from execution shall be valid or of any effect as to such homestead without the signature of his wife to the same." Section 2271 of the same revision (volume 1, p. 1641) provides "that in case of the death, intestate, of the owner of a homestead it shall descend (1) free of all judgments and claims against the deceased owner or his estate, except mortgages, laborers' and mechanics' liens, to his widow, failing lawful issue; (2) in case of issue, to his widow during her widowhood, and upon her marriage or death, to his heirs; (3) in case of issue but no widow, to such issue; (4) if he shall leave neither issue nor widow, then it shall go according to the law of descent of the state, but in that event the homestead shall be subject to the debts and liabilities of the deceased owner." Other facts are stated in the opinion.

Thomas H. Dorr, for petitioner.

Jackson B. Kemper, for respondent.

Before WOODS, JENKINS, and GROSSCUP, Circuit Judges.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

It is not clear that the motion to dismiss the petition because the petitioner is in contempt of the district court should not be sustained. The question is whether an adjudged bankrupt shall be heard to assert a claim for a homestead, of undetermined location or dimensions, while in contempt of an order of the court requiring him to pay to the trustee a sum of money which he is wrongfully withholding, and when it appears that he had not included in his schedule other moneys and property to a large amount, but had made fraudulent transfers thereof, and with his wife and family had abandoned their residence in the alleged homestead and had left the country.

The last clause of section 47 of the bankruptcy act makes it the duty of trustees to "set apart the bankrupt's exemptions and report the items and estimated value thereof to the court, as soon as practicable after their appraisal"; and by section 2 of the act the courts of bankruptcy are given jurisdiction to "determine all claims of bankrupts to their exemptions." By section 6 the exemptions allowable are those prescribed by the state laws in force at the time of filing the petition in the state wherein the bankrupt has had the required domicile. In this instance the trustee refused to recognize the homestead right claimed, and the proceedings detailed in the statement of facts followed. While the last proceeding before the referee was treated by him as being "in the matter of the petition of Oliver C. Fuller, trustee, to take possession of and to quiet title to premises claimed as a homestead," it was evidently not an independent proceeding, to which in any proper sense the bankrupt should be regarded as standing in the attitude of a defendant. It was, in fact, a part of the proceeding instituted by himself when he inserted in his schedule the claim for a homestead exemption. Before the referee and before the district court his position was essentially that of a claimant or petitioner asserting a right, which the trustee, representing the estate, denied; and the order of February 8th did not change the relation of the parties to the question or to the proceedings. That order, it would seem, was interlocutory only. It did not in terms define the extent or boundaries of the homestead to be set apart. If it had, there would have been no need for further action on the part of the referee or trustee; but that such further action was contemplated, and in fact was necessary, the opinion and order of the court read together leave no room to doubt. There is nothing in the opinion fixing the point to which the dividing line between the north and south halves of the premises should be extended except the words "to the rear of the unoccupied portion of the lot," and, the frame dwelling house being on the west end of the lot, it was yet to be determined how much of the intervening space was or should be deemed to be appurtenant to or occupied by that house. The opinion of the court quite appropriately directed that its order be certified to the referee, in response to whose certified question the ruling was made, to the end, it is clear, that under the referee's order, conforming, of course, to the order of the court, the trustee, on whom

alone the statute imposes such duty, should proceed to set apart the homestead as directed. If, however, the order should be regarded as final in its character, it was nevertheless subject to be set aside, either expressly or by implication from an inconsistent order of the court, whether acting upon its own motion or at the instance of a party, so long, at least, as the term of court at which it was entered had not gone by, as it had not when the petition of the trustee was filed; and with knowledge of the facts thereby brought to its attention the court would have been grossly derelict if it had allowed the order to stand.

When the homestead right is uncertain and so complicated with other property that the court must be asked to establish and define it, and it is made to appear, while the matter is under consideration or has not passed beyond the control of the court, that the bankrupt is withholding and concealing other property which ought to have been scheduled and turned over to the trustee, and is evading an order of the court requiring him to pay over a specified sum, is it to be said that the court may not pause, but must proceed to determine as an independent matter the question of the bankrupt's right to a homestead, even though it be apparent that he is withholding fraudulently money and property probably of greater value than the property claimed to be exempt? Under the Wisconsin statute the price of a homestead may be held as exempt for two years, if it be done for the purpose of purchasing therewith another homestead. If in such case there should be an adjudication of bankruptcy, and the trustee should obtain possession of money which the bankrupt claimed and was entitled to claim as exempt because of its being the proceeds of the sale of a homestead, ought the court, without inquiry into the facts, to order the trustee to surrender the money, notwithstanding the bankrupt, in willful disobedience of an order of the court, is alleged to be withholding and concealing other money and property to which the trustee is justly entitled? The question ought to answer itself (*Pratt v. Burr* [C. C.] 19 Fed. Cas. 1248), and there is no good reason for saying that a homestead unsold is any more sacred than the price of it when held for reinvestment in another refuge for the family. If in this case no one but the bankrupt himself were concerned, there could be no injustice in dismissing his petition to this court because of his contempt of the orders of the district court; and the fact that he has a wife and children does not seem to affect the legal aspect of the proposition. During the life of the husband, in whom is the title, the wife has by virtue of the homestead laws of Wisconsin no vested interest in the home, but simply control over the husband's right to convey or mortgage it, and even with that power she cannot hinder a change of domicile, upon which, the homestead right ceasing, the husband's disability to convey or mortgage the land will also cease, except that, irrespective of the law of homestead, a conveyance without her signature and acknowledgment will be subject to her inchoate right of dower. It was so declared in *Godfrey v. Thornton*, 46 Wis. 677, 683, 1 N. W. 362. We, however, are not called upon now to consider what would be the effect if a wife, refusing to follow her hus-

band in a change of domicile, should continue to reside in the homestead.

The court below, therefore, would have been justified in striking out the answer, or, at least, in refusing to hear the bankrupt's attorneys in response to the petition of the trustee, so long as he persisted in disobedience of the order to pay over money, and on that ground might well have set aside summarily the order directing the homestead to be set apart; but whether for that reason alone it would have been proper to declare the right of homestead forfeited and the trustee vested with absolute title may be questionable. With the order set aside or disregarded, the original question of the homestead right was open again for investigation; each party, unless precluded by being in contempt, having the privilege of introducing further proofs. So long as there had not been a final adjudication, or the term of court had not passed at which the adjudication was had, the bankrupt, though he had fled the country, was constructively in court and bound to take cognizance of what should be done. His absence could not deprive the court of the power to proceed to a final conclusion, though the fact and circumstances of his going and his family following him abroad afforded potent evidence that his claim for a homestead in any part of the property other than the frame dwelling, in which he had lived until shortly before the adjudication, was fraudulent in its origin, and that whatever such right he had had in the frame dwelling he had forfeited by his fraudulent attempt, in anticipation of bankruptcy, to obtain a larger holding. His attempt to include the frame dwelling in the homestead the district judge declared "rapacious." His attitude and conduct as finally revealed were consciously fraudulent and lawless. If not strictly an equity court, a bankruptcy court proceeds on equitable principles and is not bound to lend itself to the establishment of an undetermined claim for exemption, even though asserted in the sacred name of homestead, in favor of a fraudulent claimant, who stands in confessed defiance of the court and of the law under which the claim is asserted. "The homestead," said Judge Bond in *Re Dillard* (C. C.) 7 Fed. Cas. 703, "was a bounty to unfortunate, but honest, debtors. It was not intended for the benefit of fraudulent bankrupts." "A party," said Judge Miller in *Pratt v. Burr*, *supra*, "cannot turn that which is granted him for the comfort of himself and family into an instrument of fraud."

The case, however, is not before us on appeal to be reviewed upon its merits; and, passing the motion to dismiss, we are called upon to consider only the questions of law presented by the petition. As formulated, the questions proposed seem to be of law purely, but they include assumptions of fact not established by the record, and for that reason, perhaps, ought not to be considered. They assume the fact, which might well have been found to the contrary, that at the date of the adjudication of bankruptcy the particular property now in question was occupied by the bankrupt (in good faith) as a homestead; and, contrary to the indisputable fact, they assume that in the bankruptcy proceedings that property had been (finally and irrevocably) adjudged to be such homestead. Enough has been said

already to show that there had been no such adjudication, and that, even conceding the ultimate proposition sought to be established, that by the bankruptcy law the title to exempt property remains in the bankrupt, and in no event can go to the trustee, the final order of the court may have been made, or at least may be justified, on the ground that a homestead right in the north half of the double building had never been established, and that the homestead in the frame dwelling had been abandoned before the date of the adjudication. By his own testimony he "never abandoned the frame building as a homestead," and, that being so, he could not have acquired a homestead in the other building. *Jarvais v. Moe*, *supra*.

But, assuming the question to be before us in proper form, is it true, by the letter of the statute, that in no case and in no sense does the title to exempt property vest in the trustee? If so, and if there can be no escape by construction, then of this statute more than any other known to us the spirit is sacrificed to the letter. Illustrations may readily be suggested. When the claim is for the exemption of property which must be separated from other property of the bankrupt, until the right of exemption shall have been determined and the particular parts or parcels to be exempted designated, there can certainly be no impropriety in treating, and in order to reach just results in supposable cases it will be found necessary to treat, the title as having been sub modo in the trustee. If, for instance, as in *Re Friedrich*, 40 C. C. A. 378, 100 Fed. 284, the property consists of a stock of goods in trade, in which there is a disputed or a conceded right of exemption to a certain amount in value, is it not clear that the title to the entire stock must be deemed to pass to the trustee, subject to the claim for exemption, and that, when afterwards the exemption shall be allowed in specific articles, the title of the trustee to those articles will cease and to the other articles become absolute, and by relation be considered to have been such from the date of the adjudication of bankruptcy? In all such cases, whether the property be personal or real, the claim for exemption, until determined and defined by the trustee or by the court, is not a title to specific property or articles, but is rather a limitation or charge imposed by the statute upon the title of the trustee. This view certainly may well be applied to a claim for a homestead right which has not been determined by the judgment of a competent court, and which is asserted over more property than can be included in it. Just what part, if any, of the property claimed in this instance should have been apportioned and set off as a homestead, whether one part or another, or the whole, was matter for the court to determine, and, until that had been finally settled, it was not and could not be known what part should be exempted and what part should go (by relation had gone) absolutely to the trustee. After the entry of the order of February 8th it was in the power of the court, on motion or sua sponte, to change the order, so as to exempt the south instead of the north half of the double building, or the frame building instead of either; and, if that had been done, what then should be said of the title, either of the bankrupt or the trustee? That it shifted with the changing orders? Or, rather, that from the date of the adjudication the trustee held title

to the entire property, subject to such exemption as finally should be awarded? During the ten days from the adjudication to the filing of the schedule, in which the exemption was first asserted, where was the title? If during that time the bankrupt had died intestate and without widow and issue, the homestead would have gone "according to the law of descent" in Wisconsin, but subject to the debts and liabilities of the deceased; and yet, if the title was in no sense in the trustee, he would have been powerless to deal with the property, and if he had proceeded to dispose of the entire property of which the homestead was a part, and to use the proceeds in discharge of the debts of the bankrupt, the sale of the homestead, it would seem, must have been subject, at any time within the statute of limitations, to be set aside as invalid or void at the suit of those entitled thereto by law. Or suppose, again, that a bankrupt, having an undisputed right of exemption in a homestead, should not assert the right, and pending the proceedings should abandon the property as a residence, either with or without a purpose that the trustee should take possession and dispose of the property as a part of the bankrupt estate. What, on either supposition, would be the trustee's right in or power over the property? Again, let it be supposed that Mayer had sold the entire property which he claimed as a homestead, and at the date of the adjudication had had the money received therefor on deposit. For as much as two years the right of exemption would have extended to the proceeds of the homestead, if "held with the intention to procure another homestead therewith." To determine, upon that supposition, the right of the bankrupt to claim a part or the whole of the deposit as exempt would have involved determining—First, whether there was a homestead right in the property before the sale; second, what part (if only a part) of the entire price had been received for or was fairly attributable to the homestead right; and, finally, whether to the extent derived from the homestead the deposit had been held with the intention of procuring therewith another homestead. Until those questions had been solved in whom would have been the title to the deposit? And if for the purpose of greater safety or for any reason it had become desirable or necessary to withdraw the deposit, by whom could the withdrawal have been effected? Certainly not by the bankrupt, and if not by the trustee, then only by the consent of both parties, unless upon an order of court, certain to be too late for supposable emergencies. All such difficulties will disappear before the proposition, if conceded just as it is expressed in the seventieth section of the statute:

"The trustee * * * and his successor or successors * * * shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it (the title) is to property which is exempt, to all (1) documents relating to his property; * * * (5) property which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him."

In Wisconsin a man may have a homestead, though he be without wife or child, and in such case, of course, may convey or otherwise dispose of the property at will. If he has a wife, he may convey the homestead, if the deed be signed, though not acknowledged, by her;

and, as already stated, he may, by changing his domicile, acquire the uncontrolled power to mortgage or convey the property without the wife's consent, subject only to her inchoate right of dower (Godfrey v. Thornton, *supra*); and a conveyance of a homestead without the wife's signature, in which was reserved to the grantor "the sole, free, and absolute use and control" of the property "so long as he and his wife, or either of them, may live," has been declared valid, though without such reservation the conveyance would have been void. This was the ruling in *Ferguson v. Mason*, 60 Wis. 377, 19 N. W. 420; one of the judges, however, being of opinion (and it was so held in *Pratt v. Burr*, *supra*) that such conveyance, though without reservation, would be void only in so far as it purported to cover the homestead right. See, also, *Moore v. Smead*, 89 Wis. 558, 62 N. W. 426; *Schoffen v. Landauer*, 60 Wis. 334, 19 N. W. 95; *Jarvais v. Moe*, 38 Wis. 440. The bankrupt thus having power by his individual act to convey the property which he possesses as a homestead, though he have a wife, if he expressly reserves the homestead right for the benefit of both, and absolutely if he have no wife, it follows, even within the letter of the statute, that the title to such property, subject to the right of exemption,—that is to say, in so far as the property is not exempt,—passes to the trustee, and is vested in him by operation of law, subject (if there be a wife) to the same reservation, supplied by legal intendment, which in a conveyance by the owner must have been expressed.

In *Re Woodruff* (D. C.) 96 Fed. 317, it was held that the bankruptcy court had jurisdiction to enforce, against property set apart by the trustee to the bankrupt as exempt under the laws of the state, the rights of creditors who hold notes or other obligations of the bankrupt waiving exemptions, though the obligations had not been reduced to judgment and did not otherwise constitute a specific lien upon the property; and in *Re Sisler* (D. C.) 96 Fed. 402, a like ruling was made. Both cases proceed on the theory of title in the trustee, though for the benefit of some only of the creditors. In the first, after distinguishing the opinion of Justice Bradley in *Re Bass* (C. C.) 2 Fed. Cas. 1004, the judge, in respect to the powers of the bankruptcy court and the spirit in which the statute is to be construed, said:

"The court of bankruptcy, as we have seen, is now given the express power 'to determine all claims of bankrupts to their exemptions.' Now, what does this language import? If the court has the power to determine that the bankrupt is entitled to his exemption as against the creditors, it certainly has the correlative power to determine the right of the creditor to attack the exemption upon any legal ground. This language is not a limitation upon the power of the court, to be strictly construed, but it is a grant of jurisdiction, which must be beneficially construed to carry out its purpose. The language must have a reasonable construction, and with the express grant of power to determine all claims of the bankrupt to his exemption there seems clearly to go the power to determine that the bankrupt has no claim to exemption in favor of particular creditors, because under the constitution of this state as to them he has solemnly renounced and waived it."

See, also, *In re Wells* (D. C.) 105 Fed. 762.

It was held by the court of appeals in the Ninth circuit, in *Re Scheldt* (C. C. A.) 104 Fed. 870, contrary to the decision of the court

of appeals for the Eighth circuit in *Steele v. Buel* (C. C. A.) 104 Fed. 968, that under clause 5 of section 70a, insurance policies, though exempt by the laws of the state from execution, vest in the trustee; and under either decision such policies, if not exempt by the state laws from execution, pass to the trustee as assets, subject to the option of the bankrupt to pay or secure to the trustee the surrender value when ascertained.

The intention of this statute is, without doubt, that the creditors shall have all the estate of a bankrupt which is not exempt, and that the bankrupt shall have the exemptions allowed by the law of his domicile, determined by relation to the date of adjudication, "separating the past and the future"; but it does not follow, and may not reasonably be said to have been the intention of the statute, that a bankrupt, while concealing or withholding property or money which the law requires him to surrender to the trustee, may insist that the latter shall surrender to him other moneys or like property which the same law permits him to claim as exempt. Ordinarily and in a direct sense it is true, also, that "all after-acquired property goes to the bankrupt and with that the trustee has nothing to do"; but, again, it does not follow that with such property or its proceeds a bankrupt may not be compelled, at the end of an execution or otherwise, to make good to the trustee whatever of property or money he had failed to schedule and turn over. Neither in excuse nor mitigation of his disobedience of the court's order would Mayer have been permitted to show, if he could, that before notice of the motion to show cause he had expended or lost the particular money ordered to be paid over, and was for that reason unable to pay it except with after-acquired means. The statute certainly does not require or permit that upon such a plea he should be acquitted of contempt or relieved of the order of commitment. The rights and duties created by the statute, in some measure at least, must be correlative.

Cases which arose under the act of 1867 can have little bearing. That act required a conveyance by the register to the assignee of "all the estate, real and personal, of the bankrupt," but, besides providing that there should be excepted from the conveyance the exemptions allowed by the laws of the state in which the bankrupt had his domicile, contained the further provision that "in no case shall the property hereby excepted pass to the assignee or the title of the bankrupt thereto be impaired or affected by any of the provisions of this act." This language is perhaps too explicit to admit of construction, and yet cases are supposable in which it would have been impossible to say that under that act the title to real estate in which the bankrupt had a homestead did not vest in the assignee. An illustration is afforded by the case of *Cox v. Wilder*, 2 Dill. 45, 6 Fed. Cas. 684, where it appears that by the law of Missouri the head of a family was allowed exemption from execution in "any of his or her real estate, not exceeding (one hundred and sixty acres in farming land or one lot in a town or city) in value one thousand dollars at the date of such exemption, to be held and enjoyed by such party as a homestead"; and it was further provided that where the real estate

so owned was of greater value than the amount allowed to be exempted as a homestead, and was not susceptible of division, the entire property might be sold on execution, the officer paying over to the defendant in the execution the amount of the exemption. Similar cases arising under the laws of Vermont and Georgia, respectively, are to be found in *Re Beede* (D. C.) 3 Fed. Cas. 62, and in *Re Brown* (D. C.) 4 Fed. Cas. 334. In *Re Friend* (C. C.) 9 Fed. Cas. 821, the trustee wrongfully sold specific articles of property which the bankrupt had claimed as exempt, and Justice Bradley, instead of treating the sale as void, held the bankrupt entitled to the proceeds of the sale; and in *Re Jones* (C. C.) 13 Fed. Cas. 931, Judge Dillon held that a right of exemption, denied by the assignee, might be enforced against the proceeds of sale in the hands of the court. These rulings necessarily imply the power of the assignee, under the act of 1867, to sell exempt property and give a good title thereto, if the bankrupt consents to look to the proceeds, and this likewise implies that the bankrupt under that act could waive the exemption in favor of the assignee, claiming the proceeds of the sale of the property or not as he should choose; and that (under the act of 1841) there might be such a waiver even of a homestead right under the law of Wisconsin was held by Judge Miller in *Pratt v. Burr*, *supra*. In *Re Watson* (D. C.) 29 Fed. Cas. 421, upon objection being made that the real estate set off by the assignee to the bankrupt as a homestead was of greater value than the amount limited by law, the court ordered a sale of the property subject to the rights of the bankrupt in the proceeds, if a sale could be made for more than the lawful exemption. In *Re Kean* (D. C.) 14 Fed. Cas. 157, it was held that a discharged bankrupt could not be allowed to claim a further exemption; and this, again, carries the implication that the property, which before his discharge he might lawfully have claimed as exempt, went under the act of 1867 to the trustee to be disposed of for the benefit of creditors. In other words, the failure to claim the exemption before discharge was a waiver, which inured directly to the benefit of creditors; and if a right of exemption may be waived voluntarily, then why not by an act of fraud inconsistent with the right?

These decisions demonstrate the practical impossibility of denying to the assignee or trustee the power in frequent cases to sell and to transfer the title to exempt property, and it is therefore a fair inference that in the framing of the present act there was an intentional omission of the provision, so industriously reiterated in the act of 1867, that "in no case" should exempt property pass to the trustee. The language of the act of 1898 is not so explicit and clear as to forbid construction. The trustee is vested by operation of law with the title of the bankrupt, "except in so far as it is to property which is exempt." It certainly does no violence to this expression to treat it as meaning that the trustee is clothed with title to the property of the bankrupt in so far as the property is not exempt; and, the supreme court of Wisconsin having decided that the owner of real estate held as a homestead, though he have a wife, may convey the fee of the land if he reserves the homestead right for himself and wife, our holding in this case, that the title passed *sub modo* to

the trustee, is in literal accord with the fifth clause of section 70a, even though treated as limited by the words, "except in so far as it is to property which is exempt." Of course, the title vested in the trustee, whatever it be, must always be subjected to such exemption as the court shall finally determine in favor of the bankrupt, his widow and children, or his grantee, if pending the determination he should convey the homestead right to another; but if, as in this case, while the matter is undetermined, or is yet within the power of the court, the bankrupt and his wife abandon the property as a residence, without having transferred the homestead right to another (who can assert the rights of a good-faith purchaser), our conclusion is that the abandonment inures directly to the benefit of the creditors, and that, as if the claim of exemption had never been made, or had never had true foundation, the title of the trustee becomes absolute as of the date of the adjudication of bankruptcy.

We find in the questions propounded no reason for disturbing the order entered below.

JENKINS, Circuit Judge (dissenting). The motion to dismiss needs little comment, since the majority opinion, sustaining the motion *arguendo*, declines to pursue the reasoning to its logical conclusion and proceeds to the discussion of the merits. It may not be amiss, however, to say this much: The decree of February 8, 1900, adjudged that the north half of the flat be set apart as the homestead of the bankrupt. The opinion of the court, filed with that decree, designates the homestead as the north half of the flat "upon the center line of the party wall extended to the rear of the unoccupied portion of the lot." If this decree be not self-executing, no duty in respect thereof devolved upon the trustee. If the statute imposed upon him the duty to set apart and segregate from the estate the homestead,—a question fairly debatable,—the trustee had refused to perform that duty. The court had overruled his action, and had decreed the homestead right, performing itself the duty originally, possibly, devolving upon the trustee. He had no further duty in the premises. The decree is positive and final, and not less final because the length of the north and south lines is not stated. "That is certain which may be made certain." The ascertainment of the lines, if essential, was for the court, and not for the trustee, and by the opinion filed with the decree was referred, if to any one, to the referee, not to the trustee. The petition by the trustee of March 16, 1900, was, therefore, not one in excuse of nonperformance of the decree of February 8, 1900, but was at most a petition in the nature of a bill of review. The decree has not been appealed from or set aside. The petition contains no reference to it and seeks not to impeach its correctness. The petition would seem to have been prepared either in forgetfulness of or ignoring the decree. It treats the claim for a homestead as unadjudicated, and charges that it should be dismissed, because (1) the bankrupt stood in contempt of the court with respect to other matters, and (2) he had abandoned the homestead some six months after the adjudication of bankruptcy, and prays that the bankrupt, then beyond seas, should be cited to

show cause why his claim for exemption should not be disallowed and the trustee be authorized to take possession of the premises free and clear of homestead right or exemption claim, and to administer the same as part of the bankrupt estate. If it may be assumed that the petition, without mention of it or reference to it, sought to annul the decree of February 8, 1900, for matters occurring subsequently thereto, it must be regarded in the nature of a bill of review. It challenged the adjudicated right to the homestead because only of matters occurring subsequently to the decree. To that proceeding the bankrupt was surely a defendant and was not therein an actor. It is true that to avoid arrest and punishment for contempt of the court he had fled the jurisdiction; but he was not therefore an outlaw, and while he would not be indulged in an application for favor, he is not to be denied the right to defend himself in person or property when summoned thereto. It shocks the moral sense to say that under such circumstances the court may regard him as constructively present for the purposes of jurisdiction and may then rightfully deny him a hearing and proceed to adjudicate his rights without a hearing. That would not be due process of law, the fundamental principle of which is the right of every man to be heard in his own defense. *Hovey v. Elliott*, 167 U. S. 409, 17 Sup. Ct. 841, 42 L. Ed. 215. The petition of the bankrupt to this court for a review of the order complained of is matter of right, not of discretion or of bounty, and is merely a continuation and review of the proceedings instituted by the trustee against the bankrupt.

Passing, however, to the merits: By the law of Wisconsin the owner of a homestead, without limitation of value, has an absolute estate therein with power of alienation, limited only, in the interest of the wife, so that he cannot dispossess himself of the right of occupancy unless she join in the execution of the conveyance. There is also attached to that estate a privilege of exemption from pursuit by creditors so long as the property remains a homestead. At the death of the owner intestate the homestead descends to his widow or children beyond reach of his creditors, although after his death it be abandoned as a homestead. The estate has all the incidents of a freehold except the restriction upon the power of alienation in the interest of the wife. The superadded privilege of exemption would not seem to lessen the character of the estate. Does the title to such homestead pass to the trustee in bankruptcy? An answer to this question must be found in the bankruptcy act, for from that act alone the trustee derives his title to the bankrupt estate. He has such powers and rights of property as are therein conferred and no other. The act contemplates that the bankrupt shall be entitled to the exemptions allowed by the state of his domicile. Section 6 provides that the act shall not affect the allowance to bankrupts of the exemptions prescribed by the law of the state. Section 70a defines the title which shall pass to the trustee. It declares that he shall be "vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt." The act is careful to restrict the transfer of title to property which is not exempt, and in one instance

at least seems to indulge in unnecessary caution in that regard. Section 67e provides that property conveyed or incumbered with intent to defraud creditors shall remain part of the estate and pass to the trustee if "the same is not exempt from execution and liability for debts by the law of his domicile." It is difficult to understand that property exempt from execution could be conveyed or incumbered in fraud of creditors. The unnecessary caution, however, emphasizes the design to exclude all exempt property from the operation of law which vests title in the trustee. If, as held by the majority of the court, the title to a homestead passes to a trustee, it must be under the first clause of the fifth subdivision of section 70a as property which the bankrupt could have transferred; but that clause is necessarily limited and restricted by the exception which applies to every subdivision of the section, "except in so far as it is to property which is exempt." Such construction accords with the canon for the reading of statutes and is supported by the ruling of the circuit court of appeals for the Eighth circuit in *Steele v. Buel*, 104 Fed. 968.

The design of the lawmaker is clear that the title to the homestead, which by the state law is exempted from sale under judicial process, shall not pass to the trustee but shall remain in the bankrupt. The statute is plain; its language explicit. There is no room for construction. It is its own best expositor. This manifest design is not weakened by the provision of section 2, cl. 11, that the courts of bankruptcy shall have jurisdiction to "determine all claims of bankrupts to their exemptions." The bankrupt is required by section 7, cl. 8, to file a schedule of his property and "a claim for such exemptions as he may be entitled to." The right to a homestead may be challenged. The claim therefor may embrace more land than allowed by the state law. Undoubtedly the bankruptcy court is given jurisdiction—which before the act was lodged in all courts of general jurisdiction—to determine, if there be dispute, the right to and the extent and dimensions of the homestead. It was never deemed necessary to the determination of that question before the bankruptcy act, nor is it now necessary, that there should be an *ad interim* shifting of title. Upon determination of the question the court formally sets apart to the debtor and segregates from the estate that which the state law exempts. The bankruptcy court does not grant the exemption. It merely defines that upon which the law operates to exempt. The right is derived from the statute, and, as to the property found to be in fact exempt, the bankruptcy court has jurisdiction and the jurisdiction only to sever it from the estate; the title all the while remaining in the bankrupt. We have so held in *Re Friedrich*, 40 C. C. A. 378, 100 Fed. 284, and are therein in accord with *Steele v. Buel*, *supra*, and *In re Wells* (D. C.) 105 Fed. 762. Such was also the holding of the courts under the bankruptcy law of 1867. *Rix v. Bank*, 2 Dill, 367, 20 Fed. Cas. 846; *In re Dillard*, 2 Hughes, 190, 7 Fed. Cas. 703; *In re Radway*, 3 Hughes, 609, 20 Fed. Cas. 154; *In re Bass*, 3 Woods, 382, 2 Fed. Cas. 1004; *Cox v. Wilder*, 2 Dill. 45, 48, 6 Fed. Cas. 684; *In re Hester* (D. C.) 12 Fed. Cas. 68; *In re Hunt* (D. C.) 12 Fed. Cas. 902.

Mr. Justice Bradley, in *Re Bass*, supra, sums up the whole contention in language which leaves no room for argument:

"In other words, it is made as clear as anything can be that such exempted property constitutes no part of the estate in bankruptcy. The agreement of the bankrupt in any particular case to waive the right to the exemption makes no difference. He may owe other debts in regard to which no such agreement has been made, but whether so or not it is not for the bankrupt court to inquire. The exemption is created by the state law, and the assignee acquires no title to the exempt property. If the creditor has a claim against it, he may pursue that claim in a court which has jurisdiction over the property, which the bankrupt court has not. Nor does it make any difference that the homestead was not ascertained or set out in severalty until after the proceedings in bankruptcy were commenced, or until after the conveyance to the assignee was executed. Whenever properly claimed and designated, the exemption protects it; and the exemption created by the bankrupt act relates back to the conveyance and limits its operation. Though not designated when the conveyance was executed, it was capable of being designated; and on the principle that '*id certum est quod certum reddi potest*' it is as much entitled to the benefit of the exemption as if it had been designated and set apart before the bankruptcy occurred."

The former bankruptcy act *ex industria* stated with particularity that the exemption of the homestead from the operation of the conveyance required to be made by the bankrupt to the assignee should operate as a limitation upon the conveyance, and that in no case should the excepted property pass to the assignee or the title of the bankrupt be impaired or affected. The limitation there is no more certain and precise or more potential than the limitation of the present law, "except in so far as it is to property which is exempt."

The majority opinion suggests certain questions which it is assumed answer themselves. A reference to them may not be unprofitable. It asks, where, after adjudication and prior to the filing of the claim to the exemption, is the title to the homestead? I answer: Clearly in the bankrupt, because by the bankruptcy act the title did not pass. The title came to the bankrupt by purchase. Its exemption from pursuit by creditors is conferred by statute. The adjudication of the bankruptcy court sustaining the claim of exemption does not confer title. It has not to do with title. It had only to deal with the claim of exemption. A decree of court adjudging a man and woman to be man and wife does not perform a marriage ceremony. It is further suggested that if in the interval between the adjudication and the filing of the claim of exemption the bankrupt should die intestate without widow or issue, so that the homestead under the statute would go according to the law of descent, but subject to the debts and liabilities of the deceased, if the title was in no sense in the trustee, he would be powerless to deal with the property, and, if he had disposed of it and with the proceeds discharged the debts of the bankrupt, the sale could be set aside as invalid or void. I answer: Of course, and because the trustee never acquired and could not convey title to it. The majority opinion also inquires, if moneys exempt and moneys not exempt be mingled, in whom is the title to the exempt moneys? Clearly in him to whom they of right belong, not in him who may happen to obtain tortious or rightful possession of them. The mingling no more passes title than does the mingling of grain in a warehouse bin

with the grain of another transfer the title to that other. Each remains the owner of the aliquot part contributed by him to the common mass.

The other suggested situations are likewise easily met and resolved. The plain answer is that the trustee has no right, because he has no title. The law limits his title to property which is not exempt. The title to the exempted property remains without change with him in whom the right is vested by the law. The majority opinion would seem to hold that the title to exempt property passes upon adjudication in bankruptcy sub modo to the trustee, reverting, it may be presumed, to the bankrupt when the exemptions are established by the court, and again passing to the trustee upon a subsequent abandonment of the homestead, or else that the title to the homestead passes to the trustee upon adjudication and there abides. It is not clear which result is intended. If the former reading be correct, the logic of the opinion is that the title automatically shifts from one person to another ipso facto upon the happening of events. If the latter reading be correct, then the title to the property abides with the trustee, and all that remains to the debtor is the right of occupancy during his life. The trustee could convey that title, the purchaser becoming the owner with the right of possession upon the termination of the homestead right. But what, then, becomes of the provisions of the law that one's homestead shall descend to one's widow and issue, discharged of any claim of creditors? What, then, becomes of the right of the debtor to sell or mortgage, with the consent of his wife, the homestead premises, and to hold the proceeds for reinvestment in another home and beyond the pursuit of his creditors? The beneficent policy of the state would thereby be thwarted. Every debtor, whether honest or dishonest, by mere adjudication in bankruptcy would lose title to and control of his homestead; there remaining in him only the right of occupancy. This untoward result comes from an attempt to construe that which needs no construction,—an effort through much subtlety of reasoning to abort the plain language of the statute. The act says the title to exempt property shall not pass to the trustee. The majority opinion says that it does, and that it passes and repasses ad infinitum, shifting with events. With all respect, the majority opinion, to my thinking, indulges a game of judicial battledoor and shuttlecock, interesting, indeed, as an example of mental gymnastics, but without the sanction of reason or the warrant of law. In the course of the discussion the majority opinion suggests, interrogatively, that the bankrupt's exempt property may be held by the court to compel restoration of money fraudulently withheld by him from his creditors, and states that the question ought to answer itself. It should; but a correct answer, I fear, would fail to meet the views of my brethren. It is novel doctrine that property exempt by law from pursuit by creditors, that the debtor and his family may have a roof to shelter them, may be taken from them because the debtor has defrauded his creditors. For the wrong done by him, the law gives to creditors appropriate remedy, civil and criminal. It does not subject the homestead to the payment of debts fraudulently con-

tracted, or for property disposed of in fraud of creditors. It does not seek to punish wife and children for the dereliction of the head of the family. The visitation of the sins of the fathers upon the children may be the inexorable decree of physical law, and, possibly, an essential tenet of orthodox faith, but is not the policy of the state whose law we are considering, and which is here controlling.

Assuming, however, that the majority opinion is correct in supposing that the title to the homestead passes sub modo to the trustee until the claim for its exemption has been determined by the bankruptcy court, and then reverts to the bankrupt, the decree we are asked to review is in my judgment erroneous. The court had determined, allowed, and declared the homestead. That order, as I think, was final, and, upon the assumption in the majority opinion, caused the title thereto to revert to the bankrupt. The decree here under review in effect, although not in terms, nullifies the former decree because of the abandonment of the homestead by the bankrupt six months after the adjudication. In my opinion the bankruptcy court was without jurisdiction so to determine. The general purpose of the bankruptcy act is that the bankrupt, surrendering his estate not exempt, should be discharged from his debts then existing and should retain the property exempted and allowed to him by the law of the state of his domicile. The creditors are to have all of the estate not exempt, and must surrender all claims against the bankrupt if he shall receive his discharge. The title to the property thus reserved for the benefit of creditors is vested in the trustees as of the date he was adjudicated a bankrupt. That date is the "dead line," separating the past and the future. All that the bankrupt had on that date, except property exempt, goes to his creditors. All after-acquired property goes to the bankrupt, and with that the trustee has nothing to do. That date is the line of demarkation. The bankruptcy court has to do with the estate which through the adjudication comes to the trustee for the creditors, and with no other. The trustee can in no event pursue the after-acquired property of the bankrupt; but, failing a discharge, the creditor may pursue it in an appropriate forum, but not in the bankruptcy court. In case of discharge the creditor cannot pursue, because the debt is discharged. So here, if by reason of abandonment the homestead has become subject to debts, the creditor, failing a discharge of the bankrupt, may pursue that homestead in an appropriate forum, not in the bankruptcy court; but, a discharge being granted, he is precluded from such pursuit because the debt is canceled. At the time of this adjudication and for months thereafter the premises in question constituted the homestead of the bankrupt and his family. Its subsequent abandonment could give no title to the trustee, not only because the law restricted title to property which at the time of adjudication was not exempt, but also because, under the theory of the majority opinion, the title was revested in the bankrupt by the decree of February 8, 1900, and the court was without jurisdiction to review that decree for matters occurring subsequently to the adjudication. It is not doubted that before the act, upon abandonment of the homestead, creditors could pursue it and subject it to the pay-

ment of their debts. If they cannot now do so, it is because the bankruptcy act has tied their hands for a certain period and until determination of the question of the bankrupt's discharge.

I am constrained, with deference, to dissent from the judgment of the court.

In re GREEN et al.

(District Court, E. D. Pennsylvania. May 24, 1901.)

No. 845.

BANKRUPTCY—PREFERENTIAL PAYMENT—SUMMARY PROCEEDINGS TO RECOVER.

Where evidence shows that a bankrupt, within four months of adjudication, paid money to his wife to discharge a debt alleged to be owing her, and the wife swears that she loaned the money to her husband before marriage, that he promised to repay it, and did repay it, before adjudication, it presents a controversy that cannot be summarily determined by an order of the referee, requiring repayment on the theory that the money is still under the control of the bankrupt himself, but the right must be established by action.

In Bankruptcy.

For former opinion, see 106 Fed. 313.

Greenwald & Mayer, for trustee.

Henry Wilhelm, for bankrupts.

J. B. McPHERSON, District Judge. Certain creditors are asking for an order directing the bankrupts to deliver to the trustee the sums of \$1,000 and \$2,000 that are now respectively in the possession of the wives of the bankrupts, having been paid to the wives within four months before the adjudication, in discharge of debts alleged to be owing by the bankrupts; the theory of the petition being that the payment was fraudulent, because the debts never existed, and that the order may properly issue because the money is still under the control of the bankrupts themselves. It is apparent, however, from an examination of the testimony taken before the referee upon the petition, that each wife has possession under a claim of right. Each swore that she had lent the money to her husband before marriage, that he had promised to repay it, and that he did repay it shortly before the adjudication. This presents a controversy that cannot be summarily determined in the manner proposed, and especially as the proceeding is taken against the husbands alone. The trustee must sue the wives in the proper court, and have the dispute decided in a plenary action. In re Nugent (C. C. A.) 105 Fed. 581, 5 Am. Bankr. R. 176; In re Sheinbaum (D. C.) 107 Fed. 247; *Bardes v. Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175.

The order made by the referee must be set aside.

In re LEIBOWITZ.

(District Court, N. D. Texas. April 30, 1901.)

No. 33.

BANKRUPTCY—TIME FOR PROVING CLAIMS.

Bankr. Act 1898, § 63, cl. 5, which permits provable debts reduced to judgments after the filing of the petition, and before the consideration of the bankrupt's application for a discharge, to be proved against the estate, does not enlarge the time for proving such debts beyond the year to which such proof is limited by section 57, cl. "n"; nor is the time extended because during such time the creditor was asserting and litigating the validity of a preference, which precluded him from making proof.

In Bankruptcy. On certificate of referee in relation to disallowance of claims.

Henry & Stribling, for First Nat. Bank and others
J. Felton Lane, for trustee John D. White.

MEEK, District Judge. An involuntary petition in bankruptcy was filed against M. Leibowitz on December 9, 1898. He was duly adjudged a bankrupt on the 10th day of May, 1899. The action of the bankrupt in permitting the claimants, the First National Bank of Hearne, Tex., Kosches & Unger, and Mrs. Bettie Kosches, to obtain and maintain a preference through legal proceedings, caused the filing of the involuntary petition. Litigation between the trustee of the bankrupt estate and claimants for the funds arising out of the proceedings instituted by claimants, and held by the clerk of the county court of Robertson county, continued until the 18th day of December, 1900. The cases were carried to the court of last resort in Texas, and resulted favorably to the trustee of the bankrupt estate. The claimants were given their judgment against the bankrupt, but the trustee was awarded the funds as a part of the estate of the bankrupt, to be distributed among the creditors. The claimants on the 11th day of February, 1901, sought to prove up their claims before the referee, and an order was entered disallowing the same. The bankrupt has not filed application for his discharge. Under the foregoing state of facts, claimants contend they are entitled to have their claims allowed at any time before the consideration of the bankrupt's application for a discharge. This right is claimed by them under the provision of section 63 (5) of the bankruptcy act. This provision of the law simply declares one character of debts which may be proved against the estate of a bankrupt, and does not alter or control the time in which such debts may be presented for proof and allowance. Section 57n of the act is controlling as to the time within which claims must be presented for proof, and claimants not having brought themselves within the time limit there prescribed must fail. The referee was right in rejecting their claims because they were not filed within one year after the adjudication in bankruptcy. See *In re Rhodes*, 5 Am. Bankr. R. 197, 105 Fed. 231.

**McCLAIN, Collector, v. PENNSYLVANIA CO. FOR INSURANCES ON LIVES
AND GRANTING ANNUITIES.**

(Circuit Court of Appeals, Third Circuit. April 29, 1901.)

No. 9.

1. INTERNAL REVENUE—RECOVERY OF TAXES PAID—INTEREST.

One from whom internal revenue taxes have been illegally exacted under threat of distraint on their recovery is entitled to interest from the date of payment.

2. SAME—INHERITANCE TAXES—CONSTRUCTION OF WAR REVENUE ACT.

Section 29 of the war revenue act of 1898, which imposes a tax upon "any legacies or distributive shares arising from personal property * * * passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any state or territory, * * * to any person or persons, * * * in trust or otherwise," applies only to the estates of persons dying after the passage of the act. A trustee who, at the time of the passage of the act, held personal property upon a testamentary trust, to be distributed at a future date between the then surviving members of a class of legatees named by the testator, is not a "person possessed" of such property, within the meaning of the statute, so as to render it subject to the tax when it passes from him to the distributees.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 105 Fed. 367.

W. M. Stewart and James B. Holland, for plaintiff in error.

John G. Johnson, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. Isaiah V. Williamson died in March, 1889, and the surviving executor of his will filed an account in 1890, whereupon the orphans' court of Philadelphia county directed that the residuary estate be paid to the defendant in error, to be by it held in trust, and this was accordingly done. On April 11, 1899, the defendant in error filed its account in the same court, which then adjudged that 37 persons were entitled to take the entire balance of about \$6,000,000, and payment thereof was made in pursuance of that adjudication. Thereafter the plaintiff in error, as collector of internal revenue for the Eastern district of Pennsylvania, levied a distress upon property belonging to the defendant in error, for taxes claimed to be due under the war revenue act of 1898, on the amount which it had paid over as has been stated. In consequence of this distress, and under protest, the sum demanded, to wit, \$280,021.33, was paid, but \$94,660.07 thereof was afterwards refunded, as having been erroneously claimed, and the present action was brought in the circuit court for the Eastern district of Pennsylvania to recover the amount retained by the collector, namely, \$185,361.26, with interest. The statement of claim was demurred to, and judgment on the demurrer was entered for the plaintiff (defendant here) for \$193,927.40. The correctness of this amount (assuming that any sum was recoverable) does not appear to be now questioned. The allowance of interest was clearly right. *Ersine v. Van Arsdale*, 15 Wall. 75, 21

L. Ed. 63; *Redfield v. Bartels*, 139 U. S. 694, 11 Sup. Ct. 683, 35 L. Ed. 310.

The provision of the act of June 13, 1898, by which it is claimed the tax in question was imposed, is as follows:

"Sec. 29. That any person or persons having in charge or trust, as administrators, executors or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of \$10,000 in actual value, passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any state or territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale or gift, made or intended to take effect in possession or enjoyment after death of the grantor or bargainer, to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax, to be paid to the United States, as follows, that is to say. * * *

"Legacies or distributive shares * * * passing after the passage of this act," and no others, were made subject to the tax, and hence the question now for consideration is, when did the legacies involved in this case pass? The argument which has been based upon the ground that by the fourteenth item of Williamson's will the ascertainment of the beneficiaries was made dependent upon future and dubious events is irrelevant. It is the passing, not the vesting, of the legacies which the act makes material, and that the passing from Williamson occurred at the time of his death is, of course, indubitable. But it is contended that the phrase "passing * * * from any person possessed of such property" should not, in this instance, be related to the testator, but to his testamentary trustee; that not Williamson, who died possessed, but the Pennsylvania Company, who took the legacies "in charge or trust," should be regarded as the "person possessed," from whom the passing was to take place. We cannot sustain this contention. It puts a construction upon the statute which is certainly too questionable to be accepted as creative of a tax, and which, we think, the context shows to be a wholly inadmissible one. The passing, says the act, is to be "either by will or by the intestate laws," and surely the correct, as well as the common, understanding is that property passing either by will or by intestacy passes from and by virtue of the will or intestacy of the person who dies possessed, and not from or by the will or intestacy of any fiduciary who for a time may have it in charge. Personal estate "passing * * * by the intestate laws" always, of course, passes from the intestate himself, and never from the administrator, no matter how long the settlement of the estate may be postponed; and therefore, inasmuch as the manifest purpose of congress was to deal with testacy and intestacy alike, it cannot be supposed that the intended "passing * * * by will" could be a passing from "executors or trustees." Moreover, the passing was defined as being not only from the person possessed, but also as being "to any person or persons, or any body or bodies politic or corporate, in trust or otherwise." Therefore, when there was here a passing to the trustee, the defined event occurred. There was then a passing to a body corporate "in trust," and, as it is evident that but a

single occasion of passing was contemplated, any subsequent passing "otherwise" than in trust must necessarily be inconsequent.

Section 29 further provides that:

"Where the whole amount of said personal property shall exceed in value \$10,000, and shall not exceed in value the sum of \$25,000, the tax shall be: First.—Where the person or persons entitled to any beneficial interest in such property shall be the lineal issue or lineal ancestor, brother or sister, to the person who died possessed of such property as aforesaid, at the rate of seventy-five cents for each and every hundred dollars of the clear value of such interest in such property. Second.—Where the person or persons entitled to any beneficial interest in such property shall be the descendant of a brother or sister of the person who died possessed, as aforesaid, at the rate of one dollar and fifty cents for each and every hundred dollars of the clear value of such interest. Third.—Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the father or mother, or a descendant of a brother or sister of the father or mother, of the person who died possessed as aforesaid, at the rate of three dollars for each and every hundred dollars of the clear value of such interest. Fourth.—Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the grandfather or grandmother, or a descendant of the brother or sister of the grandfather or grandmother, of the person who died possessed as aforesaid, at the rate of four dollars for each and every hundred dollars of the clear value of such interest. Fifth.—Where the person or persons entitled to any beneficial interest in such property shall be in any other degree of collateral consanguinity than is herein before stated, or shall be a stranger in blood to the person who died possessed as aforesaid, or shall be a body politic or corporate, at the rate of five dollars for each and every hundred dollars of the clear value of such interest: provided, that all legacies or property passing by will, or by the laws of any state or territory, to husband or wife of the person died possessed as aforesaid, shall be exempt from tax or duty."

These clauses cannot be read without perceiving that by the person described in each of them as "the person who died possessed as aforesaid" there was meant the same person as, in the immediately preceding paragraph of the same section, was referred to as "any person possessed of such property." Consequently, we have the person from whom the passing was to proceed plainly identified as the person dying possessed, and it is inconceivable that an administrator, executor, or trustee would have been so designated. Furthermore, section 30 provides "that the tax or duty aforesaid shall be a lien or charge upon the property of every person who may die as aforesaid," and surely the purpose was to impress the lien upon the property taxed, and not upon that of any fiduciary who, having it in charge, might happen to die during the continuance of the trust. If we were not fully convinced of the correctness of the views we have expressed, all doubt upon the subject would be removed by consideration of the fact that the war revenue act of 1864, the tax-imposing language of which was, so far as material, precisely the same as that of the present act, had been officially administered in accordance with our understanding of the effect of that language, and this established construction of it must be presumed to have been known to congress when it again used the same language in the act of 1898. The judgment of the circuit court is affirmed.

UNITED STATES v. TAYLOR.

(District Court, E. D. Missouri, E. D. November 19, 1900.)

No. 4,544.

IMPERSONATION OF UNITED STATES OFFICER—INDICTMENT—DUPLICITY.

Act April 18, 1884, declares that any person who, with intent to defraud either the United States or any person, falsely assumes or pretends to be an officer or employé acting under the authority of the United States, or any officer of the government thereof, and who shall take unto himself to act as such, or who shall, in such pretended character, demand or obtain from any person, or from the United States, or any department or any officer of the government thereof, any money or other valuable thing, shall be deemed guilty, etc. *Held*, that such statute created two offenses; the first of which included as an essential element the use of such assumed position to extort money or property by wrongfully asserting a pretended claim of the United States, and the second comprehending the extortion of money not under the guise of asserting a claim due to the United States, but including the holding out of the offender as an officer for the purpose of giving him such credit as will entitle him to successfully demand money from another for his private use, with intent to defraud; and hence an indictment charging that defendant feloniously, and with intent to defraud H., did falsely assume and pretend to be an officer acting under the authority of the United States treasury department, and did then and there feloniously, and with intent to defraud said H., take upon himself to act as such officer, and as a part of the same sentence including the charge, "and did then and there, in such assumed and pretended character as such officer, demand and receive the sum of \$10," was demurrable for duplicity.

James Vincent Taylor was indicted for falsely impersonating a United States officer, and as such unlawfully demanding and receiving of complainant the sum of \$10, in violation of Act April 18, 1884. Demurrer to indictment. Sustained.

Edward A. Rozier, U. S. Atty.

Chester H. Krum and Robert L. McLaran, for defendant.

ADAMS, District Judge. A demurrer is interposed by the defendant on the alleged ground of duplicity in the indictment. The indictment is preferred under the provisions of the act of April 18, 1884, which enacts as follows:

"That every person who with intent to defraud either the United States, or any person, falsely assumes or pretends to be an officer or employee acting under the authority of the United States, or any department or any officer of the government thereof, and who shall take upon himself to act as such, or who shall in such pretended character, demand or obtain from any person, or from the United States, or any department or any officer of the government thereof, any money, paper document, or other valuable thing, shall be deemed guilty * * *."

An analysis of this act discloses that two offenses are denounced by it. The first, in the order stated, is falsely impersonating an officer or employé of the United States, and acting as such with intent to defraud either the United States or some person. The first portion of the act, in my opinion, makes an important element of the offense to consist of making use of the assumed or pretended position for the purpose of extorting money or property from an-

other either, for instance, in satisfaction of an alleged claim of the United States, or to secure immunity from punishment for an alleged offense, or for other similar purposes, in which the impersonator, acting under the assumed authority of the United States, undertakes to assert the authority of the United States, and, in so doing, to defraud. The distinguishing feature of this first offense, in my opinion, is the making use of the assumed or pretended position for the purpose of falsely and wrongfully asserting a pretended claim of the United States, and thereby to defraud the person with whom he is dealing, out of money or property. The second offense is falsely impersonating an officer or employé of the United States, and in the pretended or assumed character demanding or obtaining either from the United States, or from some person, any money or valuable thing, with the intent to defraud. The elements of this offense, in my opinion, are more comprehensive, and do not limit the wrongful act to such as extorting money or property from another under the guise of asserting a claim due to the United States, which it is the duty of the offender in his pretended official character to assert, but includes the holding of one's self out as such officer or employé for the purpose, among other things, of giving him such a credit or standing as will enable him to successfully demand or otherwise obtain money from another for his own private use and benefit, and with the intent to defraud. The indictment in this case charges that the defendant "feloniously and unlawfully, with intent to defraud one J. E. Holbroke, did falsely assume and pretend to be an officer or employé acting under the authority of the treasury department of the United States, to wit, a United States detective and secret service operator, and did then and there falsely, and with intent to defraud said J. E. Holbroke, take upon himself to act as such officer or employé so as aforesaid. * * *

The foregoing part of the indictment is manifestly intended to charge the first offense which I have hereinbefore specified. The indictment then proceeds in the same count, and as a part of the sentence already broken, as follows: "And did then and there, in such assumed and pretended character as such officer and employé of the United States, demand and receive the sum of \$10, lawful money of the United States." It cannot, I think, be successfully denied that this single count of the indictment undertakes to charge the two separate offenses already seen to be denounced by the act in question, and is therefore bad for duplicity.

In re DEININGER.

(Circuit Court, D. Oregon. April 17, 1901.)

No. 2,670.

INTERSTATE COMMERCE—STATE LEGISLATION AFFECTING—PROHIBITING SALE OF GAME OR FISH.

There is no unqualified right of property in game or fish, which, although reduced to possession, remain subject to the control of the state, in the exercise of its police powers; and a law making it a penal offense for a person to have trout in his possession for sale is a valid police regulation, and not an unlawful interference with interstate commerce, although such trout were brought for sale from another state, where they were lawfully caught.

On Petition for a Writ of Habeas Corpus and Order to Show Cause.

J. J. Fitzgerald and E. E. Merges, for the petitioner.

A. C. Spencer, for respondent.

BELLINGER, District Judge. The petitioner was convicted in the state court of having in his possession trout for sale, in violation of the game laws of Oregon, and was sentenced to pay a fine of \$35. In default of payment, he has been imprisoned by the sheriff of the county. He therefore makes this application for a writ of habeas corpus, and this hearing is for an order upon the sheriff to show cause why the writ should not be granted. The facts in the case, briefly, are that the petitioner is the manager of the Chlopeck Fishing Company, doing business in Portland, Or.; that said company conducts a retail fish market in Portland; that the trout in question were purchased in the city of Seattle, in the state of Washington, where they had been lawfully caught, and were shipped from that state to the market of the company in Portland, for sale here.

It is contended for the petitioner that the law of Oregon which makes the possession of trout for sale, lawfully caught in another state, unlawful, is a restraint of interstate commerce, and is therefore void. In the case of *Geer v. Connecticut*, 161 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793, it is held that a law of Connecticut which provides that no person shall at any time kill any woodcock, ruffed grouse, or quail for the purpose of conveying the same beyond the limits of the state, or shall transport or have in possession, with intent to procure the transportation beyond such limits, any such birds killed within such state, is legislation which it is within the constitutional power of the state to enact. In that case, as in this, it was contended that the act of the state of Connecticut was in restraint of interstate commerce, since it made the possession of the birds in question for the purpose of conveying the same beyond the state illegal, notwithstanding the fact that said birds were lawfully killed in the state of Connecticut. The decision is based upon the fundamental distinction that exists between the qualified ownership in game and the perfect nature of ownership in other property. If game when reduced to possession became an article of property, in the ordinary sense of the word, it would belong to commerce; otherwise, it is a subject of control by the state, in the exercise of its police power. There is,

in my opinion, no room to distinguish between the right to take game out of the state and the right to bring it within the state. Interstate traffic is affected as much in one case as in the other. It is not material that in one case the killing of game is discouraged by the limitation which the law puts upon its use, by prohibiting its exportation, while in the other the enforcement of the law against the taking of game is rendered practicable by making its possession for sale unlawful. The ultimate object sought in each case is the same, and the law in each case is a legitimate exercise of the police power of the state. The taking of game is not an industry. It is merely a diversion. If it is ever anything more than this, it is under primitive conditions of society, when industrial enterprise and commerce are not yet established. It is wholly immaterial whether the game was lawfully caught within the state of Washington or not. The violation of the laws of Washington imposes no duty in respect to the particular matter upon the state of Oregon. Its right to prohibit the possession of the interdicted game does not depend upon what has been done in another jurisdiction, but wholly upon the limited right of property which exists in game birds, animals, and fishes. The right to legislate without restraint, so far as the game within the state is concerned, is not questioned. When game is brought from another state, by whatever means, or for whatever purpose, or in whatever condition, it becomes, upon the moment of its introduction into the state, a part of the game of the state, and subject to the control of its laws. In the case of *In re Davenport* (C. C.) 102 Fed. 540, the court holds that one state does not have the constitutional power to prohibit traffic in game imported from another state. I regret my inability to adopt the view of the learned judge who decided that case. The respect which I have for his opinion has caused me to hesitate in reaching a conclusion different from his. The petition for a writ of habeas corpus is denied.

BRENNAN et al. v. EMERY-BIRD-THAYER DRY-GOODS CO.

(Circuit Court of Appeals, Eighth Circuit, April 12, 1901.)

No. 1,469.

TRADE-MARKS—DESCRIPTIVE WORDS—"STEEL SHOD" SHOES.

The words "Steel Shod," when applied to boots or shoes whose soles are studded with steel nails to render them more durable, are essentially descriptive, and cannot be exclusively appropriated by one manufacturer as a trade-mark.¹

Appeal from the Circuit Court of the United States for the Western District of Missouri.

For opinion below, see 99 Fed. 971.

¹ What names subject to exclusive use, see note to *Kathreimer's Malzkaffee Fabriken Mit Beschränkter Haftung v. Pastor Kneipp Medicine Co.*, 27 C. O. A. 357.

Robert Bach McMaster (Clarence L. Palmer, on the brief), for appellants.

John L. Peak, for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. On March 6, 1897, Hubert Brennan and Edward L. White, the appellants, exhibited their bill of complaint against the Emery-Bird-Thayer Dry-Goods Company, the appellee, charging the latter with the infringement of an alleged trade-mark which the complainants had for some years been in the habit of stamping or branding on the soles of a certain kind of shoes of their manufacture. The alleged trade-mark consisted of the words "Steel Shod" printed on the face of a figure representing an anvil. The trade-mark in question was registered in the United States patent office on June 16, 1891, and had been used by the complainants to a considerable extent after that date. The application which they filed for the purpose of securing a registration in the patent office contains the following statement or declaration:

"The trade-mark consists in the arbitrarily selected word symbol 'Steel Shod.' This has generally been arranged as shown in the accompanying fac simile, in which it appears in connection with the representation of an anvil. The latter feature may, however, be omitted without altering the character of our trade-mark, the essential feature of which is the arbitrary word symbol 'Steel Shod.' This trade-mark has been used continuously by us in our business since about April 1, 1891."

The defendants, by their answer, disclaimed any intention of violating the complainants' alleged trade-mark, and in that behalf the answer contained, in substance, the following averments: That prior to December, 1896, the firm of Bullene, Moore, Emery & Co., the predecessors of the defendant company, had handled a small quantity of shoes, made by the complainants, which bore the impress of the above-described trade-mark; that there was nothing on the shoes so handled by said firm to indicate that the complainants claimed it as a trade-mark, or that it was registered; that when the defendant was organized its officers were ignorant of the fact that the words "Steel Shod" had been registered as a trade-mark, or that the complainants claimed an exclusive property in the words, but supposed, on the contrary, that said words were descriptive of the character and quality of the shoes to which the words were affixed, and that any one was entitled to make use of the same if they aptly described the soles of the shoes to which they were applied; that, acting under such belief, the defendant company, after it was organized as a corporation, had had certain shoes made for its trade, on the soles of which the words and symbol aforesaid were stamped to indicate that they were in fact steel shod; that, in connection with said words, and underneath the same, it caused to be printed the following initials: "E. B. T. & Co."; that in December, 1896, it was informed for the first time of the claim which was made by the complainants with reference to its proprietary interest in the words "Steel Shod"; that thereafter it ceased to make use of such words on shoes which were manufactured for its trade,

but that it did have in stock when the bill was filed about two dozen pairs of shoes bearing the aforesaid stamp, which had been made for it before it received the aforesaid notice of the complainants' claim; and that it had obliterated said stamp on all of such shoes, and disclaimed any intention of thereafter making use of the alleged trade-mark.

Turning to the evidence in the case, it is to be observed that it fails to show that either the firm of Bullene, Moore, Emery & Co. or that the defendant corporation after it was organized had any knowledge that the complainants claimed a proprietary interest in the words "Steel Shod," until some time in December, 1896, or about three months before the present action was instituted. The words last aforesaid, and the accompanying representation of an anvil as branded on the shoes, which were purchased from the company by the last-named firm, did not show that the words in question were registered as a trade-mark, and there is no evidence in this record, so far as we can discover, that knowledge of the fact that they were so registered and claimed was acquired from any other source. It must accordingly be assumed to be true, as stated in the answer, which is duly verified, that in making use of the words "Steel Shod" in the manner disclosed by the answer, upon shoes of its own manufacture, the defendant company acted in ignorance of the complainants' alleged exclusive right to those words, and with no intention of appropriating to its own use another's trade-mark. The testimony does show, however, that, when the words "Steel Shod" were branded by the defendant's direction on shoes that were manufactured for its trade, they were so used upon shoes whose soles were quilted with steel wire, and whose heels were studded with steel nails or steel posts, so that the words "Steel Shod" aptly described the kind or the quality of the shoes. It is also noteworthy that the shoes manufactured by the complainants to which they now apply the alleged trade-mark have soles of the same kind,—that is to say, soles that are quilted or thickly studded with nails,—although it is claimed by them that originally they used the words "Steel Shod" in connection with shoes that only had steel nails or posts in the heels, and that, as thus applied, the words indicated a kind of shoe whose durability they would warrant. Since December, 1896, when the defendant company first received notice of the complainants' claim, it has abandoned the use of the words "Steel Shod" on shoes, which it has manufactured for its trade; but since this action was instituted it has substituted the words "Steel Clad" on shoes sold by it whose soles are quilted with wire nails for the purpose of rendering them more durable.

Now, in view of the foregoing facts, and in view of the further fact that the bill counts exclusively upon an alleged wrongful appropriation of the words "Steel Shod," which are said to have become by long-continued use, as well as by registration, a technical trade-mark, the only question in the case is whether these words, which, as the complainants say, constitute the "essential feature" of their trade-mark, and may be used without the figure of an anvil, can be exclusively appropriated by any manufacturer of shoes or

footwear so as to become a trade-mark when used in connection with the manufacture and sale of footwear. We feel constrained to hold that this question must be answered in the negative. It is one of the fundamental rules of the law of trade-mark that words, and even symbols, which are descriptive of the kind, quality, nature, properties, or place of manufacture of an article to which the words are applied cannot be appropriated as a trade-mark, as respects that article, because other persons who manufacture or produce the same article may have occasion to make use of the same words or symbols to describe their own products, and they are entitled to the free use of apt language and symbols for that purpose. No person or corporation can acquire, even by long-continued use, a monopoly of words or signs which are essentially descriptive of the article to which they are applied. If a manufacturer desires to obtain an exclusive right to the use of words or symbols to indicate the origin of his goods, and to identify them, he must choose words or symbols which, as respects the article to which he applies them, are arbitrary or fanciful in the sense that they do not describe its kind, quality, properties, or the place where it is manufactured. To sustain these familiar propositions it is only necessary to refer to a few cases. *Canal Co. v. Clark*, 13 Wall. 311, 321, 20 L. Ed. 581; *Mill Co. v. Alcorn*, 150 U. S. 460, 464, 14 Sup. Ct. 151, 37 L. Ed. 1144; *Chemical Co. v. Meyer*, 139 U. S. 540, 546, 11 Sup. Ct. 625, 35 L. Ed. 247; *Merriam v. Clothing Co. (C. C.)* 47 Fed. 411, 414; *Petridge v. Wells*, 13 How. Prac. 387. The words "Steel Shod" are essentially descriptive when applied to boots or shoes whose soles are studded with steel nails to render them more durable. Indeed, we can scarcely conceive of language which is more apt to define the species of shoe last mentioned, or that would be more naturally adopted by a manufacturer for that purpose. The words in question, when applied to shoes whose soles are quilted with nails, are neither arbitrary nor figurative; and within the doctrine above stated no manufacturer is entitled to appropriate them as his exclusive property for the purpose of describing shoes which are thus made. If the law permitted words which are essentially descriptive of kind, quality, or properties to be appropriated by a merchant or manufacturer to advance the sale of his own goods, the English language would be speedily impoverished in these days when competition in all lines of trade and manufacture is both selfish and keen. It has accordingly been decided that the words "Headache Wafers," as applied to a drug put up in the form of a wafer for the cure of headache, cannot be appropriated as a trade-mark (*Gessler v. Grieb*, 80 Wis. 21, 27, 48 N. W. 1098); that the word "Snowflake," as applied to bread or crackers, is descriptive of whiteness, lightness, and purity, and as so applied cannot be appropriated as a trade-mark (*Larrabee & Co. v. Lewis*, 67 Ga. 561, 44 Am. Rep. 735); that the words "Rye and Rock," as applied to a mixture of liquid rock candy and whisky, cannot be appropriated as a trade-mark (*Van Beil v. Prescott*, 82 N. Y. 630); that the words "Black Package Tea," as applied to tea put up in black packages, cannot be appropriated as a trade-mark (*Fischer v. Blank*, 138 N. Y. 244, 249, 33

N. E. 1040); and that the words "Iron Bitters," as applied to a solution of iron designed to be used as a tonic, cannot be so appropriated (*Chemical Co. v. Meyer*, 139 U. S. 540, 546, 11 Sup. Ct. 625, 35 L. Ed. 247). In view of these decisions, and many others of an analogous character which might doubtless be found, and for the reasons heretofore stated, we conclude that the complainants have no exclusive property in the words "Steel Shod," as applied to shoes whose soles are quilted with steel nails, and that the effort on their part to appropriate them must accordingly fail, and their alleged trade-mark be held to be invalid. The decree of the lower court dismissing the bill of complaint is accordingly affirmed.

WRITING MACH. CO. v. ELLIOTT & HATCH BOOK-TYPEWRITER CO.

(Circuit Court of Appeals, Second Circuit. May 9, 1901.)

No. 125.

PATENT—VALIDITY—INFRINGEMENT.

The Crary patent, No. 477,517, for improvements in typewriting machines designed for printing in books of record, claim 1, contains a single novel feature, consisting of a mechanical connection between the table on which the book rests and the leaf-supporting platen by which the latter can be adjusted at whatever elevation may best suit the thickness of the book, and rigidly held in such place. *Held* not anticipated, and valid, and, in view of the prior condition of the art, sustains a construction broad enough to cover any such means of adjustment, and, as so construed, is not infringed by a device which is adjustable to and from the table, and where its platen is a swinging plate, which, when it is supported on the open book, receives the type mechanism, but is kept in its place by the support it receives from the book.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Appeal from a decree of the circuit court for the Southern district of New York (106 Fed. 507), which dismissed the complainant's bill in equity for an alleged infringement of claim 1 of letters patent No. 477,517, dated June 21, 1892, and issued to Joseph M. Crary, as inventor, for improvements in typewriting machines. The complainant is the owner of the patent.

D. Walter Brown, for appellant.

Thomas Ewing, Jr., and P. T. Dodge, for appellee.

Before WALLACE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. On January 3, 1891, the inventor, Crary, filed his application in the patent office for an improved typewriting machine, and letters patent therefor, No. 477,353, were issued to him on June 21, 1892, the date of the patent in suit, for which he had filed an application on November 13, 1891. Each invention was especially intended for printing in large books of record, and in such a machine the use of a flat platen or plate is necessary to support the leaf to be printed and to remove the curvature of the leaf created by its attachment to the back or hinge of the

book. The platen of 477,353 was stationary, and the book was adjusted to the platen; that is, was moved upon the table up or down as the varying thicknesses of books required. This method was obviously inconvenient, required frequent handling of heavy books, and the study of the inventor resulted in the improvement described in claim 1 of the patent in suit, which, speaking very generally, consisted in the combination with other elements of a platen adjustable to and from the table top. This improvement was a substantial, independent, and distinct subject of invention, but the complainant is in error in supposing that the patent is to be examined without reference to the state of the art as disclosed by the inventor's earlier invention. Ten months after he had applied for a patent for a typewriting machine with a fixed platen, he made application for the improvement now in controversy. As a matter of fact, it was an improvement upon the senior invention, and was the introduction into book-typewriting machines of an adjustable leaf-supporting platen connected with and co-operating with the other parts of the machine. Crary apparently originated the improvement, but it was, strictly speaking, a secondary invention, for it performs the function previously performed by the stationary platen, although it performs it in a much better way than had been accomplished by its predecessor. Walk. Pat. § 359. It was a substantial and meritorious invention, and was not limited to the details of the mechanism shown in the specification. The mechanism of claim 1 is described in the opinion of the circuit judge as follows:

"To a stationary table is adjustably connected a rigid, flat, leaf-supporting platen. This platen is connected to the table, as shown in the specifications and drawings, by four slotted links, which at their upper ends are pivoted to ears of the platen. Said links are slotted, and slide and oscillate on rods supported below the table top. Clamp nuts enable the operator to fix the platen at any height above the table, thus adjusting it in a rigid position at whatever elevation may best suit the thickness of the book which lies upon the table."

The specification says that:

"The platen, by means of the links, is adjustable to the thickness of the book upon the table, and is then fixed rigidly by the clamp nuts. Where a portable table is not desired, any stationary table may be used to support the book-printing device, and the links may in such case be used independently of the tie-rods by setting them at any suitable angle with the platen, to sustain the latter at a suitable height above the table to suit the thickness of the book; the links, when adjusted, being clamped rigidly to the ears, C', by the screws U'. The links, with such construction, merely rest by their ends upon the table top which supports the book, but serve as adjustable legs to set the platen above the table top at a suitable distance to place the book beneath the platen."

It thus appears that the platen, after adjustment, is rigidly clamped at its four corners by the clamp nuts, and is a rigid, flat surface, upon which the type mechanism is entirely supported, and in this respect the device differs from the invention of 477,353, in which the type mechanism was supported wholly on the bed which receives the book. Claim 1 is as follows:

"(1) In a typewriter, the combination with a table and its supports of a flat platen adjustable to and from the table top, type mechanism, and means supported wholly upon the platen for moving the type mechanism transversely and longitudinally over the platen, as and for the purpose set forth."

In the defendant's machines, which are made substantially in accordance with the description contained in letters patent No. 620,125, dated February 28, 1899, and issued to Walter P. Hatch and Frederic W. Hillard, the platen is loosely hinged by hooked lugs to a vertically adjustable bar upon a frame at the back of the machine, called a "lift frame," upon which, as a pivot, the upper end of the platen turns, and, if the book does not intervene, the lower end will rest upon the table. When the machine is in use, the open book is placed in position, the platen is turned down upon it, and can be turned back when a new leaf is to be written upon. "The machine bedplate is likewise hooked upon this same bar, and the bar, being lifted into engagement with it, serves also as a convenient hinge about which the machine bedplate with its type mechanism may be turned up and out of the way for the purpose of arranging the book for writing, or turning the pages. The adjustment of the platen depends consequently upon the thickness of the underlying portion of the book, and is directly determined by the thickness of this underlying portion and any blocks which may be placed under the book." The question of infringement turns very much upon the point of the conformity or nonconformity of the defendant's adjustable platen to the corresponding platen described in the patent in suit. The defendant's device is, in a certain sense, adjustable to and from the table,—that is, the upper end of the platen swings on the vertical adjustable bar on the lift frame, and the lower end loosely rests on the table; but it is not the adjustable platen of the complainant's patent, which is rigidly clamped at its four corners to the table, capable of being moved from the table top, "and there retained in place rigid, and in a proper plane to receive the impact of the type," and which is kept in place by its attachment to the other parts of the machine. The defendant's platen is a swinging plate, which, when it is supported on the open book, receives the type mechanism, but is kept in its plane by the support it receives from the book, and the book is really the thing which supports the type mechanism. The decree of the circuit court is affirmed, with costs.

EDISON PHONOGRAPH CO. v. HAWTHORNE & SHEBLE MFG. CO. et al.

(Circuit Court, E. D. Pennsylvania. May 2, 1901.)

No. 15.

PATENTS—SUIT FOR INFRINGEMENT—JURISDICTION OF EQUITY.

The jurisdiction of equity in the case of infringement of a patent exists only when the bill states facts upon which the right to some form of equitable relief may properly rest. Where all acts of infringement charged are in the past, and there is no allegation that their continuance is threatened or intended, the remedy at law by an action for damages is adequate.

In Equity. Suit for infringement of patent. On demurrer to bill.

Howard W. Hayes, for complainant.

E. C. Rhoads, C. A. L. Massie, and Philip Mauro, for respondents.

J. B. McPHERSON, District Judge. The demurrer specifies several objections, either to the bill as a whole or to parts of the bill; but, in the view that I think must be taken of the dispute, only one objection need be considered, namely, that the complainant has a complete and adequate remedy at law.

The facts are as follows: The complainant is now the owner of letters patent No. 386,974, originally issued to Thomas A. Edison, for improvements in phonographs. The machines themselves are manufactured by a second corporation, called the Edison Phonograph Works, and are sold by a third corporation, called the National Phonograph Company, under a license issued by the complainant, which is declared in the bill to be an "exclusive right and license to use and vend the inventions described in said letters patent." To every phonograph made under this patent is fastened a plate, upon which is inscribed, *inter alia*, a capital letter and a serial number; and the license made by the complainant to the National Phonograph Company provides:

"That every phonograph used or vended by the (National Phonograph Co.) shall have upon it such serial number without erasure or alteration, and that this license extends to such phonographs only so long as they severally shall have upon them said serial number without erasure or alteration; and that any phonograph, whether in the possession of the said (National Phonograph Co.) or any subsequent purchaser, the serial number upon which is erased or altered, shall no longer be licensed under said patents, and the user or vender thereof shall be an infringer of said patents covering such phonographs. And the (National Phonograph Co.) agrees to place upon every phonograph used or vended by it, a notice that such phonograph is licensed under the patents of the (Edison Phonograph Co.) only so long as the serial number upon said phonograph remains upon it without erasure or alteration."

This agreement was made in April, 1900, and the bill avers that in August of the same year an act of infringement was committed by the defendants; paragraph 10 of the bill describing the act as follows:

"That on or about the 10th day of August, 1900, the said National Phonograph Company sold a phonograph of the type known as the 'Gem Phonograph,' theretofore made for it by the said Edison Phonograph Works under license from your orator as aforesaid; that at the time of such sale the said phonograph had securely attached to it a plate as aforesaid, having on it the date of the issue of said letters patent, the aforesaid notice, and the letter and serial number G—22,917; that the said phonograph afterwards came into the possession of the said defendants; that the said defendants thereupon caused the said serial number to be removed and obliterated from said plate and said phonograph, and afterwards, to wit, on or about the 24th day of September, 1900, used and vended said phonograph in the city of New York, in the state of New York, with the said serial number obliterated as aforesaid; that at the time the said number was obliterated, and at the time the said phonograph was sold by the said defendants, the said defendants had full knowledge of the conditions aforesaid upon which the said phonograph was manufactured and sold under the said license from your orator."

In addition to this charge, paragraph 11 of the bill makes a further averment:

"And your orator further shows that the defendants, and others acting in concert with them, well knowing the premises, since the grant of said letters patent, and since the date of the assignment last mentioned, within the Southern district of New York and elsewhere in the United States wrongfully and unlawfully, and with intent to injure your orator and to deprive it of the just profits resulting from said inventions, and without the license or consent of your orator, have sold and used phonographs substantially as described in said letters patent, and particularly such as pointed out in claims numbered 9, 11, 13, 14, 15, 24, 27, and 28 of letters patent No. 386,974, thereby infringing the exclusive rights of your orator, and have derived, and still are deriving and receiving, great gains and profits from such unlawful use, but to what extent your orator is ignorant, and cannot set forth."

These are the two charges made against the defendants, and I think it is apparent that for such grievances the complainant has an adequate remedy at law. They have already been committed by the defendants, and no averment is to be found, either in the paragraphs quoted or elsewhere in the bill, that the defendants intend to repeat the acts, which, for the present, may be described as acts of infringement. The complainant does not even inform us in what business the defendants are engaged, so that no inference as to their future conduct can be drawn from their occupation, if such an inference be at any time permissible. It is well settled that the jurisdiction of equity in the case of infringement of letters patent exists only when the bill states facts upon which the right to some form of equitable relief may properly rest. For infringement merely the remedy at law is complete and adequate: *Root v. Railway Co.*, 105 U. S. 189, 26 L. Ed. 975. In the present case, although the bill prays for an injunction to restrain the defendants from future acts, there is no averment in the bill by which the prayer can be supported. The charges all refer to acts in the past, and for acts in the past a verdict for damages is a full and sufficient remedy.

The demurrer is sustained, and the bill is dismissed, at the costs of the complainant

KITSELMAN et al. v. KOKOMO FENCE-MACH. CO. et al.

(Circuit Court of Appeals, Seventh Circuit. April 9, 1901.)

No. 647.

1. PATENTS—ANTICIPATION—WIRE-FENCE MACHINES.

The Davisson patent, No. 289,507, for a machine for making wire fabric, was not anticipated, but the machine described is a distinct advance over those of the prior art.

2. SAME—CONSTRUCTION—PRIMARY INVENTION.

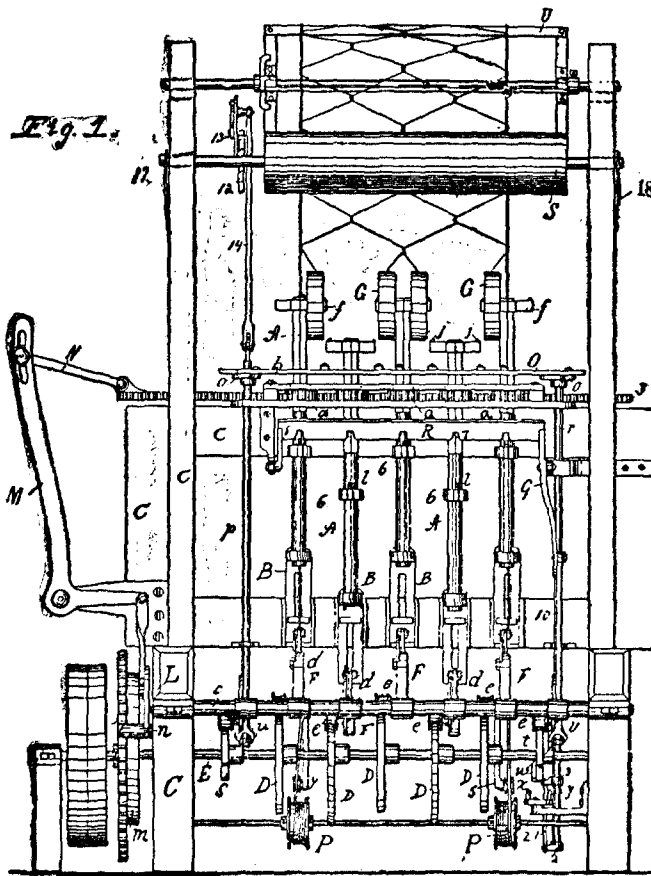
The Kitselman patent, No. 356,322, for a wire-fabric machine, was not anticipated, and is valid. While the machine described embodies some of the features of the prior Davisson patent, it makes changes in the mechanism which, while simple in themselves, were highly important in the general result, which was to transform a stationary or loom machine into a form which rendered it portable and capable of being successfully used in the field for the weaving of wire fence in situ; and, being the first to accomplish that result, the invention was of a primary character, and the patent is entitled to a liberal construction. As so construed, claims 1, 2, 11, and 15 are infringed by machines made in accordance with the Whitney patent, No. 552,025.

Woods, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the District of Indiana.

In the suit below the appellants alleged infringement of four patents, under which they are manufacturing a machine for weaving wire fence in situ. These are, Letters Patent No. 289,507, granted W. J. Davisson, December 4, 1883, and later assigned to appellants; Letters Patent No. 356,322, granted A. L. Kitseleman, one of the appellants, January 18, 1887; Letters Patent No. 357,067, granted T. M. Connor, February 1, 1887, and subsequently assigned to appellants; and Letters Patent No. 505,607, granted appellants as assignees of John C. Pope, September 26, 1893. The particular claims charged to be infringed are the second and third of the Davisson patent; the first, second, ninth, tenth, eleventh, fifteenth and twentieth of the Kitseleman patent; the second and third of the Connor patent; and the first, ninth and tenth of the Pope patent.

Figures 1 and 2 of the Davisson patent—one of the four in suit, and referred to in the opinion—will serve to show the twisting spindles and wire-reels in position for operation; Figure 6 is an enlarged sectional view of the twisting-spindles; and Figure 10 a vertical section of a reel-case and a wire-reel in position thereon. They are as follows:



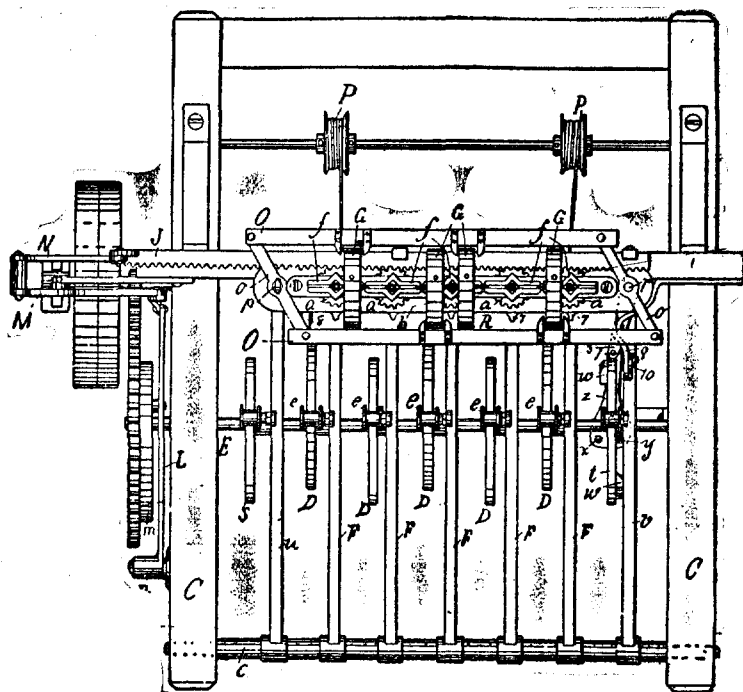
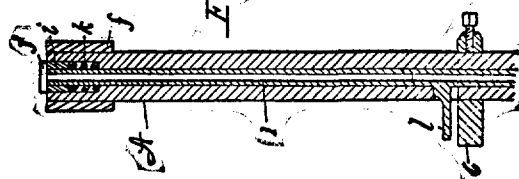


Fig. 2



Fig. 6

Fig. 10.



The specifications of the Davisson patent are as follows:

"A series of hollow vertical spindles, A A, having their ends journaled in vertical sliding bearings B B, are mounted on a suitable main frame, O C. Each of said spindles is provided at its upper end with a cogged pinion, a, which is provided with a projecting cylindrical hub having a bearing in a plate, b, secured to frame C. Pinions a are each provided with a square central perforation, and the upper end of each of the spindles is squared and fitted to slide freely through said perforation, the purpose being to revolve the spindle by means of the pinion, and to allow a vertical movement of the spindle through the pinion. Each spindle A is given an intermittent reciprocating motion by means of a cam, D, mounted on the driving-shaft, E, and a lever, F, pivoted at one end to a rod, c, extending across from one side of the main frame to the other, and connected at the free end with the sliding bearing B by means of a short link, d. A friction-roller, e, is adjustably secured to lever F over cam D, there being a cam and a lever for each spindle. Cams D are placed alternately on the driving-shaft, with their flat faces on opposite sides of the shaft and their high portions overlapping, so that at each half-revolution of the driving-shaft each alternate spindle is raised, as seen in Fig. 1; but on account of the overlapping of the high portions of the cams there are two points in each revolution where the spindles are all at their highest point at the same time, for a purpose hereinafter explained. Across the top of each spindle is secured a square cross-bar, f.

"G G G are cylindrical cases formed of sheet metal, having a central hub, g, which has a square central hole which fits over, and is adapted to slide upon the cross-bars f. The cases G are open on one side, and each carries within it a reel, H, which is adapted to turn on hub g. The wire for forming the meshes of the fabric is wound upon said reels, and they are prevented from slipping off the hub by turn-buttons h h, all as clearly shown in Fig. 10.

"For the purpose of preventing the wire-reels and their cases from being thrown off from the ends of cross-bars f, a narrow bar, i, having upturned ends j j, Fig. 6, is placed in a groove in the top edge of cross-bars f, said groove being of such depth that the upturned ends of bar i may be drawn down flush with the top surface of f. Said cross-bar f is centrally secured to the upper end of a tube, I, which slides in spindle A. The interior of spindle A is enlarged at the top to receive a spiral spring, k, which surrounds tube I and forces the upturned ends of bar i above the surface of f. A pin, l, fastened to the exterior of tube I, projects through a slot in the side of the spindle and stops the upward movement of the tube and the bar i.

"J is a rack-bar engaging pinions a a, and adapted to slide forward and backward endwise, and to revolve said pinions and their respective spindles alternately in opposite directions. Rack-bar J is reciprocated by means of a grooved cam, m, on one side of the driving-wheel, (shown clearly in Fig. 5.) a lever, L, pivoted to the main frame at n, and having a pin projecting into grooved cam m, a bell-crank, M, to the short arm of which the free end of lever L is connected, and a rod, N, pivoted to the end of the rack-bar and adjustably connected to the long arm of lever M.

"O O are shipper-bars for shifting the wire-reels from one set of spindles to another. Said bars are pivoted at their ends to cross-heads o o, and said cross-heads are rigidly secured at their centers to two upright shafts, p r, which shafts are raised twice in each revolution of the driving-shaft by means of cams s and t, secured on the driving-shaft, and levers u and v, pivoted at one end to the rod e, and connected at the other end with shafts p and r. Shaft r, after being raised, is given a partial revolution by means of cam-shaped projections w w on the side of cam t, Fig. 2. Said projections engage alternately pins x y on a lever, z, the opposite end of which is forked, and engages a rod, 1, secured to shaft r by means of two short arms, 2 and 3.

"P P are reels carrying the wires for forming the edges of the fabric. 45 are guides for said wires.

"For the purpose of holding spindles A in position, I secure upon each spindle a dog, 6, and provide a catch-plate, R, which plate is provided with notches 7, adapted to fit over said dogs. Said plate is attached to short arms 8, 9, which are pivoted to brackets attached to the main frame. Arm 9 is extended outward beyond its pivot, and is connected with lever v by a rod, 10, the effect being, when said lever is raised, to throw plate R downward and engage the dogs on the spindles.

"For the purpose of taking up the finished fabric, rolls S T are mounted on shafts journaled in the main frame. The bearings of roll T are movable, and the surfaces of the rolls are held in close contact with the fabric by means of a spring, 11, at each end of roll T. A reel, U, for storing the finished fabric, lies in the slotted bearings on the supports rising from the main frame. One turn of the fabric having been taken about said reel and secured thereto, the reel is thereafter revolved by frictional contact with roll T, on which it rests. Roll S is revolved intermittently by means of a ratchet-wheel, 12, secured to its shaft, a pawl, 13, and a rod, 14, connected to shaft p.

"The operation of my machine is as follows: The wire from reels P P is carried upward through the outside spindles, A A; or, if a narrower fabric is desired, it may be carried through either of the other spindles, and four of the incased reels carrying wire for forming the meshes are placed on alternate spindles, as shown in Fig. 1. The wire is led from each of these reels through an opening in the case, and all of the wires are passed between take-up rolls S T and passed once around reel H, and there secured. Power is now applied to the driving-shaft E, and as it revolves rack J is thrown forward and the spindles A are revolved, making two complete revolutions, and thereby twisting together the wires on the opposite ends of the cross-bar f on the central spindle and passing the wires on the cross-bars of the outside spindles around the straight wires from reels P P. When these revolutions have been accomplished, the intermediate spindles carrying no reels have been raised by their respective cams D and levers F to the level of the spindles carrying the wires, and catch-plate R has engaged dogs 6, at the same time depressing bars l by striking pins l downward. At the same time the shafts p r have been raised by cams s t and levers v u, carrying upward the shipper-bars O O till they are level with the cross-bars f, which are now all in line, and the forks of the shipper-bars embrace between them the reel-cases G. The cam projection w on one end of cam t now passes between pins x y, engaging y, and lever z, being thereby vibrated and engaging rod l, partially revolves shaft r, by this means moving the shipper-bars O O endwise, and thereby shifting the cases G and their reels to the intermediate cross-bars, f, which before carried no reels. The spindles first carrying the reels now fall, and those now carrying the reels are revolved by the return of rack J to its first position and a new series of meshes formed. At each upward movement of the upright shaft p pawl 13 engages ratchet-wheel 12, and the finished fabric is drawn upward and wound upon reel U.

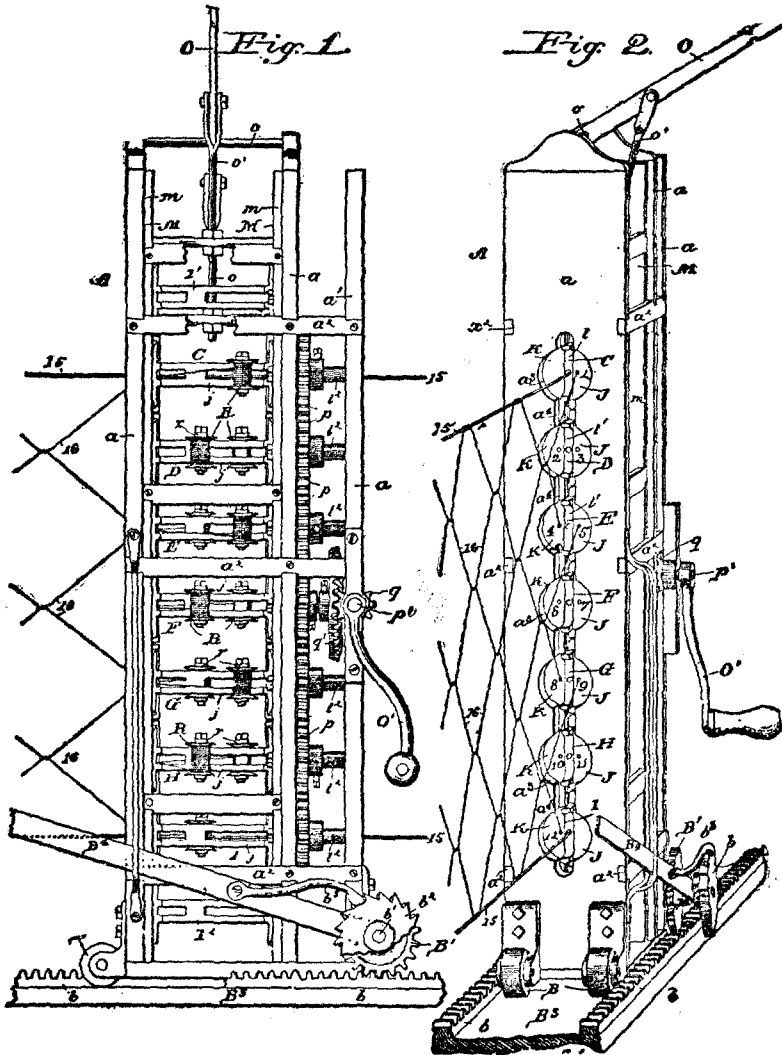
"When short sections of fabric are to be made—as for gates—straight rods may be substituted for the side wires, and the expansible reel removed."

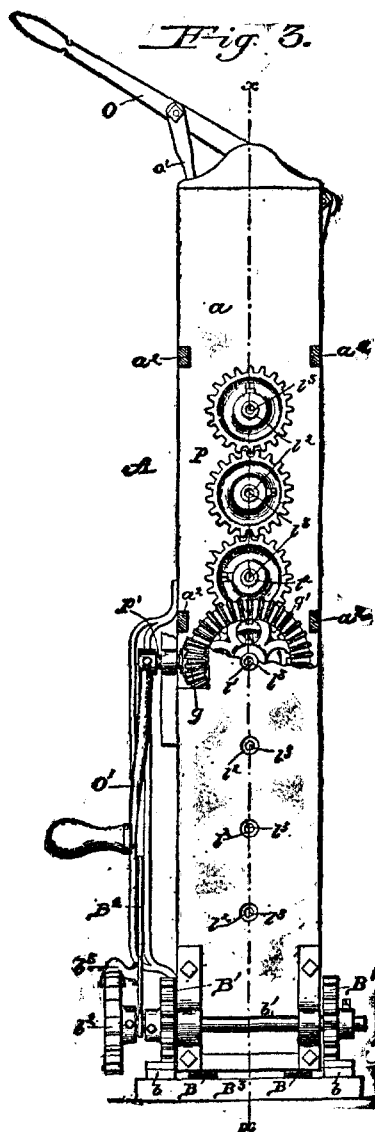
The claims of the above patent relied upon as infringed are the second and third, and appear below:

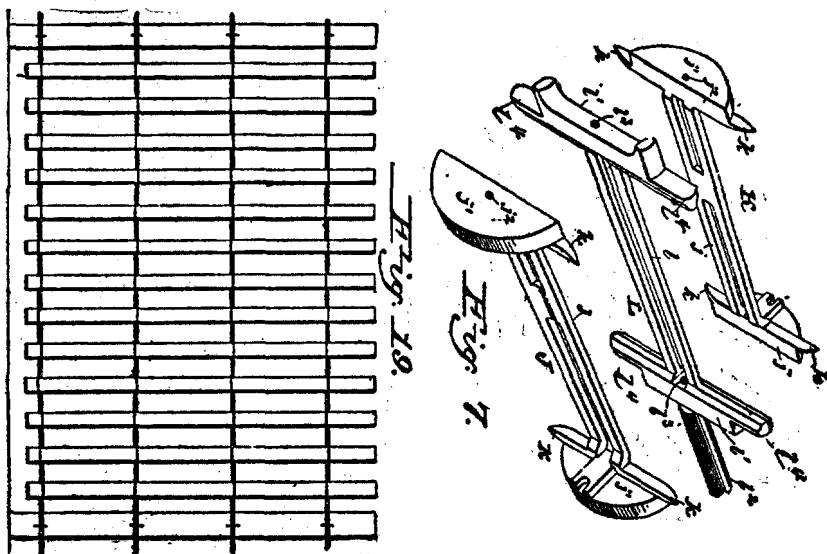
"2. In a machine for making wire fabric, a series of spindles arranged in a line and mounted in bearings on a suitable supporting-frame, and having on each spindle a cross-head carrying reels for wire on opposite sides of the axis of said spindle, substantially as specified.

"3. In a machine for making wire fabric, two or more hollow spindles adapted to admit the passage through their axis of wires forming the edges of the fabric, and having on each spindle a cross-head carrying reels for wire on opposite sides of the axis of said spindle, substantially as specified."

The pertinent drawings and specifications of the Kitzelman patent are as follows:







"Referring to the drawings, in which like letters of reference denote corresponding parts in all the figures, A designates the main frame or casing of my improved wire-fabric machine.

"When the apparatus is to be constructed in portable form, so that it is adapted for use in the open field, road, or other place for putting up or constructing fences as the fabric is turned out or manufactured by the same, the carrying-frame A comprises the vertical standards or uprights a and a', which are arranged parallel with each other and connected and braced by suitable cross or transverse pieces, a''; but the shape of this frame is immaterial, and I would have it understood that I hold myself at liberty to vary and change the same as may be desired.

"When the machine is to be transported and used in the open field, it is mounted upon supporting rollers or wheels B and B', which are arranged in pairs at the front and rear ends thereof, respectively. The front rollers or wheels, B, are provided with smooth or plane peripheries and travel on the smooth surface of a board or other suitable track, B³, that is placed on the ground or other place, and the rollers B' are provided with teeth on their peripheries, as clearly shown in the drawings, the said toothed wheels meshing with the racks b, that are arranged at the sides of the board or track B³ and rigidly affixed or secured thereto in any suitable manner. The toothed wheels mesh with the toothed surface of the track, so that when they are rotated by the means which I will presently describe the main frame and the various parts of the operating mechanisms will be drawn along and thus fed at the required or proper rate, and the wheels B, with the smooth peripheries, are arranged comparatively close together, so that they will bear on the track between the racks or toothed surfaces at the sides of the latter, whereby the frame is rendered very steady in its movement.

"The toothed supporting wheels are rigidly affixed in any suitable manner to a common shaft, b', so as to rotate or turn therewith, and this shaft is journaled in suitable bearings on the main frame at the lower rear side thereof. One of the ends of this shaft b' is extended beyond the sides of the vertical main frame, and to this extended end is rigidly affixed a ratchet-wheel b'', with the teeth of which engages the pointed or free end of a pawl, b'', that is pivoted on and carried by a hand or operating lever, B⁴, which is provided with an eye or opening at one end, through which the shaft is passed, so that the lever is supported on the shaft and free to move thereon independently of the same. This ratchet mechanism is designed to be operated by

hand to feed the frame and other parts of the mechanism along to any required distance; but I do not intend to restrict myself to the peculiar construction and arrangement of the parts of the same, as they can be varied without departing from the spirit of my invention.

"The distance which the main frame can be moved can be easily and readily regulated or varied by the operator by causing the pawl of the hand-lever to slip over two, three, or more teeth of the ratchet-wheel, so that the mesh of the wire fabric or fence can be made of uniform size or varied as may be necessary, according to the design of fabric selected, as will be very readily understood.

"The main frame A carries a series of devices for twisting the wire into open spaces or loops, and, for the sake of clearness and convenience, in describing or referring to these devices hereinafter I will term them as 'twisters.' Any preferred or desired number of these twisting devices may be employed that may be deemed desirable or necessary, and in the accompanying drawings I have shown a series of seven, and will confine my description of the operation of the machine to this number of these devices; but I would have it understood that I hold myself at liberty to vary and change the number thereof to adapt the machine to manufacturing wire fabric of any desired width, or to constructing fences of varying or different heights.

"In order to render the operation of my machine more clear and explicit, I have lettered these twisters C D E F G H I. The twisters from C to I, inclusive, form the active twisters, and at the top and bottom I provide two inactive twisters, I' I²; and in describing the process of manufacturing the different classes or kinds of fabric I will describe the method or manner of threading the twisters, and also in which the fabric is formed. Each of these active twisters consists, essentially, of two oppositely-movable sections, J and K, and a stationary section, L, these terms being used for the purpose of distinguishing the parts of the twisters. In Fig. 7 of the drawings I have shown one of these active twisters with the parts detached from each other, and will now describe the said parts separately from each other. The oppositely-movable sections J K of each of the active twisters are made precisely or substantially alike, and they each consist of a tie or connecting bar, j, and two segmental heads, j', which are formed integral with the tie-bar and at the extremities of the latter. These segmental heads of the movable sections of the twisters are placed on opposite sides of the stationary sections of the twisters, so that the flat sides of the said segmental heads of the movable sections impinge or bear against the stationary section on their flat or straight sides, and their outer curved edges form a complete circle, whereby the stationary and movable sections of the twisters are adapted to impinge upon each other and to resolve together, so as to form the twist in the loop during the process of manufacturing the fabric.

"As before stated, each of the movable sections of each twister is cast or formed in a single piece of metal, and the segmental heads j' of the twister-sections are each provided with a transverse aperture or opening, j², except one of the movable sections of the upper and lower twisters, C I, respectively, for the free passage of the wire, as more fully described presently, and said heads are further provided with radial or outwardly-projecting arms or ribs k, which impinge or bear against the sliding frames to prevent longitudinal play of the same. These arms are also formed or cast with the twister-sections, and they are arranged to project beyond the periphery of the segmental heads, and at or near the straight inner side thereof, for the purpose described.

"The stationary or immovable section L of each twister consists of a tie or connecting bar, l, and the flat heads or ends l', formed or cast in a single piece therewith at opposite extremities of the tie or connecting bar, the heads or ends of the tie-bar being made of the same thickness or width as the bar itself, so that the sides of the tie-bar and heads thereof are in line with each other. The extremities of the heads l' of the central stationary section of each twister are extended beyond the upper and lower sides of the tie or connecting bar, as at l⁴, so that when the said central section is rotated with the side sections of the twister to form the twist in the loop the extended ends l⁴, will impinge upon the inner sides of the main carrying-frame, and thereby prevent the central section from longitudinal movement. The stationary sec-

tion of each twister has a cylindrical shaft or bearing-piece, 1², cast in a single piece therewith, and this shaft is arranged at the rear end of the section and projects outwardly beyond one of the heads thereof, as shown, the shaft and the heads of the tie-bar being provided with passages or openings 1³, which are in line with each other, so that the warp-wires of the fabric or fence can pass through the said openings very freely without hinderance or danger of becoming entangled with other parts of the apparatus.

"The inactive twistiers I and I' are arranged at the upper and lower ends of the main frame and on the opposite sides of the central sections of the active twistiers, and said inactive twistiers are merely fitted in and carried by the sliding frames to coincide with the central sections of the active twistiers C I; but they do not affect the operation of the machine.

"M and N designate the sliding frames, which are arranged within the uprights a of the main frame A and on opposite sides of the twistiers. These sliding frames each consist of two vertical pieces, m, which are connected by suitable transverse pieces to render the frame rigid and strong, and which bear against the inner sides of the uprights a of the main frame. The upright a at the front of the main frame and the uprights m of each of the sliding frames are each provided with an opening or aperture, a³ and m', respectively, the opening a³ of the main frame being circular, and the openings m' of the sliding frames are formed on the inner edges of the sliding frames and semicircular, so that when the sliding frames coincide the said openings or recesses m' register to form a complete circle, and these openings a³ in the front uprights a, of the main frame are connected by vertical slots or passages a⁴, and a space, m², is left between the contiguous edges of the sliding frames for the stationary sections L, as will be very readily understood. The openings a³ and m' of the main and sliding frames are adapted to register or coincide, and they are equal in diameter to the diameter of the circle formed by the semicircular heads or disks at the ends of the movable sections of the twistiers. It will thus be seen that I provide one of the uprights of the main frame and both uprights of the sliding frames with a series of circular openings, which are connected by intermediate spaces or slots, and that these openings and slots or spaces are arranged one above the other in vertical lines. The circular openings in the said main and sliding frames correspond in number with the number of twistiers employed.

"The twistiers are arranged in series one above the other, and the stationary section of each of the twistiers is fitted between the contiguous edges of the sliding frames and located between the movable sections of the twistiers, which are thus disposed on opposite sides of the stationary section. The central stationary sections of all of the twistiers are arranged in a vertical line, and they are fitted or so arranged that the heads at the extremities thereof are fitted in the straight slots or spaces m² intermediate of the semicircular openings in the contiguous edges of the vertically-sliding frames, the shaft of the stationary section of the twister being passed through and suitably journaled in the rear uprights, a and a', of the main frame, so that the stationary section of the twister is prevented from movement or play in a vertical line. The segmental heads at the extremities of the movable section of each twister are fitted so as to rotate very freely in the opening m' in the sliding frame, and the straight faces of the heads of the movable sections and the tie or connecting bars thereof are normally in contact with the head and tie-bar, respectively, of the corresponding stationary or central section of the twister, whereby all three of the sections of each of the twistiers are adapted to be rotated in vertical planes together or simultaneously for the purpose of forming the twist in one of the loops of the fabric, all of the said series of twistiers being geared together to adapt them to be rotated at one operation in order to twist the wires in the series of loops simultaneously.

"From the foregoing description, taken in connection with the drawings, it will be seen that the heads of each section of each twister are fitted in the opening or recess in one of the sliding frames M or N, and when these frames are moved vertically these movable sections of the twistiers are carried or moved with their respective frames, so that they are caused to coincide or register with a stationary central section of a twister above or beneath the

section from which the movable section started before the sliding frame was shifted. Thus, for instance, when the sliding frame N is moved upwardly, the sections K of the twistors E and F are carried with it and caused to register with the stationary sections of the twistors D E, respectively, as will be very readily understood. The object of thus shifting or moving the sections J. K. of the twistors is to cause the wires that are fed there through to cross or incline, in order to prepare the wires for the subsequent operation of twisting them, which is accomplished by rotating the twistors one or more times, as may be desired, all as hereinafter more fully described.

"The sliding frames M N and the movable sections of the twistors carried thereby are operated or shifted vertically in opposite directions by a single movement of a single hand-lever, O—that is, when the frame M is moved upwardly, the frame N will be forced downwardly; and vice versa. This hand-lever O is journaled or fitted near one end on a central pin or shaft, o, that is rigidly supported in the upper end of the main frame A, and the said lever is connected with the shifting or sliding frames by intermediate links, o', which are pivotally connected with the lever and the frames, as is obvious.

"Each of the shafts of the central section, L, of each twister is provided with a spur-gear wheel, p, which is rigidly secured thereto, so as to rotate therewith, and these gear-wheels are all of the same diameter and have the same number and proportion of teeth, so that all of the twistors are rotated at the same rate of speed and describe a complete circle or revolution in the same space of time. The gear-wheels mesh with each other, so that all of the twistors are rotated simultaneously, and these gear-wheels are operated at one time by a single crank, O', that is arranged at one side of the machine, and is secured on a shaft p', which is journaled in suitable bearings affixed to the upright a' of the main frame, the said shaft having a small bevel gear wheel or pinion q, which meshes with a larger bevel gear-wheel, q', on one of the shafts of one of the stationary sections of one twister. It will be seen that by rotating the crank the motion thereof will be communicated to the shaft of one of the twistors through the bevel gear-wheel and pinion, and as all of these shafts are geared together the twistors are rotated simultaneously.

"The warp-wires that compose the fabric are passed or threaded through the central section of the twistors through the aligned openings therein, and the woof-wires of the wire fabric or fence are passed through the transverse perforations or openings in the semicircular disk or head of the movable sections of the twistors.

"The warp-wires are wound or coiled in bundles as they leave the factory, and they are unwound in rear of the machine and stretched for a suitable distance—say fifty rods—upon the posts in rear of the machine, and they serve as stays to aid in keeping the machine vertical, the said warp-wires being passed through suitable openings in the upright a', thence through the shaft of the central stationary section of the twister, then through the aligned openings therein, and out of the opposite side of the machine through the circular openings in the upright a at the front of the main frame. The woof-wires are coiled upon spools or bobbins R, that are loosely journaled in brackets r, which are affixed very rigidly to the outside of the movable side sections of the twistors by means of suitable bolts or screws, which are passed through the brackets, and the tie-bar of the movable section, each of the said movable sections of the twistors, except the inactive sections I I' and one of the movable sections of the twistors C I, being provided with a spool or bobbin, which is carried thereby and rotates therewith during the operation of twisting the wire b to form the loops. The wire from these spools or bobbins R is passed through the transverse opening in the head of the movable side sections of the twistors, and thence through the circular opening in the front upright, a, of the main frame. One of the movable sections of the twistors C and I at the extreme upper and lower ends of the machine, however, is not provided with the bobbins R for the woof-wires, because when the shifting frames M N are moved vertically one section of one twister C and the section of the twister I on the opposite side of the stationary central sections of all of the twistors will be thrown above and beneath the circular openings in the main frame, and hence it is impossible to pass or feed the woof-wires through the said

movable section of the twistors therein, and when the frames M N are shifted to one position the inactive sections I I' are adjusted to register with the stationary sections L of the twistors C I, the inactive twistors being provided merely to properly rotate the twistors C I. The warp-wires, however, are passed through the central stationary sections of the said twistors.

"In order to attain a clear understanding of the shifting of the movable side sections, J K, of the active twistors by the sliding frames M N, I shall designate the central stationary sections by the reference-letters which distinguish the twistors from each other—as, for instance, C D E, &c.—and the movable side sections of the twistors by the numerals from 1 to 12, inclusive, as clearly shown in the end elevations.

"To make the style of fence shown in Fig 1 of the drawings I proceed to thread the twistors as follows: The end twistors, C I are threaded with the large wire, which is to form the warp, by passing it through the aligned openings in the central stationary part or section thereof, and the smaller-sized wires, that form the woof of the fabric, are then passed through the twister-heads 1, 4, 5, 8, 9, and 12, and it will thus be seen that no wires are passed through the twister-heads 2, 3, 6, 7, 10 and 11, and the inactive twistors I I', and the blank sections of twistors C I. When using the machine to construct a fence in the field, one end of the large wires from the central section of twistors C I is attached to the fence-post just beyond the machine. The large wires 15, which pass through the central sections of the upper and lower twistors C I, form the warp for the woven-wire netting or fabric, while the smaller wires, 16, which are inserted through the heads of the side movable sections of the twistors, form the weft or woof of the netting. The wires 15 should be stretched taut by means of suitable stretchers located any desired distance from or in rear of the machine; but I have not deemed it necessary that these stretchers shall be shown, as any device for accomplishing this end can be used. With the warp-wires 15 arranged as shown and described to form the selvage of the wire netting or fabric, and the weft or woof wires arranged through the twister-heads of the sections J K, to make the style of fence in Fig. 1, I proceed as follows: The lever O is pressed down to move the slide M downward and by the same movement force the sliding frame N upward, inasmuch as the slides move in opposite directions simultaneously. By moving the sliding frame N upward the side sections of the twistors that are located in the sliding frames are forced upward correspondingly, and the side sections J of the twistors in the sliding frame M are forced downward with the frame by the same movement of the lever. Thus the section 1 of the upper twister, C, which has one of the weft-wires 16, will be carried down and brought on a line to coincide with the central section of the twister D. By the same vertical movement of the sliding frames M N the twister-heads 5 and 9 are carried down opposite to the central section, L, of the twistors F and H, and the twister-heads 4, 8, and 12 are carried up opposite to the central sections of the twistors D, F, and H, one twister receiving one of the side sections from the adjoining twister and giving one of its own side sections to the said adjoining section. The blank inactive twistors I I' are thus caused to register with the central section, L, of twistors C I and the blank sections of twistors O I are reversed, as is obvious. In this manner the side sections, J K, which have weft-wires 16 passed through them, coincide with the twistors D, F, and H, which originally had the side sections without any weft-wires. While the machine is in this condition, with its weft-wires all located at the twistors D F H, the crank O' is turned, causing the rotating of all of the twistors simultaneously as they are geared together for instantaneous operation. The number of complete turns given to the twistors will regulate the number of twists which are made in the wires.

"As the twistors are geared together, one twister will turn in one direction and the adjacent twister will turn in the opposite or reverse direction; but at the same time each twister will make the proper twist on the two weft-wires without interfering with each other.

"It will be understood that the throw or movement of the sliding frames M N is just sufficient to cause the side sections to align or coincide with the central section of the twistors above and beneath the same, according to the

direction in which the side sections are moved by the sliding frames. In turning the twistors to make a complete twist, it is necessary to completely revolve the twistors—that is, transfer one side section from the sliding frame M to the sliding frame N, and then return it again to the frame M. This turning of the twistors is kept up to correspond with the number of twists to be made at the crossing of the wires. When the twisting is completed at this point, the sliding frames are shifted back to their original positions by properly manipulating the hand-lever, thus returning the side sections, J K, to their proper central sections. The weft-wires are now located as follows: The single weft-wires at the twistors 1 and 12 extend alongside of the warp-wires 15. The double weft-wires at the twistors 4 5 and 8 9 are arranged on each side of their respective central sections, C E, and while in this position the crank is again turned to cause the rotation of the twistors and consequent twisting of the wires at the points designated. The single end weft-wires twist around the warp-wires and the double weft-wires twist upon themselves or around each other. Having now reached the point from where the operation started, it is not necessary to continue further, since by repeating the operation over and over again the wires are inclined and twisted to form additional meshes or loops of the netting, as will be very readily understood. It will be plain that by the alternate shifting of the sliding frames M N up and down the weft-wires are extended down and up in alternate series, and thus woven together to form the mesh when the twistors are rotated."

The claims of the Kitzelman patent alleged to be infringed are the following:

"1. In a wire-fabric machine, a series of sectional twistors, each of which comprises a central section for carrying a warp-wire, and having rotary movement imparted thereto, and the shifting sections for carrying the weft-wire, and receiving rotary motion from the central section to form the twist, substantially as and for the purpose herein described.

"2. In a wire-fabric machine, the combination of a series of sectional twistors geared together for simultaneous rotation, and each comprising a central portion movable only on its axis and side portions capable of a compound movement—that of rotation on their axes—and of a shifting longitudinal movement, substantially as described, for the purpose set forth."

"9. In a wire-fabric machine, the series of sectional twistors, comprising the central and side sections, the central section of each twister being geared to the twister adjacent thereto for simultaneous operation, substantially as described, for the purpose set forth.

"10. In a wire-fabric machine, the combination of a series of twistors geared directly together for simultaneous operation, and each comprising a central section and the side section, each side section carrying a spool or reel for the wire, substantially as described, for the purpose set forth.

"11. In a wire-fabric machine, a series of twistors connected for simultaneous operation, and each consisting of a central section and the side section, in combination with the spools carried by the side sections, the central section of each twister being provided with a longitudinal opening for the passage therethrough of the warp-wire, substantially as described."

"15. In a wire-fabric machine, the combination of a series of rotary twistors geared directly together for simultaneous operation, each twister having a central section capable of rotary movement only, and two side sections which are capable of a shifting movement independently of the central section in opposite directions simultaneously, whereby the said shifting sections of one twister are adjusted to register with the central sections of twistors on opposite sides of the same, substantially as described, for the purpose set forth."

"20. In a wire-fabric machine, a series of sectional twistors, each comprising a central section, the central sections being geared together to be simultaneously rotated on their axes, and the shifting side sections adapted to align with the central sections to be rotated therewith, substantially as described, for the purpose set forth."

The view we have taken of this case makes it unnecessary to set out the drawings and specifications of the Connor and Pope patents.

Appellees construct their wire fencing fabric as licensees under and pursuant to Letters Patent No. 552,025 granted W. D. Whitney December 24, 1895, the drawings and specifications of which are as follows:

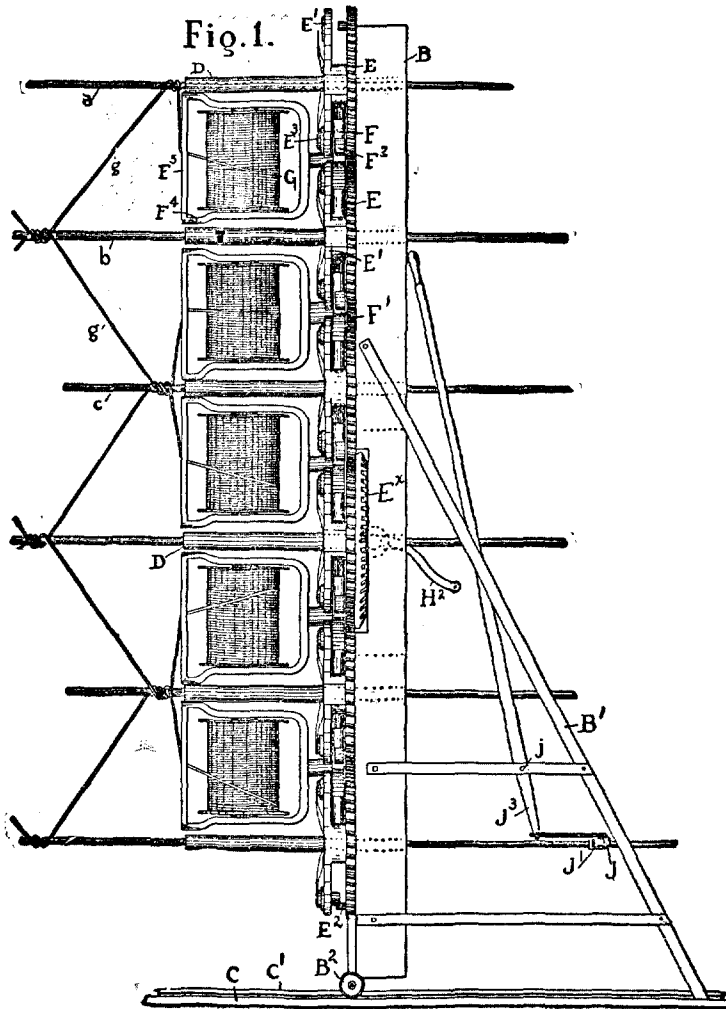


Fig. 2

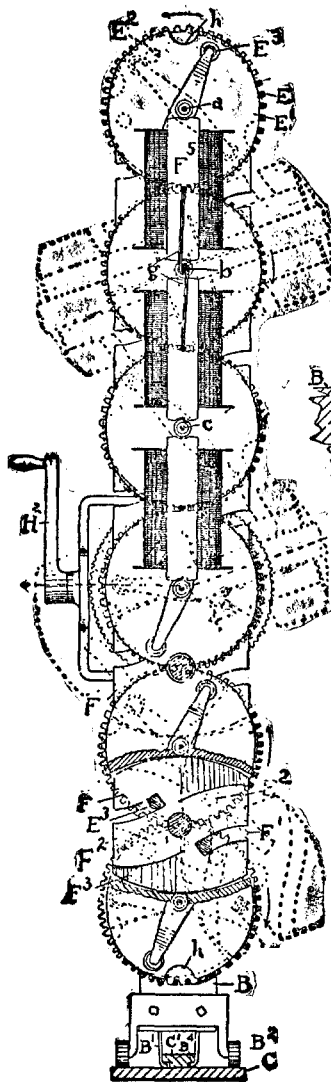


Fig. 5

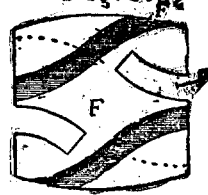


Fig. 3

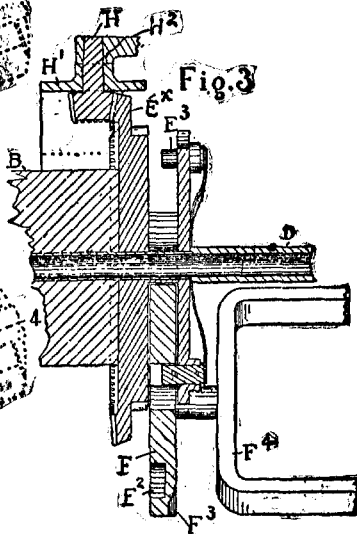
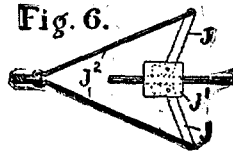
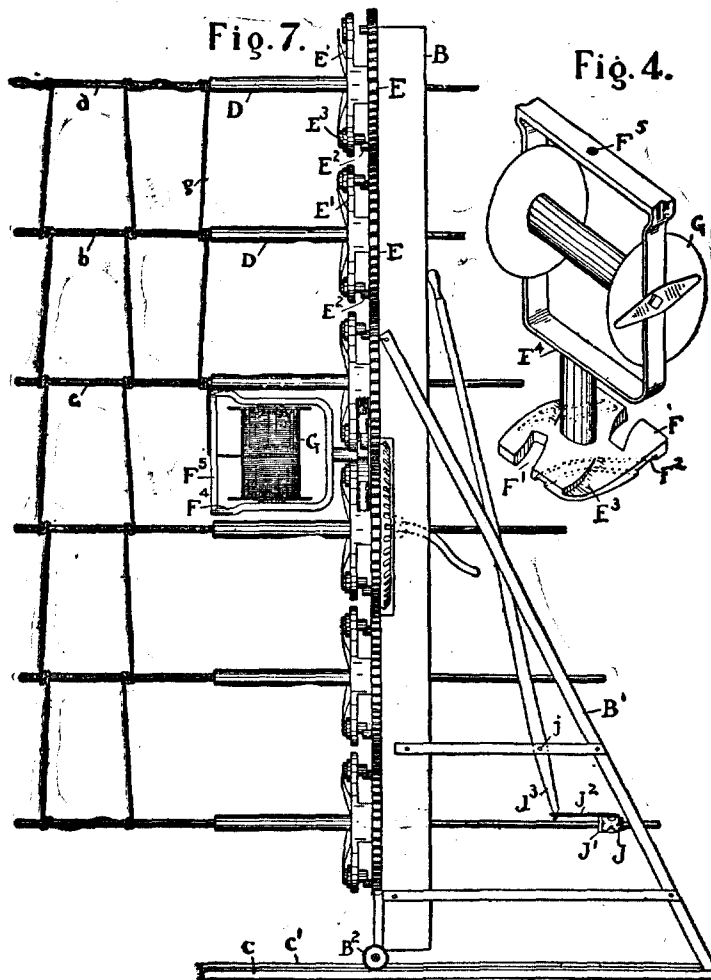


Fig. 6





"In the present embodiment of my invention I have shown it applied to a traveling frame adapted for making, in the field, fencing having longitudinal strands or wires, said frame embodying an upright post B having suitable braces B', and at its lower end supporting-wheels B², resting upon a board or support C having a rib C' grooved on opposite sides, into which grooves project the inwardly-extending ends B⁴ of the braces B'. Passing through the post B, and at even distances apart, are tubes D, preferably extending at the front, as shown, and through these pass the longitudinal wires a b c, &c., of the fence or fabric, and upon them are loosely journaled rotary supports for the spool-carriers, said supports consisting, in the present instance, of intermeshing

gears E having, at the front, plates E', between which and the gears are recesses for the accommodation of the bottom plates F of the spool-carriers.

"E² indicate studs or bosses arranged in the recesses and projecting from the face of the gear, and E³ are latch-pins passing into the recesses through apertures in the plates E' and pressed inward by springs E⁴, small heads on the latch-pins limiting their inward movement. The studs and latch-pins are arranged some distance apart, as shown, the former being arranged to co-operate with the curved grooves F² in the rear side of the plate F of the spool-carrier, and the latch-pins to co-operate with the incline F³ on the top of said plate and the curved slot F' in one side thereof, the groove and slot crossing, as shown, and the relations of the parts being such that the spool-carrier is held by the latch and stud on the rotary support and may be rotated with it without danger of dropping out.

"Upon the outer sides of the plates F are the spools G containing the weft or filling wire g and mounted on a spindle in a suitable yoke-frame F⁴ having the perforated cross-bar F⁵ through which the weft-wire passes, any suitable brake or tension device being applied to the spool to prevent movement excepting when the wire is positively drawn off. The outer plates E' of the rotary supports are preferably recessed at h for the accommodation of the standard of the spool-carrier, as shown in Fig 2.

"The gears E intermesh and are adapted to be rotated in either direction by means of bevel-pinion H mounted on a frame H' and having an attached handle or crank H², said pinion meshing with a corresponding bevel-wheel E² formed upon or attached to one of the gears E, as shown in Fig. 3.

"The devices for moving the frame B after the wires are twisted consist of a clamp embodying jaws or levers J J, pivoted to a block or support J' and adapted to grip one of the longitudinal wires of the fence or fabric, the outer ends of said jaws being connected by links J² with the end of a lever J³ pivoted to the main frame at j. It will be seen that when the lever is moved in the direction indicated by the arrow in Fig. 1 the jaws J J will grip the wire and the machine will be moved, and upon moving the lever in the opposite direction the jaws will slip on the wire, the distance of movement of the frame depending on the movement of the lever, which is adjusted to the size of the mesh required.

"When making wire fabric or fence such as shown in Fig 1, the longitudinal wires are first set up and held taut, being passed through the tubular supports D. Then the filling-wires g from the spools are secured to the end post or the longitudinal wires by twisting or in any suitable manner. For the purposes of illustration I will number the supports E from the top, calling the upper one 1, the next 2, and so on, and the upper longitudinal wire a, the next b, and so on. Starting from the position shown in Fig. 2, in which the slots and grooves in the spool-carriers are engaged by the pins and studs on the supports E, the machine may be operated to twist the filling wires together and around the wires a c e or b d f, as desired; but, assuming that the first twist is to be around the wires b d f, the supports E are rotated by the handle in the direction of the arrows, Fig. 2, and those numbered 2 4 6 will carry the spool-carriers F around, as in dotted lines, their latches E³ co-operating with the sides of the slots F' and the studs E² preventing the carriers dropping out. This operation is accomplished because the slots F' in the spool-carrier plates F extend transversely of the path described by the latch-pins on the supports 2, 4 and 6 that are to move the spool-carriers, and substantially coincident with the path described by the latch-pins on the supports 1, 3 and 5 that are to rotate empty, the grooves F² being correspondingly arranged relative to the studs E² on the supports. This rotary movement is continued in the same direction as long as may be necessary to form the required number of twists around the wires b, d and f, (the weft or filling wires passing around the longitudinal wire b and d being of course twisted around each other also, while a single weft wire is passing around wire f.) During the movement in this direction, as the carriers approach the position shown in full lines in Fig. 2, the latches E³ on the supports indicated by 1, 3 and 5 ride up the inclines F³ on the plate F of the spool-carriers and drop into the slots F', and as long as the motion is in the direction indicated the carriers will be

rotated as described and maintained in the supports indicated by 2, 4 and 6; but when it is desired to twist the weft-wires around the longitudinal wires a c e it is only necessary to reverse the direction of movement of the supports E after said supports have completed a full revolution, after the latches have dropped into the slots F', and when the parts are in the position shown in Fig. 2 in full lines, and the operation of twisting the weft-wires around wires a c e may be understood by assuming that the supports E are rotated in the opposite direction from that indicated by the arrows. Now, as before, the latch pins E³ of the supports 1, 3 and 5, that are to move the spool-carriers, describe a path transversely of the plane of the slots F' in the carriers, and consequently move the carriers with them, while the latches E³ on the supports 2, 4 and 6 ride up the inclines on the moving carriers, drop into the slots F' and pass out as the carriers turn away from the supports. It will now be understood that the weaving of the fence can be readily accomplished by making the required number of twists around the longitudinal wires and then reversing the operating means, transferring the spool-carriers and twisting on the other wires in the opposite direction, thus dispensing with the transferring mechanisms heretofore deemed necessary and simplifying and lightening the machine.

"While the present embodiment of my invention is designed for building fences in the field, I do not wish to be confined to this arrangement, as wire netting or fabric could be readily made in quantity on large machines built for the purpose, the necessary relative movement of the fabric and machine being accomplished by moving the fence fabric instead of the machine, as herein.

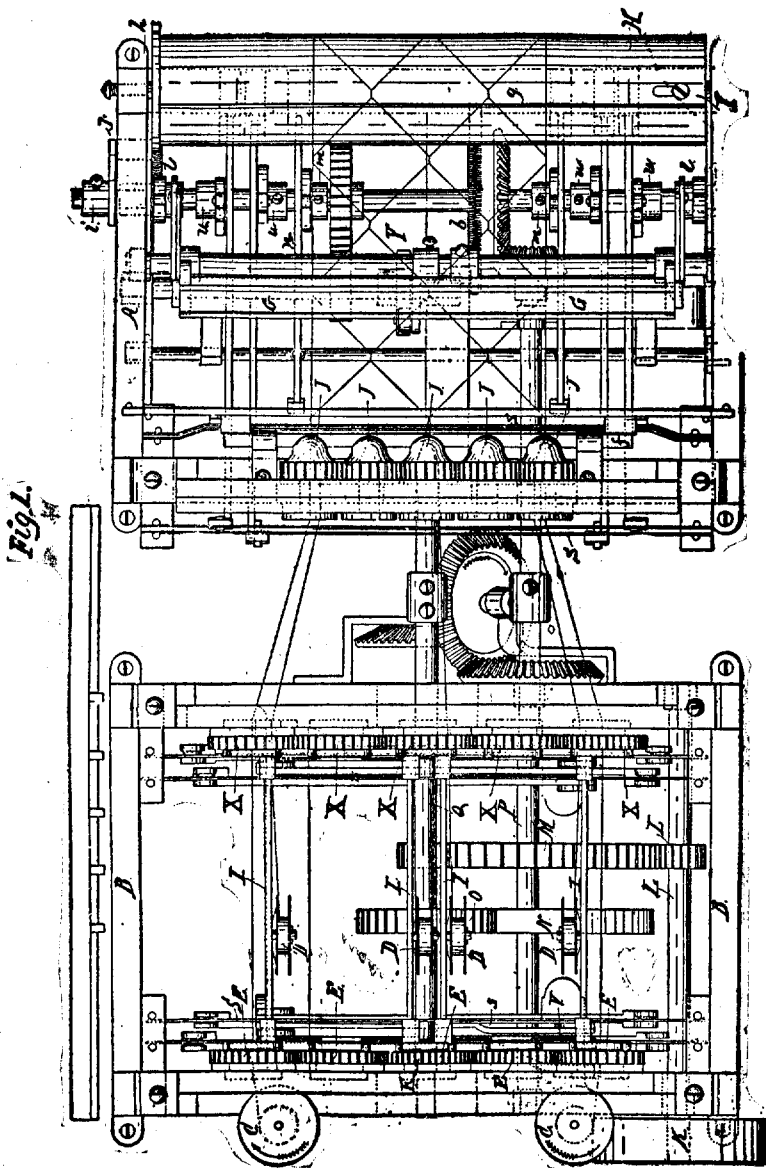
"Although the spool-carriers are supported only at the lower end and at some distance from the spools themselves, it will be noted that the wires g draw from the aperture in the cross-piece F⁵ to the longitudinal strand, in the direction of the length of said cross-piece, and that while the carriers are being transferred and are rotating the end of the cross-piece is against and turns about the tubular extensions D, as seen in Figs. 1 and 2, thereby preventing the carriers from dropping out.

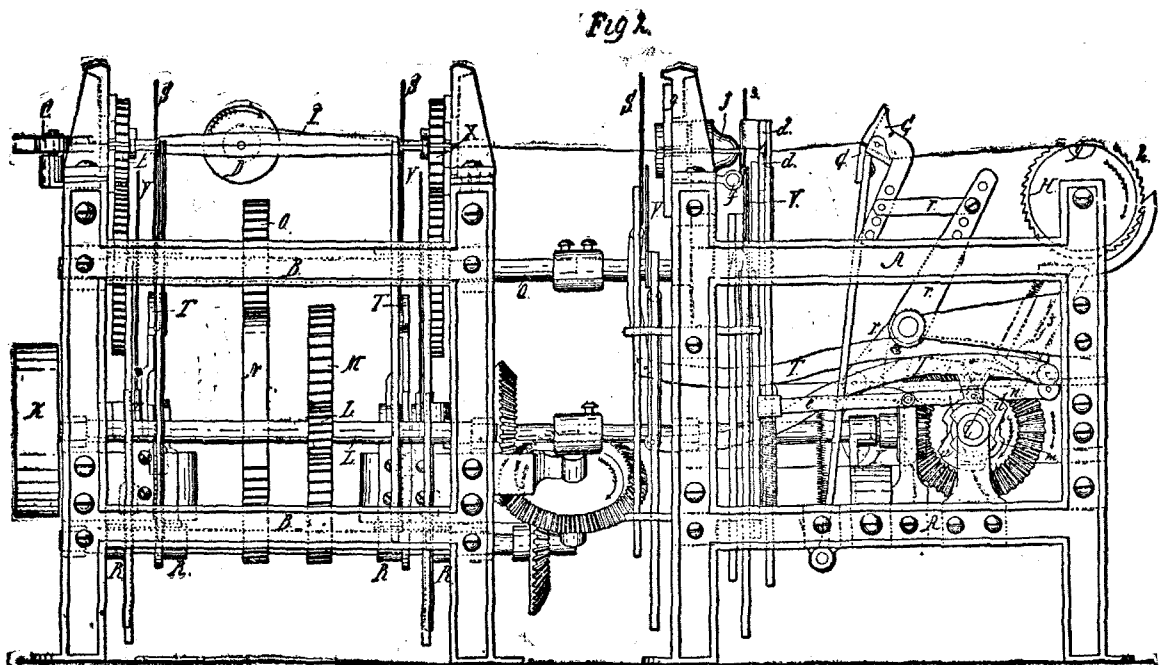
"If it is desired to make a fence with square or rectangular meshes, as shown in Fig. 7, it may be accomplished by this machine by removing all of the spool-carriers excepting one, and causing the supports E to make one (or more) and a half complete turns around each longitudinal wire before the motion is reversed, causing the carrier to travel down. Then move the frame back, twisting the wire around the lower wire f, as shown, and when the carrier has made one or more complete turns, reverse the motion and it will be transferred to the next support E above, if the motion is reversed when the carrier is in engagement with the support to which it is to be transferred.

"The socket or recesses in the rotary carrier-supports E and the plate F, which in the present construction is the base of the spool-carrier is but one form of co-operating parts whereby the carriers are seated upon the rotary supports, and by the terms "co-operating projections" and "recesses," used in the claims, I wish to be understood as referring broadly to a means for seating the carriers on the supports in such manner that they may be retained by the latches when the rotation is in one direction, whether the recesses be in the support E and the ends of the plate F be the projections, as shown, or vice versa.

"As far as the operation of my device is concerned, it is immaterial whether the latches are placed on the supports or gears E or upon the carrier-plates F so long as the relative movements of the latches, inclines and grooves are preserved. The slots F² and inclines F³ on opposite sides of the spool-carrier plate in connection with the spring-latches on the supports E constitute what I term a "reversed" latch connection between the parts—that is, one in which the transfer of the carrier from one support to the other is caused by the direction of the movement of the support relative to the carrier."

The essential drawings and specifications of Letters Patent No. 10,743, granted John Nesmith April 4, 1854, and referred to in the opinion as most adequately representing one branch of the prior art, are as follows:





"The principal and main features of novelty of my invention consist in the principle of the revolving of the wires parallel to each other at the same time they are being twisted, and the other parts and movements of my machine to produce the effects hereinafter described.

"To carry out my invention and design fully, and first to manufacture my wire-netting and wire-fence machines, it is the best plan, in my opinion, to construct the various parts of said machines of such materials as are hereinafter named. The frames should be of cast-iron, also the cams, the stands, and gearing of the same material. The levers and shippers throughout should be of wrought-iron. The jaws G G may be made of cast-iron, to which must be attached pieces of steel where the same come in contact with the wires. The netting beam or cylinder H may be made of hard wood, with iron centers, and the ratchet-gear on said cylinder may be of cast-iron. The center part of the wire-reels may be made of wood, with a sheet-iron rim on flange on each side.

"It will be readily understood by any good practical workman, by inspecting the inclosed drawings and specification, and following out the details described hereinafter, how to make, construct, and use my wire-netting machines. It is necessary to have machines for making every different size of the netting or fence—that is, for every different size of the meshes of the same—and any width of the netting less than the whole scope of the machine can be made by simply drawing in the number of wires desired, as will be understood hereinafter; and in proceeding to operate or use my netting-machines it will be seen by examining the drawings that the same are composed of two parts connected together by two shafts, as seen at P and Q, Fig. 1, and one of the said parts I call the 'twister,' the frame of which is shown at A A, Fig. 2. The other part I call the 'feeder,' the frame of which can be seen at B B, Fig. 2.

"The border-wire to netting and top and bottom wire in fence is usually larger than the wire to be twisted, although the wires can all be of the same size, if desired. The wire is placed upon the reels C C, Fig. 1, and then one end of the same is passed through a hole which is drilled in the center of the four outside gears, E E and X X, Fig. 1. The said wires are then passed to the twisting part of the machine, and through holes drilled in the centers of the two outside twisting-gears, J J, Fig. 1. Then the said wire is passed between the jaws G G, Fig. 2, and then to the cylinder H, as seen at Figs. 1 and 2, and firmly secured to the same by a clamp, g, and a catch, y, which can be seen at Figs. 1 and 2, then the wires to be twisted, which are wound upon or around the reels D D D D, Fig. 1. Said reels are then placed upon the stands I I I I, Figs. 1 and 2, on which they revolve as the wire is being drawn off from them. One end of the wire on each of the four reels D D D D is then passed through one end of the reel-stands I I I I, Fig. 1, thence to and through the slots in the twisting-gears J J J J, Fig. 1, and then they are passed between the jaws G G, Fig. 2, and thence to the cylinder H, Figs. 1 and 2, and secured to the said cylinder by the same contrivance as the border-wires, before described. The said wires being all adjusted, as above mentioned, the power is applied to the driving-pulley K, Fig. 1, which is conveyed to the shafts P and Q, Fig. 1, by means of the shafts L and gears L and M, as seen at Fig. 1. The shippers S S S S, Figs. 1 and 2, being first raised by the cams R R and U U, Fig. 2, operating against or raising the levers T T, which are shown in Fig. 2, it being understood that the shippers S S in the twisting part of my machine act in concert with and simultaneously with the shippers S S in the feeding part of my machine. By this movement they are brought into the position as shown in Fig. 2 of the drawings, and then stop moving, and as soon as the movement of the said shippers ceases the twisting-gears J J J J, Fig. 1, and the feeding-gears E E E E and X X X X, as seen at Fig. 1, make two revolutions, they revolving exactly with each other, so as to keep the wires parallel and from getting entangled with each other, two revolutions of the said gears being all the twisting that is necessary at each end of the meshes in the netting and fence for making good substantial work, although more or less twisting of the wire may be obtained, if desired, by altering the gearing in the following manner—viz., by enlarging the gear N, Fig. 1, if more than two revolutions are required of the said twisting and feeding gears, and by reducing the gear N, Fig. 1, if less than two revolutions

are wanted in the said feeding and twisting gears at each end of the meshes in the netting.

"The before-mentioned gears J J J J J and E E E E E and X X X X X, after making two revolutions, as before stated, cease moving, which is effected by a part of the teeth of the gear N, Fig. 1, being cut off from its periphery, and as the said twisting and feeding gears stop revolving in such position that the slots in the said gears are on a line with each other, so that the wires can be shipped from one set of gears to the others, by the shippers S S S S, Figs. 1, 2, and so that the wires can be shipped back from one set of gears to the others by the shippers V V V V, Figs. 1, 2, it being understood that the said feeding and twisting gears revolve and stop alternately—that is, they revolve when the shippers cease moving, and that the shippers perform their duty while the said gears remain motionless, and as the said gears stop revolving the jaws G G in the twisting part of my machine are moved backward nearly to the twisting-gears J J J J J by the cam Y and arms and connecting-pieces r, Fig. 2, and the spring b, Fig. 1, and by the peculiar construction of the upper jaw, G, and connecting-pieces r, they (the said jaws G G, Fig. 2) are brought together upon the wire and then moved forward, or toward the cylinder H, one-half the length of the meshes of the netting, as will readily be understood by inspection of the drawings, and when the wire is so drawn forward and the jaws G G stop, then the shippers S S S S, Figs. 1, 2—that is, one of the two sets of shippers on each side of the feeder-frame and one of the two sets of shippers, Fig. 1, on each side of the twisting-gears—are first raised by the cams R and U, said shippers then remaining in this position until the wire is sufficiently twisted. Then they are depressed or moved downward to their lowest position, as seen at V V V V, Fig. 2. Then the said sets of shippers V V V V, Fig. 2, on each side of the frame B and each side of the twisting-gears J J J J are moved upward by the cams R and U by the same operation as the shippers S S S S, before described, and by the upward movement of the said shippers V V V V the wires are shipped from the position in which they were left by the shippers S S S S to the other feeding and twisting gears, as will be readily understood by inspection of the drawings—that is, one set of shippers move the four inside wires one way and the other set of shippers will move the four inside wires the other way at the required time to harmonize with the other correct movements of the machine. The two outside or border wires never move transversely, but move longitudinally, like the other wires, except that they pass through holes drilled in the center of the four outside feeding-gears and the two outside twisting-gears. The two outside small wires are wound twice around the border-wires at every other twisting operation, as will be seen by inspection of Fig. 1.

"The reel-stands I I I I, Fig. 1, have each a spring on the side next the reel, the object being to produce friction and to prevent the wire from coming off the reels too easily.

"The wire for netting, fencing, &c., should be well annealed. The necessity of this will be readily understood by practical workmen. The take-up motion to the cylinder H, Figs. 1 and 2, is composed of a ratchet gear, h, Fig. 1, and cam i, Fig. 1, and lever j, Fig. 1.

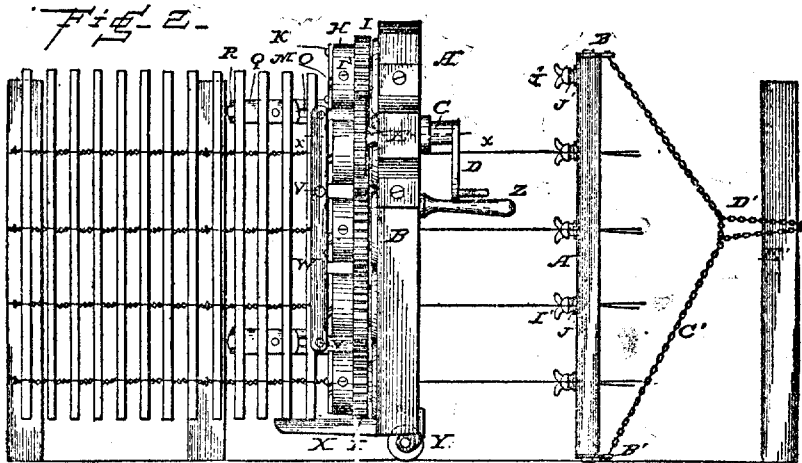
"At f, Fig. 2, is shown a shaft which supports a straight-edge, over which the wires travel as they pass through the machine.

"d d, Fig. 2, are two movable planes that are moved or brought together by means of the cams l and m, Fig. 1, and levers e and n, Fig. 1, the object of the said planes being to guide the wires when they are shipped, and to hold the wires firmly while they are being twisted, so that the wires may not be sprung where they are not twisted, and at the end of each twisting operation they (the said planes d d) open or move apart, but are together, as seen at d d, Fig. 1. On the top plane, d, there are five small vertical projections—one in the front of the center of each gear. These projections are to prevent the wire from being twisted too far into the meshes.

"By inspecting the drawings it will be seen that the jaws G G are made in such shape that as they are moved backward by the cam Y and arm r, the jaws are opened, and when they are moving forward they are brought in contact with the wire by shutting together, by which operation the said wire is moved from one twisting operation to another, and so on.

"It being understood that the take-up motion acts or operates at the right time, so as to keep the wire straight and smooth during the operation of the said machine, as hereinbefore set forth."

The Middaugh and Wilcox patent of December 23rd, 1884, is the best example of the second branch of the prior art; Figure 2 of its drawings is set out below.



The court below held that none of the appellants' patents possessed the quality of a pioneer invention; that neither appellants nor their assignors were the first to make a portable machine for weaving wire fencing fabric in the field; that both appellants and appellees were on an equal footing, both being mere improvers upon the prior art; that in this view of construction to be put upon appellants' patents appellees did not infringe; and dismissed the bill for want of equity.

R. H. Parkinson, for appellants.

Thomas A. Banning, for appellees.

Before WOODS and GROSSCUP, Circuit Judges, and SEAMAN, District Judge.

After the foregoing statement of facts, GROSSCUP, Circuit Judge, delivered the opinion of the court, as follows:

The decision of the Circuit Court turned upon the question whether the patents sued upon embodied a pioneer invention. We concur with that court in the opinion that if the invention was not of a primary character—a substantial departure from the machines of the previous art—the appellees' machine is so sufficiently differentiated from the patents sued upon that a claim of infringement can not be maintained. But if, on the other hand, appellants' patents were the first to give to the world a workable, portable machine for weaving wire fences in the field—a machine distinctly creating a new product—and aptly embody in their specifications and claims the mechanical arrangements that bring about such a result, the decree below is erroneous.

To accurately comprehend the scope and merit of the appellants' inventions it is necessary to review the preceding art. This divides

itself into two branches; that relating to loom machines, where the wire netting was made in the factory, and afterwards transferred to the field; and that relating to field machines, where the fence was constructed in situ.

The Middaugh and Wilcox machine was the most advanced of the field machines, and may be used as an illustration of the art in that direction. It was used to build a picket fence, the pickets of which were held in place by twists or weaves of parallel longitudinal wires. It employed mechanism that would give to such parallel wires the necessary twists, but did not involve a shifting, either of the wires or of the spools, such as is essential to the weaving of a diamond mesh. It did not, in fact, build a wire mesh fence, but a wooden fence, with wire supports. It thus differs from the appellants' inventions, not only in the mechanism employed, but in the product turned out. The wooden picket fence, with its wire supports, is, in no just sense, a predecessor, in kind, of the diamond mesh wire fence. Field machines of this character, therefore, must be dismissed, as not anticipatory of appellants' machines.

The two inventions in the loom machine branch of the art, most closely resembling the appellants' patents, are the Nesmith patent, and the William Smith (English) patent.

The Nesmith patent was taken out April 4, 1854, and seems to have remained unimproved upon until the Davisson patent, December 4, 1883. The patent is set out at large in the statement of facts, and there is no need, in this connection, of calling attention to the details, other than those connected with the mechanical means, generally speaking, whereby the twisting and the shifting, requisite to the weaving of the netting was brought about.

An examination of the model, drawings, and specifications shows that it contemplated but two border-wires; though intermediate stay-wires could have been provided, by the use of intermediate twisting-heads with a hollow core. Each of the twisting-heads—not only those carrying the border-wires, but the ones intermediate—had radial slots through which were carried the feeding wires, being held in tension by appropriate mechanical means. A turning of these twisting-heads carried the respective wires on their opposite sides around each other, and, at the borders, around the border-wires, thus giving the necessary twists. This having been accomplished, the twisting heads were brought into position where the slots of each were directly opposite to the corresponding slot of the other, so that, by an appropriate shifting device, the feeding-wires were carried into the opposite slots, and thus placed upon the opposite twisting-heads. It thus happened that, when the twisting-heads were again put in motion, the feeding-wires were turned in a direction opposite to that of the previous turn; and, by repeated revolutions of this kind, the diamond mesh was woven.

Two distinctive features of this patent must be borne in mind: First, that the changes of the feeding-wire, so that it would be rotated alternately in opposite directions, are brought about by the shifting of the wire, and not of the reels from which it is wound; and secondly, that there was necessitated a supplemental machine,

whose office was, by a series of opposite revolutions, to keep the wire in the rear of the twisting-heads from becoming itself twisted. These differences clearly dispose of the Nesmith patent as an anticipation.

The Smith patent is as readily disposed of. There is no proof that it ever built in the field a fence, and the description discloses nothing to differentiate it from the class of looms to which the Nesmith invention belongs; for, in speaking of the manipulation of the feeding-wires, Smith says: "I apply to the lower part of the machine feeding bobbins, supplied with the wires or cables, which pass up to the work in suitable guides, and I cut a space out of the centre of one of the halves of the twisting wheels (which are always made in two parts), so that my wires shall pass through; then when the divisions of the wheels are carried apart by the ordinary sliding bars my wires are pushed by guides out of the spaces in the wheels into slots in one of the sliding bars about midway between the turning wheels and on the opposite side of its half wheel, so that my wires may be held while the twist is made, and they are thus relieved from the action of the twisting wires which form the mesh.

* * *

An examination of the appellants' patents will show that, beginning with the Davisson patent, the twisting of the wires was effected by mechanical means entirely different from those of Nesmith or Smith. Davisson dispensed with the supplemental mechanism necessary to the Nesmith machine, and, so far as we know, to all preceding loom machines, by substituting revolving reels for the stationary ones. Instead of passing the wires through the slotted twisting-heads (which necessitated the rear untwisting mechanism) Davisson projected forward from the revolving gear wheel spindles provided with a cross-head at their working ends adapted to alternately receive and discharge the reels from which the feeding-wire was uncoiled. The revolution of these spindles, with the reels thus mounted upon them, rotated the reels in such manner as to twist the feeding-wires around each other, and around the border wires. After as many such rotations as were needed to give the requisite twists, the reels, having been brought forward to a proper position, were shifted to the cross-heads of the adjacent spindles.

The two significant features of the Davisson invention are: That the diamond mesh is made by a shifting of the reels, instead of the wires; and that the supplemental untwisting mechanism is avoided. This was a distinct advance in the improvement of loom machines. By an ingenious mechanical change,—the substitution of shifting-reels for mechanism shifting the wires—it reduced the loom machine from a complicated and bulky structure to a machine at once simple and effective.

But the Davisson machine, nevertheless, remained a loom machine. It was wholly inadaptable to use in the fields. It gave to the farmer no walking, workable diamond mesh fence maker.

What problem, then, did Kitselman, in 1887, have before him; what available material was at hand; and what did he accomplish? The most casual comparison shows, of course, that his machine—

and especially its product—is essentially different from the fence builders of the Middaugh and Wilcox design. It differs radically also from the Nesmith patent, in that interweaving is done by the shifting of the spools, instead of a clumsy shifting of the wires. Its nearest kinsman is the Davisson patent; and, although the Davisson patent is owned by the appellants, it must, for the purpose of determining the scope of the Kitselman invention, be looked upon as an anticipation.

Kitselman utilized the Davisson hollow spindle, projecting forward of the rotating-gear, with its cross-head and transferable spool-carriers thereon, for the purpose of twisting the intermeshing wire, and imbedding the longitudinal wires along the central line; but from this point he made an important departure—a departure that took the fence builder practically from its belly, as a loom machine, and set it upon its feet as a walking, working field machine. It individualizes the passing of this art from its lower antecedents to its present state of comparative perfection.

The mechanical changes were simple, but the results were revolutionary. The spindles of the Davisson machine were arranged vertically; had, with reference to the Davisson machine, a longitudinal movement; and were alternately forced forward and withdrawn from the plane of operation by means of a shifting device that was necessarily bulky and impracticable for field use. The Kitselman spindles were horizontally placed; had no longitudinal or lateral movement; and were confined permanently to the plane of their rotation.

In the Davisson machine, as in the Kitselman, the spindle, with its reels, acts as the twisting agent, the spindle forming the rotator; but in the Davisson machine the spindle, where the warp wire emerges from its hollow center, stands well back from the reels, thus allowing the warp wire to go unsupported to the plane of operation; while in the Kitselman machine the spindle extends clear forward to the twisting zone, to which it carries, through its hollow center, the warp wire, fully supported against side pulls. In the Davisson machine the spool-carriers are transferred to their adjacent spindles by means of an apparatus previously described as involving a longitudinal and transverse motion. Kitselman effects the transfer of his spool-carriers by shifting the one to the spindle above the spindle with which it has just operated, and the other to the spindle below. This shifting, being brought about by a longitudinal motion only, thus eliminating the necessity of a transverse motion.

In the Davisson invention a simple gear is set behind each spindle, but none of these gears engage each other, so that, when the spool-carriers are shifted to adjacent spindles and cross-heads at each successive twist, they are revolved about a practically new center. Kitselman provided each twister at its central section with a spur gear of sufficient diameter to engage the gears of the adjacent twisters, and by this means imparted a simultaneous motion to the whole series of twisters. The gear arrangement of the Davisson machine tends to twist the opposing carriers out of alignment;

subjects the central wire to certain deflection; and pulls the woof wires somewhat from their intended direction. In the Kitselman machine the pull, incident to the twisting operation, is constantly equalized, the central portions of the twistors offsetting each other in the plane in which the strain comes.

These distinctions are, to a certain extent, subsidiary, but nevertheless important. Their results entered into the general result, whereby the machine is taken from the ground, and effectively put upon its feet. The striking, effective change, however, is in the elimination from the Davisson machine of the transverse motion, (the transverse motion with reference to the Kitselman machine) and as a logical result, of the cumbrous machinery effectuating such transverse motion. The effect is as if each alternate spindle of the Davisson machine (those out of gear and standing back during the act of twisting) were eliminated, and the reels were transferred directly to and from the remaining adjacent spindles. It is this feature that gives opportunity for short spindles; that obviates the clumsy transverse adjustment; that, in short, compacts the machine within a space that permits its being set up upon its feet.

The Davisson machine could be put to no other use than that of a factory loom; it could not, in the very nature of its structure, be set up within a narrow compass. The Kitselman machine, by reason of the changes already pointed out, can be compactly mounted in a narrow vertical frame. The Davisson machine is, as we have already said, a fence builder practically on its belly, with all the clumsiness and inertness of the lower species; the Kitselman invention, for the first time, put the fence builder on its feet—an easy going, adaptable, working machine of the highest species. It built, for the first time, in the field, a wire mesh fence. It became a farm implement—an implement before unknown—as much so as the first harvester or the first stump puller. It turned over to the farmer in the field the work that had been previously done by the wire weaver in the shop. Out of it practically came a new product—a product as common now as the barbed fence, and probably much more useful.

The mechanical features distinguishing the Kitselman patent from the Davisson machine—and, of course, from all the preceding fence builders—have been indicated with sufficient precision. The first, second, eleventh, and fifteenth claims of the patent, read in connection with the drawings and description, seems to us to adequately embody them. In construing a claim the whole specification is taken together, and if the terms in which the claim is stated are consistent with those of the description, the latter with its accompanying drawings is treated as an amplification and explanation of the former, illustrating and applying its more concise and definite expressions. Rob. Pat. § 523.

Thus amplified by the description, the claims disclose a fence builder which, for the first time, employing a series of sectional twistors different from any that preceded, gears these twistors together for simultaneous rotation (a conception not involved in the Davisson patent); and brings about the necessary shifting by a

longitudinal movement, thus eliminating the Davisson transverse movement with its concomitant disadvantages—disadvantages fatal to the machine as a walking fence builder. Kitselman disclosed to the world for the first time a practical means of supplying the farmer with a highly useful fence. He has set forth these means in detail, in the descriptive portion of his patent, and has framed the claims mentioned to correctly embody them as a mechanical unity. His work is the work of a primary inventor, certainly as much so as in the cases presented in *The Corn-Planter Patent*, 23 Wall. 181, 23 L. Ed. 161, and *The Barbed-Wire Patent*, 143 U. S. 275, 12 Sup. Ct. 443, 36 L. Ed. 154; and his Letters Patent are, therefore, entitled to a liberal construction.

A liberal construction, in our opinion, includes the appellees' machine. The latter is different in many features of mere mechanical structure; in the direction traversed by the spool carriers; in the attachment of the spindles; in the mounting of the pinions; in the manner of supporting the spool-carriers, and in many other particulars—set out in the opinion below and in the argument of counsel. But all these subsidiary differences still leave the appellees' machine within the underlying structural conception—the mechanical individuality—of the Kitselman invention. They are changes here and there—oftentimes to its betterment—of the details, but they do not make the appellees' machine, any the less, the direct offspring of Kitselman's thought, and its mechanical embodiment. Within this view, appellees' machine constitutes an infringement.

The decree of the Circuit Court must be reversed and the cause remanded with directions to enter a decree in accordance with this opinion.

WOODS, Circuit Judge, dissents.

JUSTI et al. v. CLARK.

(Circuit Court of Appeals, Seventh Circuit. April 9, 1901.)

No. 730.

1. PATENTS—VALIDITY OF REISSUE—COLLATERAL ATTACK.

The courts cannot declare a reissue patent fraudulent and void in a collateral proceeding on the ground that the petition for the reissue did not state facts authorizing the commissioner to grant the same, since the statute does not prescribe the mode by which the required facts must be shown, and it must be presumed that the commissioner acted upon sufficient proof.

2. SAME—INVENTION—DENTAL SPITTOON.

The Hurlbut reissue patent, No. 11,696 (original No. 563,664), for an improved dental spittoon, consisting of an outer and an inner bowl, the inner being pivoted and revoluble by means of a jet of water directed tangentially against its inner surface, which also forms a water veil or sheet over its inner surface, was not anticipated by anything in the prior art, nor by the Bardsley rotary fluid motor (patent No. 509,644), but discloses patentable invention; and the device described marks a distinct

advance over anything in previous use, in the essential matters of sightliness and cleanliness. The first four claims also held infringed.

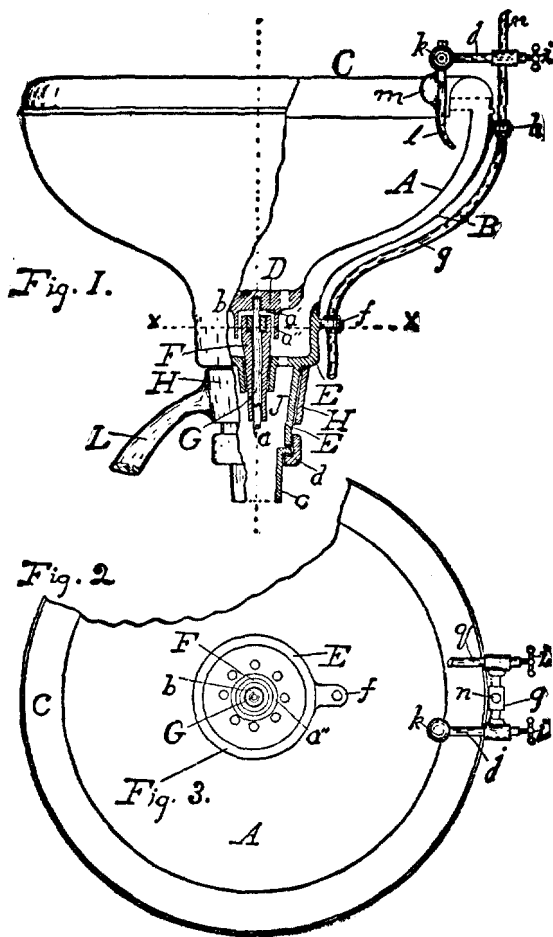
Woods, Circuit Judge, dissenting.

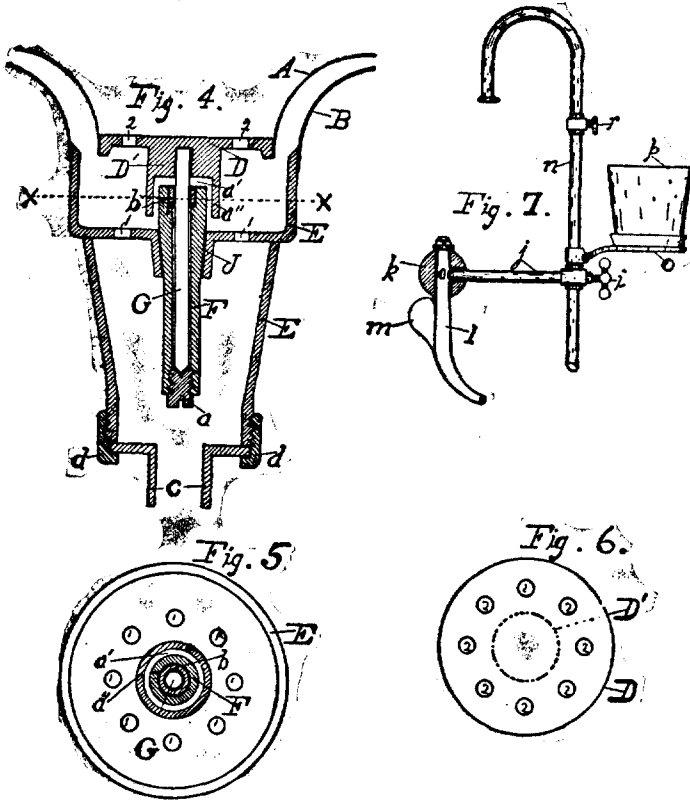
Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

For opinion below, see 100 Fed. 855.

The action in the Circuit Court was to restrain the appellants from infringing re-issue Letters Patent No. 11,696, granted September 27, 1898, to Frank Hurlbut for a dental spittoon, and by him assigned to the appellee. The original patent was No. 563,664, issued July 7, 1896.

The material portion of the original patent, together with its drawings, and the four claims sued upon (contained also in the re-issue), is as follows:





"My invention relates to that class of spittoons used by dentists, physicians, and other specialists where it is desirable to have running water in the spittoon for the purpose of cleansing the same.

"For further description of my invention reference will be had to the following specification, in which—

"Figure 1 is an elevation of my invention, the right half being in section. Fig. 2 is a plan view of the same. Fig. 3 is a transverse section on line XX of Fig. 1. Fig. 4 is an enlarged vertical section of the parts shown in section at the lower end of Fig. 1. Fig. 5 is a plan view of the fixture E, showing the perforations 1 1 through the bottom plate of the same. Fig. 6 is a plan view of the fixture D, showing the perforations 2 2 in the plate of the same. Fig. 7 is a side elevation of the valve fixtures and section, showing one style of swiveled injector I. Any style or pattern of swiveled injector will serve the purpose.

"My improvement may be attached to a permanent or a movable stand or to the wall or to some part of an operating chair and is further provided with an outer and an inner bowl, the outer bowl remaining stationary upon fixtures, while the inner bowl may be continuously rotated by means of water discharged against its inner surface through the injector I.

"Similar characters refer to corresponding parts in all the figures.

"A represents the inner bowl, which is movable upon a pivot, as herein-after described.

"B represents the outer bowl, which is stationary upon its fixture.

"C is a removable cap or rim fitted upon the top of the outer bowl B and extends over and inside of the upper edge of the inner bowl A. The cap C is made removable, so that the inner bowl A may be lifted out for the purpose of cleansing the parts.

"D is a plate, providing the perforated bottom of the bowl A, and is provided on its under side with a hub D'. The hub D' is provided with a central socket, also the downward-extending shell a". Into the socket is fitted a pivot-stem G. The drawing discloses the pivot-stem G as loosely fitted into the socket of the hub D'. It is immaterial whether it be loosely fitted or rigid.

"E is a solid fixture forming the bottom of the outer bowl B and is provided on its under side with a hub J. The hub is provided with a cone-shaped opening, into which is fitted a socket-post F. The fixture E is also provided with the cone-shaped shell E', extending downward to the fixtures c and d, connecting it with a waste-pipe. The bottom of the fixture E is perforated, as shown at 11, Fig. 5.

"F is a tubular post, cone-shaped near its upper end and is thus fitted into the cone-shaped opening in the hub J of the fixture E. Into the lower end of the post F is fitted an adjustable bolt a. The bolt a being adjustable, it may be raised and thus provide a bearing for the pivot-stem G.

"G is a pivot-stem, on which is mounted the revolving bowl A.

"H represents a socket on the end of an arm L of any suitable fixture for securing the spittoon in any desirable position or to any desired object.

"a is an adjustable stool-bolt fitted into the end of the socket-post F, and in addition to providing a pivot-bearing for the pivot-stem G it provides a means of adjusting the inner bowl A up or down.

"b is an annular ring of hardened metal fitted into the upper end of the post F to provide a side bearing for the pivot-stem G.

"c is a fixture secured to the lower end of the chamber formed by the shell E' by means of the lock-nut d, and is for the purpose of connecting the spittoon to a waste-pipe.

"f and h are fixtures provided on the side of the outer bowl B for supporting the supply-pipe and may be connected in suitable manner to any waste-pipe or hydrant.

"g is the water-supply pipe supported by the fixtures f and h, and provided near to the top of the bowl with an ordinary cross-pipe fitting, the lower arm of the cross being attached to the supply-pipe g. (See Figs. 2 and 7.) The upper arm may be extended and provided with a glass filler n. (See Fig. 7.) The two side arms of the cross may be extended and provided each with an ordinary stop-cock i l. (See Fig. 2.)

"j is an extension from one of the valves i and connects the same with the globe k.

"k is a globe-shaped fixture provided with a two-way opening, into one of which is fitted the pipe j and through the other extends the injector l.

"l is the injector, through which water is discharged into the bowl A. This injector is fitted through the globe k and is designed to swivel in the same. The lower end of the injector terminates with a bent nozzle. At one side of the injector is provided a thumb-piece m for the purpose of turning the same in the globe k.

"The upper end of the injector l, at a point opposite the pipe j, is provided with one or more openings, so that water may be admitted to the injector regardless of the angle at which the nozzle may be set, the inflow of water being controlled by the valve i. The valves i l are connected with the cross-pipe fitting with the swivel-joint, so that the fixtures extending inside of the bowl may be turned upward on the swivel-joint and thereby removed from over the bowl in order that the inner bowl may be removed for the purpose before described.

"o is a bracket fitted loosely around and extending from the pipe n for supporting a water-glass p. Desiring to fill the glass the bracket o may be swung around, bringing the glass under the water-pipe n.

"r is a stop-cock on the pipe n.

"q is an extension from one of the valves i, and to which it is intended to connect a saliva-ejector.

"The operation of my invention is as follows: Assume the spittoon to be in position resting in the socket H of the arm L, said arm L being secured as before described and the water-pipe g being connected with a supply-pipe by a section of hose or otherwise, as desired, and the fixture c being likewise connected with a waste-pipe. Desiring to operate the bowl the operator will open the stop-cock i opposite the injector k l, admitting water to the bowl through the nozzle end of the injector l. By means of the thumb-piece m the injector may be turned so as to discharge the water against the inner surface of the bowl A at any angle desired. The force of the water thus discharged imparts motion to the inner bowl and causes it to revolve upon its pivot-stem G. The speed at which the bowl revolves is controlled by the force of the supply and the angle at which the injector is set. The outlet from the bowl is through the perforations 2 2 and 1 1 of the plates D and E and thence through fixture c to the waste-pipe. (See Figs. 4, 5, and 6.) In the event of an overflow of the bowl A the water may pass down the space between the outer and inner bowl and through the plate E to the waste-pipe.

"The air-space a', provided between the upper end of the post F and the under side of the hub D', and inclosed by the downward-extending shell a" of the hub D', is intended to act as a ram in preventing water from working up over the post F and around the pivot-stem G.

"Having thus described my invention, what I claim as new, novel, and desire to secure by Letters Patent of the United States, is—

"1. In a spittoon, an inner and an outer bowl, the inner bowl being revolvable; and a water-injector adapted to direct a jet of water against said revolvable bowl to revolve the same.

"2. A dental spittoon having an outer and an inner bowl, the inner bowl being revolvable within the outer bowl; a water-injector adapted to throw a stream of water against the inner surface of the inner bowl; and an adjustable fixture carrying the injector by which it is made removable from the inner bowl.

"3. In a dental spittoon, an inner and an outer bowl, the inner bowl being revolvable; a water-injector held to direct water against the inner surface of the inner bowl to revolve the same; and a fixture which holds the water-injector, the water-injector being adjustable in the fixture to change the direction of the stream which it directs against the revolvable bowl to modify the speed of the revolution of the bowl.

"4. In a dental spittoon, an outer and an inner bowl, the inner bowl being revolvable in the outer bowl; the water-injector for directing the stream of water against the surface of the inner bowl to revolve the same; and a removable cap placed over the upper edges of the two bowls secured to the outer bowl."

The claims added by the reissue—fifth, sixth and seventh—are as follows:

"5. In a dental spittoon, the combination of an outer bowl and an inner bowl having a space located between them and open at its top and bottom, the inner bowl supported at its bottom and having an always-open outlet or drain, a removable cap arranged above the upper edges of the two bowls and over said space and means for supplying water to the inner surface of the inner bowl and continually maintaining a thin sheet of water upon such inner surface.

"6. In a dental spittoon, the combination of an outer bowl and an inner bowl having a space located between them and open at its top and bottom, the inner bowl supported at its bottom and having an always-open outlet or drain, means for supplying water to the inner surface of the inner bowl and continually maintaining a thin sheet of water upon such inner surface and a removable cap arranged above the upper edges of the two bowls but providing communication between the inner bowl and said space.

"7. In a dental spittoon, the combination of an outer bowl and an inner bowl having a normal air-space located between them and open at its top and bottom, the inner bowl supported at its bottom and having an always-open outlet at its lowest point, means for supplying water to the inner surface of the inner bowl and continually maintaining a thin sheet of water

upon such inner surface and a cap secured to the outer bowl, out of contact with the inner bowl and adapted to cover the space between the bowls but leaving a space between it and the top of the inner bowl."

There was no substantial dispute that the spittoon manufactured by the appellants is almost an exact copy of the Hurlbut spittoon; but appellants insisted that it was within the uses to which the Bardsley patent could be rightfully adapted.

The Bardsley patent, No. 509,644, issued November 28, 1893, for a rotary fluid motor, together with its drawings, is as follows:

FIG. 1

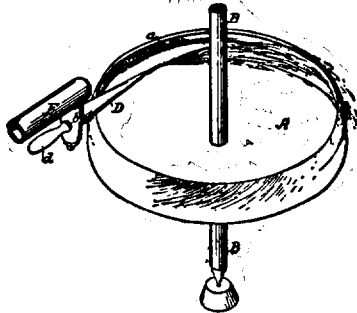


FIG. 2

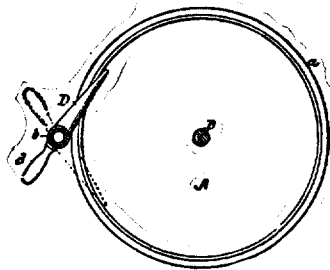


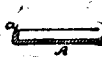
FIG. 3.



FIG. 4.



FIG. 5.)



"One object of my invention is to construct a rotary fluid motor of an extremely cheap and simple character compared with its efficiency, and one which can be run in either direction at will, a further object being to provide for the ready changing of the direction of rotation of the motor. These objects I attain in the manner hereinafter set forth, reference being had to the accompanying drawings in which—

"Figure 1, is a perspective view of a fluid motor constructed in accordance with my invention. Fig. 2 is a plan view of the same, partly in section; and Figs. 3, 4 and 5, are sectional views illustrating different forms of motor wheel or disk which can be employed.

"My improved fluid motor consists of a disk A secured to a shaft B which is mounted in suitable bearings so as to be free to turn, the disk having upon its outer edge a projecting flange a which is, by preference, bent inward slightly at the top, as shown in Fig. 3. The central portion of the disk may

be in the form of spokes or open work if desired, and the disk may run either horizontally, vertically or at an angle.

"Above and at one side of the disk A is a conical nozzle D which is preferably mounted upon the depending end of a fluid supply pipe F so that it can be turned thereon, the hub or butt b of the nozzle being provided with a handle d for this purpose.

"The nozzle D is so disposed that the jet therefrom will be delivered parallel with a line tangential to the periphery of the disk A and will strike the surface of said disk close to the outer flange, the force of the water being exerted upon the disk and flange and the stream spreading upward on said flange to which it clings by reason of capillary attraction until it is finally discharged by centrifugal force over the edge of the flange, as shown in Fig. 1. The water is thus caused to act upon the disk and flange throughout a considerable portion of the entire circumference of the disk so that I am enabled to obtain almost as high a degree of power as in a bucket motor operated by a jet, especially in cases where the jet is very small and issues with great velocity from the nozzle.

"One important advantage possessed by my improved motor over the ordinary form of bucket motor, moreover, is that it is capable of being run either backward or forward with equal facility, by simply changing the direction of the jet, and in order that this latter result may be readily accomplished I use a pivoted nozzle as shown in Fig. 1, which when adjusted to the position shown by full lines in Fig. 2, will drive the motor disk in one direction, and when adjusted to the position shown by dotted lines in said figure, will drive said disk in the opposite direction.

"In carrying out my invention various forms of flange may be formed upon the disk A in place of that shown in Figs. 1 and 3. For instance, an inwardly curved flange such as shown in Fig. 4 may be used, or a low upturned flange, such as shown in Fig. 5, or in some cases the flange may be dispensed with altogether, as I have obtained good results from a motor in which the jet was simply discharged upon the face of a flat disk, the use of the flange in all cases, however, being preferred, it serves to confine the water to the disk for a longer time, and thus enables it to exert a greater amount of power than if it were not so confined.

"It will be evident that in carrying out my invention, there can be two or more nozzles disposed so as to discharge upon the disk at different points, and the jets can all act upon the same face of the disk or some upon one face and some upon the opposite face of the same, and in other cases there may be more than one disk upon the shaft, each of the disks being acted upon by one or more jets. In some cases, also, the face of the disk may be slightly roughened or provided with fine corrugations, but these should not be such as to break up the jet or cause any rebounding of the water on striking the disk.

"Having thus described my invention, I claim and desire to secure by Letters Patent—

"1. A fluid motor consisting of a disk or plate and a nozzle located above the plate but inclined downward toward the same, and also occupying a position parallel with a line tangential to the periphery of the plate so that it will discharge downward upon the face of the plate, adjacent to the periphery of the same, a jet parallel to such tangential line, substantially as specified.

"2. A fluid motor in which are combined a disk or plate having an upturned flange upon its outer edge, and a nozzle located above the plate but inclined downward toward the same, and also occupying a position parallel with a line tangential to the periphery of the plate, whereby it will discharge downward upon the face of the plate, adjacent to the periphery of the same and within the flange, a jet parallel to such tangential line, substantially as specified.

"3. A fluid motor in which are combined a disk or plate, and a nozzle located above the plate but inclined downward toward the same, said nozzle being pivoted to the supply pipe and capable of being moved thereon to right or left so as to occupy, when in either extreme of movement, a position parallel with a line tangential to the periphery of the plate, substantially as specified."

Other patents brought to our attention are as follows:

No. 102,737, May 3, 1870, D. Wellington.
No. 102,738, May 3, 1870, D. Wellington.
No. 155,814, Oct. 13, 1874, W. Stockton.
No. 163,527, May 18, 1875, S. G. Randall.
No. 204,793, June 11, 1878, F. Bramer.
No. 233,495, Oct. 19, 1880, C. Fink.
No. 241,884, May 24, 1881, C. E. Robinson.
No. 241,949, May 24, 1881, J. R. Finney.
No. 274,105, Mch. 20, 1883, E. B. Bliss.
No. 305,430, Sept. 23, 1884, E. A. Daniel.
No. 317,251, May 5, 1885, J. J. Walton.
No. 349,704, Sept. 28, 1886, J. M. Fletcher.
No. 448,100, Mch. 10, 1891, W. E. Warner.
No. 486,776, Nov. 22, 1892, S. Haines, et al.
No. 535,925, Mch. 19, 1895, W. J. Shilling, Jr.
No. 553,510, Jan. 28, 1896, S. Campbell.
No. 594,117, Nov. 23, 1897, M. C. Merker.
No. 597,359, Jan. 11, 1898, G. E. Johnson.

The court found upon final hearing for the appellee, and entered a decree accordingly; from which this appeal is prosecuted.

The errors assigned are, in substance, as follows:

1. "That the reissue was invalid because fraudulently obtained, and because there was no foundation in law for a reissue."
2. "Because the reissue claims are unlawful expansions of the originals, and, therefore, void; and the whole patent is therefore also void."
3. "Because the claims sued on are void for want of patentable novelty."
4. "Because the court erred in finding infringement."

The further facts are stated in the opinion of the court.

R. S. Taylor, for appellant.

L. L. Coburn, Samuel E. Hibben, and J. H. McElroy, for appellee.

Before WOODS, JENKINS, and GROSSCUP, Circuit Judges.

GROSSCUP, Circuit Judge. The injunction against infringement was asked only upon claims (1), (2), (3), & (4) of the re-issue patent. These are identical with the like numbered claims in the original patent. There is nothing, therefore, in the particular re-issued claims, upon which relief is asked, different from the original claims. The decree of the Circuit Court in following the re-issue, did not expand or alter what would have been appellee's right, had there been no re-issue, and the suit had been brought upon the original Letters Patent.

But it is insisted that the claims added in the re-issue (though not brought into this case as a base for an injunctive order) were not within the right of the commissioner to allow, upon the showing of facts there made; and our attention is invited to the petition for re-issue, as failing to show facts sufficient to give the commissioner jurisdiction. It is urged, in view of this, and of the progress of the art between the dates of the original and the re-issue Letters, that the success of the appellee in procuring the re-issue is in the nature of a fraud.

The defect of the argument is that it assumes that we have before us, in this case, all the facts that the commissioner had before him in the application for a re-issue; and that we can, in a collateral proceeding, declare the patent fraudulent, on account of the supposed imposition upon the commissioner. The statute relating to the sub-

ject, Section four thousand nine hundred and sixteen, provides: "Whenever any patent is inoperative or invalid by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new, if the error has arisen by inadvertence, accident or mistake and without any fraudulent or deceptive intention, the commissioner shall on the surrender of such patent and the payment of the duty required by law, cause a new patent for the same invention, and in accordance with the corrected specification to be issued to the patentee."

It will be seen that there is in this statute no provision relating to the medium of the required proof. It is not provided that the proof of the facts upon which a re-issue may be granted—the inoperativeness or invalidity of the original patent, through inadvertence, accident or mistake, and without deceptive intention—shall be by affidavit, deposition, or oral testimony. It is not provided that the attention of the commissioner shall be called to such facts by any set petition, or other paper writing. This may be done, so far as statutory procedure goes, by oral testimony. All that the statute contemplates is that the judgment of the commissioner shall be satisfied; and this is, of course, presumed from the fact that the re-issue was granted. In the absence of the whole case submitted to the commissioner—petition, affidavits, oral testimony and all—upon which he acted, we can not determine, had we the power, that there were not before him facts sufficient to give him jurisdiction to grant a re-issue, or that the commissioner was misled. There seems to us to be no error in this particular of the case.

This brings us to the questions of invention and patentability. The Hurlbut dental spittoon consists of an inner bowl set within an outer bowl, the inner one so arranged that it may revolve, without much friction, upon a pin point bearing. Against the inner surface of the inner bowl a jet of water is thrown tangentially, so adjusted in quantity and pressure that, while the bowl is caused to revolve, the revolution is accomplished easily and quietly, and the water permitted to spread like a flushing veil or sheet over the whole surface. Overflow is prevented by an annular ring, and space for the escape of air from the waste pipe is found between the outer surface of the inner bowl and the inner surface of the outer. The effect is noiselessness, a tasteful appearance, and a sense of purity and cleanliness. The spittoon immediately superseded the dental spittoons preceding it.

The White dental spittoon, in existence before 1890, seems to have been the point at which the art, up to the Hurlbut spittoon, had reached its climax. The White spittoon was a single stationary bowl, through which rose centrally, nearly to the level of the rim, a vertical rod carrying a water-spraying device that, turning pivotally on suitable bearings, distributed the water over the inner surface of the bowl, subjecting its surface to a spray, such as comes to a lawn from a water sprinkler. It was, to a certain degree, cleanly and tasteful, and went into general use; but its differentiation from the Hurlbut spittoon, appearing six years later, is well marked. In the White

spittoon the sprinkler revolves, while the bowl stands still; in the Hurlbut it is the bowl that is revoluble. In the former the power is applied to the swinging cross-arms through the vertical rod by a construction known as Barker's mill; in the latter the jet of water, striking the inner surface of the bowl, is, at once, the power that revolves it, and its cleanser. In the White there always stands up in the center of the bowl—a catch-all for the discharges from the patient's mouth—this upright rod, and its cross-arms, themselves incapable of self-cleansing; in the Hurlbut there is no exposed portion that is not self cleansed. The striking advance of the Hurlbut over the White spittoon is thus manifest.

The other patents cited—the Finney, Bliss, Fletcher, and Warner—are of a like construction, each having the stationary bowl, supplied with stationary, water distributors. They fall short, therefore, as did the White, of the peculiar adaptation that gives to the Hurlbut spittoon its perfection as a dental bowl.

Usually in any art the approach to the highest attainment is gradual; the final result reached is but a step beyond its immediate predecessor. But in the art of dental spittoons the approach to the Hurlbut invention seems to have been by a long leap from its immediate predecessor. The transition from the White to the Hurlbut is in the nature of a decided departure, if not a new creation. We are of the opinion that the thought that conceived this new help to the ills of mankind is invention, and that its embodiment, in the mechanical means employed, completes the act as patentable invention.

But though nothing is brought forward from the dental art as anticipatory of the transition from the White to the Hurlbut spittoon, the Bardsley patent—confessedly in another field—is urged as having made the Hurlbut spittoon so obvious, that what followed could only have been mechanical adaptation. We can not concur in this view.

The Bardsley patent was for a rotary fluid motor. Its sole purpose was to obtain power from a jet of water, and transmit it by a shaft to some other apparatus. It carried with it no thought of, or provision for, the flushing of water that causes self cleansing; it contained, indeed, no purpose of self cleansing. There was in it no basin, as a receptacle for the discharges from the patient; no provision for noiselessness; no suggestion of sightliness; none of the details that, taken together, constitute the tout ensemble of the Hurlbut spittoon. It is true that, the underlying idea of the Hurlbut spittoon, well in mind, a glance at the Bardsley motor might reveal, in rough, the means for its mechanical embodiment; but the gist of invention is just this conception of the underlying idea—the mental, rather than the manual act—the burst of thought, rather than the reduction of the thought to practice. The Bardsley motor, in our opinion, had nothing in it that was calculated to reveal, in its entirety, the Hurlbut dental spittoon.

Indeed, the Bardsley motor only utilized a well known law of nature—that a jet of water, applied tangentially to the inner surface of a basin nicely pivoted, would tend to revolve it. This had been partially exemplified, for many years, in preceding water motors;

and widely exemplified in the revoluble tumblers upon nearly every soda fountain counter. It was a known law of nature when the early dental spittoons were devised, with their stationary bowls and stationary water-distributor; and when the White spittoon was conceived, with its revoluble distributor; but, until Hurlbut's time, it was not thought of in solving the problem of a sightly and sanitary dental basin. Is not this fact significant? Is it not persuasive that Hurlbut's conception was invention rather than mere skill—a flash of the intellect, creative and helpful, rather than the plodding advance of the mechanic. Taken altogether, we regard the Hurlbut device as the result of an inventive thought, suitably reduced to practice, and, therefore, patentable.

There was no error in the decree of the Circuit Court, and it is accordingly affirmed.

WOODS, Circuit Judge (dissenting). I am not able to agree that the Hurlbut device embodies invention, though, the Bardsley patent out of the way, its patentability I think should be conceded. Its meritorious feature is the revoluble bowl washed by the water which revolves it. As a mechanism it is in this particular completely anticipated by the Bardsley device, which in the form illustrated in the patent is capable of use as a spittoon, while if its disk be given the depth and contour of a dental cuspidor it becomes the complete exemplification of Hurlbut's construction. In the patent it was called a "motor," but was it for that reason any less a mechanism of which Hurlbut or any other mechanical inventor was bound to take cognizance than if it had been stated in the patent that it might also be used as a self-cleansing cuspidor?

In respect to invention in the adaptation of an existing device to a new use, the rule is thus stated in *Potts & Co. v. Creager*, 155 U. S. 597, 608, 15 Sup. Ct. 194, 199, 39 L. Ed. 275, 279:

"As a result of the authorities upon this subject, it may be said that, if the new use be so nearly analogous to the former one that the applicability of the device to its new use would occur to a person of ordinary mechanical skill, it is only a case of double use; but if the relations between them be remote, and especially if the use of the old device produce a new result, it may at least involve an exercise of the inventive faculty. Much, however, must still depend upon the nature of the changes required to adapt the device to its new use."

The significance of the last sentence should not be overlooked. The following cases cited in the briefs afford pertinent illustrations of the application of the rule: *American Road-Mach. Co. v. Pennock & Sharp Co.*, 164 U. S. 26, 17 Sup. Ct. 1, 41 L. Ed. 337; *Iron Works v. Fraser*, 153 U. S. 332, 14 Sup. Ct. 883, 38 L. Ed. 734; *Trimmer Co. v. Stevens*, 137 U. S. 423, 11 Sup. Ct. 150, 34 L. Ed. 719; *Aron v. Railroad Co.*, 132 U. S. 84, 10 Sup. Ct. 24, 33 L. Ed. 272; *Briggs v. Ice Co.*, 20 U. S. App. 374, 8 C. C. A. 480, 60 Fed. 87; *Gustin v. Mill Co.*, 9 U. S. App. 301, 3 C. C. A. 474, 53 Fed. 120; *Thomson-Houston Electric Co. v. Western Electric Co.*, 34 U. S. App. 186, 16 C. C. A. 642, 70 Fed. 69; *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U. S. 485, 20 Sup. Ct. 708, 44 L. Ed. 856. These and many like cases, as I understand them, proceed upon the theory that the mechanical art

is a unit, and that every mechanical invention is presumed to have been made with a full knowledge of all that had been accomplished before in all branches of mechanism; so that when the question arises whether there was invention in adapting an old device to a new use, or whether a supposed new device designed for a new or old use was in fact an adaptation of an old device, it must be determined by the rule quoted from the opinion in *Potts & Co. v. Creager*; much depending on the nature of the changes required to effect the new adaptation. The changes which Hurlbut had to make in the Bardsley mechanism in order to convert it into the revolving bowl of his cuspidor, washed by the water which turned it, were certainly slight and obvious, involving nothing beyond the skill of a mechanic conversant with the art. Indeed, nothing was necessary except to cut away so much of the shaft, B, in the Bardsley motor as rises above the bottom of the disk, and apply well-known means for the discharge and carrying away of the water. It is significant that Hurlbut's original application, filed March 18, 1895, followed the issue of the Bardsley patent on November 28, 1893, by less than sixteen months; and, in view of the close resemblance of the two devices, it is not unreasonable to infer that one was the outgrowth of the other.

If it be insisted that the Bardsley device is to be distinguished because its only intended function was as a "fluid motor," the answer is that in the cuspidor of Hurlbut it has the same function. If it be said to run nothing but itself, it is nevertheless a motor. The rotating part of the cuspidor may be regarded, perhaps, with equal fairness, from either of two points of view,—as a modified form of the Bardsley motor, or as a Bardsley motor with a bowl attached, to which it imparts a motion identical with its own. The disk on which the water impinges is described in the specification as having upon its outer edge a projecting flange, which by preference is bent inward slightly at the top; and the central portion is described as being, if desired, in the form of spokes or open work. To substitute for the central portion, whether solid or consisting of spokes or open work, a bowl, of whatever shape, would not change the essential character of the structure, whether the bowl be attached to, or made integral with, the flange. In either form the presence of the Bardsley motor, acting as a motor to revolve the bowl, is evident.

In the case of *Johnson v. McCurdy* (decided to-day by this court) 108 Fed. 671, it is said:

"Nor can the Bardsley patent be construed to rightfully exclude others from using a jet of water tangentially applied to the inner surface of the bowl to revolve the bowl. This was a law of nature, well known before the Bardsley device."

If this be true, it is equally fatal to the Hurlbut device, which, without the revolving bowl moved by a tangential jet of water, is manifestly without patentable novelty. The other parts of the combination were in familiar use in earlier devices, in substantially similar relations and serving the same uses as in this combination. Neither patent, however, as I conceive, is subject to the objection stated,—not more than a patent for a turbine or other form of wheel

intended to be moved by water, or for a device designed to catch the wind for the purpose of utilizing its power. No law of nature tells how the jet of water shall be made to impinge, nor how to construct a device to which it may be effectively applied. Whatever the distance from White to Hurlbut, that from Bardsley to Hurlbut was but a step along a lighted passage.

JOHNSON et al. v. McCURDY.

(Circuit Court of Appeals, Seventh Circuit. April 9, 1901.)

No. 744.

PATENTS—INFRINGEMENT—ROTARY WATER MOTOR.

The Bardsley patent, No. 509,644, for a rotary fluid motor, is not infringed by a dental spittoon made in accordance with the Hurlbut re-issue, No. 11,696, in which the inner bowl is revolved by a jet of water similar to that employed to revolve the motor of the patent; such feature of the device not being patentable.

Woods, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the District of Indiana.

The action in the Circuit Court was to restrain the appellee from infringing Letters Patent No. 509,644, granted to Edward E. Bardsley, November 28, 1893, for a rotary fluid motor, assigned to appellants.

The infringing spittoon is manufactured in accordance with re-issue Letters Patent, No. 11,696, granted September 27, 1898, to Frank Hurlbut, for a dental spittoon. Both the Hurlbut and Bardsley patents, and other patents bearing upon the controversy, are set out at large, or cited, in *Justi v. Clark* (this day decided by this court) 108 Fed. 659.

R. S. Taylor, for appellants.

Samuel E. Hibben, L. L. Coburn, and J. H. McElroy, for appellee.

Before WOODS, JENKINS, and GROSSCUP, Circuit Judges.

After the foregoing statement of the case, GROSSCUP, Circuit Judge, delivered the opinion of the court, as follows:

Following *Justi v. Clark*, just decided, the decree of the Circuit Court must be affirmed. The Hurlbut patent is not, in our opinion, and for reasons there stated, an infringement of the Bardsley patent. Nor can the Bardsley patent be construed to rightfully exclude others from using a jet of water, tangentially applied to the inner surface of a bowl, to revolve the bowl. This was a law of nature, well known before the Bardsley device.

The decree of the Circuit Court is accordingly affirmed.

WOODS, Circuit Judge. For reasons indicated in the case of *Justi v. Clark*, I cannot concur in this opinion, though not clear that the conclusion is wrong.

THE EUREKA NO. 32.

(District Court, S. D. New York. May 7, 1901.)

SHIPPING—PROCEEDING TO LIMIT LIABILITY—WHEN MAINTAINABLE—SINGLE CLAIM.

A proceeding in admiralty for limitation of liability under Rev. St. §§ 4284, 4285, should not be entertained where there is but one known claim, and the nature of the accident or loss makes improbable any other, and where the petition neither avers a belief in the existence of any other claim, nor shows any grounds for apprehending any other. In such case the statutory limitation of liability is effectually available as a defense under section 4283, by answer in the action on the single claim; and such procedure not only avoids the expense of the special proceeding, but preserves the plaintiff's right of jury trial, which should not be interfered with any further than necessary to effectuate the purpose of congress.¹

In Admiralty. Petition for limitation of liability.

Wilcox, Adams & Green, for application.

BROWN, District Judge. Upon a petition filed by the above-named petitioner, owner of the coal barge Eureka No. 32, application is made for an order for the appraisalment of the barge in proceedings to limit the liability of the owner of the Eureka, pursuant to sections 4284 and 4285 of the United States Revised Statutes. The petition alleges that an action has been brought in the supreme court of this state against the petitioner and the Oceanic Steam Navigation Company, owner of the steamship Oceanic, by Mary Madigan, the widow and administratrix of Patrick Madigan, deceased, to recover the sum of \$20,000 for the benefit of his widow and next of kin, under the New York statute, on account of the death of Patrick Madigan, caused by the alleged negligence of the defendants in said suit while the decedent was engaged in shoveling coal in the hold of the Eureka, which was being discharged by means of tubs into the steamer Oceanic alongside; that it was alleged in that suit that the hold was dark and insufficiently lighted, and insufficient means used to prevent the tubs from swinging, so that without warning to the deceased, and without fault on his part, his head was violently struck and crushed, causing his death soon after.

The above is the only claim stated in the petition; nor is there any averment of any other debt or liability of the petitioner on account of the Eureka. The petition avers, however, that there were a number of men on the barge besides those in the hold engaged in the work; that "acts of negligence may have been committed or other things done by those on board or those in charge of said barge of which your petitioner has no knowledge, but for which the petitioner avers suits may thereafter be brought against it, and against which the petitioner would be entitled to limit its liability in this

¹ Limitation of shipowner's liability, see note to *The Longfellow*, 45 C. C. A. 887.

proceeding, if such there were." The petition further states that the voyage or trip of the Eureka, in connection with which the accident occurred, was a trip from Jersey City to pier 48 North River, New York City, on which the Eureka had been towed across the river to deliver a cargo of coal to the Oceanic pursuant to contract, upon which there was "no freight pending."

In the case of *The Rosa* (D. C.) 53 Fed. 133, I declined to entertain jurisdiction of proceedings in limitation of liability under such circumstances, stating the reasons for my decision. I am aware that a different conclusion is reached in the case of *Quinlan v. Pew*, 5 C. C. A. 438, 56 Fed. 111, and in the more recent case of *The McCaulley* (D. C.) 99 Fed. 302. Highly as I respect the decisions of those courts, I am unable to appreciate the force of the reasons given for the decisions, contrary to what seems to me to be the plain language of section 4284, which in terms limits a proceeding for a pro rata distribution to cases in which there are several distinct claims. Section 4285 refers to "such claimants," i. e. a case within section 4284; and in the act of 1851 (9 Stat. 635) both were parts of the same section. Rules 54 to 57 of the supreme court in admiralty imply the same limitation, and were intended only for cases of several claimants. *The Scotland*, 105 U. S. 33, 26 L. Ed. 1001.

As stated in the case of *The Rosa*, where there is but a single outstanding demand, it seems to me an unjustifiable extension of section 4284, and an encroachment upon the ordinary rights of suitors in state courts, to interfere with litigation in the state courts beyond what congress has authorized. Whenever a case arises under section 4284, that is, where there are several claims for a loss or damage on the same voyage, jurisdiction is no doubt conferred to entertain this special proceeding; and as held in the case of *Elwell v. Geibel* (C. C.) 33 Fed. 71, this jurisdiction is most properly exercised by the district courts only.

The case of *In re Morrison*, 147 U. S. 14, 13 Sup. Ct. 246, 37 L. Ed. 60, was one of collision, where the *Alva* was sunk, in which there was not only every probability of numerous claims, but in the papers before the supreme court other claims affirmatively appeared. Where suit has been brought upon one claim and the circumstances are such as to make probable the existence of other claims arising out of the same accident, as in cases of collision, or from any other circumstances of the same voyage, sections 4284 and 4285 may no doubt be rightly invoked and proceedings thereunder instituted for a pro rata distribution; but where there is but one known claim, and the nature of the accident or loss makes improbable any other, and the petition neither avers a belief in the existence of any other claim, nor shows any grounds for apprehending the existence of any other, the case seems to me to be wholly outside of the provisions of sections 4284 and 4285, and to be fully covered and provided for by defense under section 4283 by answer in the state suit. The limitation of liability is then completely and effectually available by way of defense in the state court under that section. *The Scotland*, 105 U. S. 24, 33, 26 L. Ed. 1001; *Loughin*

v. McCaulley, 186 Pa. 517, 40 Atl. 1020. There is no need of any trustee in such a case, nor of any of the cumbrous, dilatory and expensive machinery of the special limited liability proceedings under sections 4284 and 4285.

The court cannot fail to recognize that practically the only object of applications upon a single claim like this is, to get the case away from the common-law jurisdiction and a trial by jury. But this right to a common-law remedy, with its attending jury trial, is precisely the right which section 563 of the Revised Statutes expressly reserves to suitors "in all cases where the common law is competent to give it." In the case of *The Main*, 152 U. S. 122, 14 Sup. Ct. 588, 38 L. Ed. 381, the supreme court, in quoting with approval the comments made in English cases upon the construction that should be given to the limited liability statute, viz., "so as to derogate as little as possible consistently with its phraseology from the otherwise legal rights of the parties," concludes by saying:

"Being in derogation of the common law, we think the court should not limit the right of the injured party to a recovery beyond what is necessary to effectuate the purposes of congress." Pages 132, 133.

Where there are several claims so as to require a pro rata contribution, no doubt a common-law remedy is not competent to give relief, because it does not include the equitable powers of the appointment of a trustee, or the summoning in of various different claimants so as to make a pro rata apportionment according to the various claims. But where there is but a single claim nothing of this kind is necessary. Full relief may be obtained by the shipowner in the original action, by answer setting up the statutory limitation of liability, the value of the vessel, and making proof accordingly on the trial. Such defenses by way of answer are not infrequent, as I am informed, in the state courts in this district. At this moment I have before me for decision a similar instance in this court, and such was *The Scotland*, 105 U. S. 24, 33, 26 L. Ed. 1001. Presumably, it is only because the common law is not competent to afford adequate relief to the shipowner by way of defense, where there are several claims requiring a pro rata division, that section 4284 provided for the independent special proceeding in cases "where there are several claims," requiring such a division.

One other incident of the independent proceeding under section 4284 and rule 55, that operates still further to the prejudice of the injured party is, that the costs and expenses of the proceeding are to be allowed to the ship owner. Thus a fund, already insufficient to make good the injured party's honest demand, is still further depleted by a cumbrous and expensive proceeding. These costs are (a) for a long and costly advertisement calling for imaginary claims having no existence; (b) a commissioner to take proof and report upon these imaginary claims, never to be presented; (c) the appointment of a trustee to take charge of the ship or its proceeds in order to provide for an imaginary pro rata distribution, which will never arise; and finally for the other statutory charges in the fee bill, in a proceeding wholly unnecessary and of no benefit to any one except the shipowner, to enable him to escape a jury trial.

Two other circumstances in the present case should also be mentioned.

(a) Section 4284 contemplates "voyages," and vessels making voyages. What the owner is required to turn over is "the vessel and her freight for the voyage." The only voyage of the Eureka in this case, according to the petition, was the brief passage across the North River as above stated, occupying perhaps a half hour; and the petition states that there was "no freight pending." The owner, however, carrying his own cargo must answer for a reasonable freight, as if he were carrying the goods of another. If such brief trips as the present can be treated as voyages within the statute, it is rather by accident than by any original design of the statute.

(b) More important is the circumstance, that in this case, although the tort was maritime, the maritime right of action died with the deceased. The present right of action is not maritime at all, but purely statutory. To this statutory action, trial by jury is an incidental right, secured by the state law as well as by section 563, subd. 8, Rev. St. U. S. For a maritime court to wrest such a statutory, nonmaritime right of action from the state tribunals, to the denial of a jury trial and in derogation of the common rights secured by both state and federal statutes, could only be justified by the necessary construction of the limited liability statute and the clear intent of congress, evidenced by the plain language of the act; neither of which, as it seems to me, here exist.

For these reasons I must decline to entertain the proceeding. The petitioner has leave to discontinue.

MORRIS et al. v. BARTLETT et al.

SAME v. WHITAKER et al.

(Circuit Court of Appeals, Third Circuit. April 24, 1901.)

Nos. 4, 5.

JUDGMENT—RES JUDICATA—ADMIRALTY SUITS IN REM AND IN PERSONAM.

A decree dismissing a libel in rem against a vessel to recover for repairs does not constitute an adjudication of the nonliability of the owners, who, under admiralty rule 12, could not be joined as defendants in such suit, and did not intervene therein, unless it clearly appears from the record that such issue was not only raised, but decided, since its determination was not necessarily involved. Where the opinion of the court shows that the decree was based on a finding that the contract was not made with the master as alleged, but with the owners, under circumstances which did not entitle libelants to a lien, an expression of opinion therein that libelants agreed to wait for payment from the earnings of the vessel, which was a question not material to the decision, does not render the decree conclusive upon that question when pleaded in bar of a subsequent suit against the owners, or offered in evidence as an estoppel.

Appeals from the District Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 99 Fed. 786.

J. H. Brinton, for appellants.

Edward F. Pugh and Henry Flanders, for appellees.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. The appellants were libelants in the court below in two suits in admiralty, each brought against owners of the schooner Jennie Middleton to recover for certain repairs to the schooner made by the libelants. Each suit was in personam. In one the service of process was in the nature of foreign attachment; in the other there was personal service of process upon the defendants. There was an appearance by the defendants in each suit, and plea and answer were filed in each case, setting up the same defenses. In each case the libelants gave evidence sufficient to establish their claim. The defendants, respectively, to sustain their plea, put in evidence a certified copy of the libel, amended libel, answer, opinion, and decree (dismissing the libel) in a previous suit in admiralty brought by Joseph I. Morris and others (the present appellants) against the schooner Jennie Middleton in the district court of the United States for the district of New Jersey. The defendants offered no other evidence, but rested their defense altogether upon the decree of the United States district court for the district of New Jersey dismissing the libel against the schooner as a bar to the libels against the owners of the schooner filed in the court below in the cases brought before us by these appeals. The court below sustained this defense, and dismissed the libels in personam on the ground that the subject-matter thereof was *res adjudicata* by virtue of the above-recited prior decree. We are now called on to determine whether or not this conclusion of the court was right. Now, the previous suit against the schooner Jennie Middleton in the district of New Jersey was strictly a proceeding in rem. The libel charged that the schooner belonged to and hailed from the port of Philadelphia, and was owned by residents of that city, and that, being in the port of Camden, N. J., in need of certain repairs to render her seaworthy, the libelants, at the request of her master, contracted to make said repairs, and did make them, and that the same were made "on the credit of the said schooner, as well as of the owners thereof"; and prayed that process of attachment might issue against the schooner, etc. The owners of the schooner were not joined as defendants in the libel, and, indeed, they could not have been so joined. Admiralty rule 12 provides:

"In all suits by material men for supplies, repairs or other necessities, the libellant may proceed against the ship and freight in rem, or against the master or owner alone in personam."

This language as to procedure is in the alternative, and a suit by material men against the ship and owners jointly for repairs cannot be maintained. *The Corsair*, 145 U. S. 335, 12 Sup. Ct. 949, 36 L. Ed. 727. That decision of the supreme court is a distinct authority for the proposition that in no case within admiralty rule 12 can ship and owner be joined as defendants in the same libel, either originally or by amendment. *Id.*, 145 U. S. 341, 12 Sup. Ct. 949, 36 L. Ed. 727.

The owners of the schooner Jennie Middleton did not intervene as parties defendant in the previous suit against the schooner. Whether or not, as claimants of the vessel, they gave the usual stipulation, does not certainly appear from those parts of the record exhibited to us. Probably they did, and we may so assume, but thereby they only became bound to abide by and pay the decree, should the libel against the vessel be sustained. From first to last that suit was wholly a proceeding in rem. The master of the schooner put in an answer, but evidently it was in behalf of the schooner—the res—itsself, the defendant. Specifically answering the several articles of the libel, the answer denied that the repairs in question were made at the request of the master of the schooner, or under any contract with him. It denied that the repairs were made “on the credit of the schooner as well as on that of the owners,” and it denied “that there is any admiralty or maritime lien upon the vessel upon which the libel can be founded or maintained.” After thus responsively denying the fundamental allegations of the libel, the answer proceeded to state, in substance, that the repairs were made under an agreement between the libelants and Bartlett & Shepherd, of Philadelphia, managing owners of the schooner, and that by the terms of the agreement the libelants were to be paid out of the earnings of the vessel; that the vessel had not yet earned a sufficient sum to pay the claim of the libelants; and that, “even if the libelants have a lien on the vessel (which is denied), and even if their account is correct (which is not admitted), their libel is filed prematurely, and ought to be dismissed.” The decree dismissing the libel against the schooner was in these words:

“This cause coming on to be heard upon the pleadings and proofs in the presence of Mr. Joseph H. Brinton, proctor of the libelants, and Messrs. Flanders & Pugh, proctors for the claimants, and the court having heard the argument of the respective proctors, and having duly considered the same, and being of the opinion that the libel should be dismissed, it is accordingly, on motion of Messrs. Flanders & Pugh, proctors of claimants, ordered, adjudged, and decreed that the libel herein be, and the same is hereby, in all things dismissed, with costs.”

This decree, no doubt, conclusively established that the schooner Jennie Middleton was not bound for the debt for the repairs to the vessel. Did it determine any question touching the personal liability of the owners? The decisive issue in the former suit was, lien or no lien? The basis of the libel was the alleged lien, and only on the ground set forth in the libel could there have been a decree against the schooner. A decree must be secundum allegata as well as secundum probata. The *Hoppet v. U. S.*, 7 Oranch, 389, 3 L. Ed. 380. When, therefore, it appeared that the repairs to the Jennie Middleton were not made at the request of the master or on the credit of the vessel, there was nothing else to do but to dismiss the libel, for no personal liability of the owners was enforceable in that proceeding. The *General Smith*, 4 Wheat. 438, 443, 4 L. Ed. 611. There Judge Story, speaking for the supreme court, after stating that, if the suit had been in personam, jurisdiction of the district court to grant relief could have been sustained, added:

"Where, however, the proceeding is in rem to enforce a specific lien, it is incumbent upon those who seek the aid of the court to establish the existence of such lien in the particular case."

The opinion in the suit in the district of New Jersey (*The Jennie Middleton*, 94 Fed. 683) shows that the conclusion of the court was that there was no lien against the vessel for the repairs, and therefore that the libel must be dismissed. Lack of lien, as we have seen, was fatal to the proceeding in rem, and imperatively called for a decree dismissing the libel. The opinion, we think, plainly indicates that the decree of dismissal proceeded altogether upon the ground of failure to establish the existence of a lien. The opinion concludes thus:

"In *The Havana* (D. C.) 87 Fed. 487, Judge Butler said that, 'where repairs are made in a foreign port on the order of owners, the presumption is against the existence of a maritime lien, and the burden is on the libellant to clearly show a contract.' In the case of *The Havana*, the home port of the vessel was Philadelphia. The repairs were made at Baltimore. The alleged lien was for a balance on repairs ordered by the managing owner. The repairs were charged to the vessel. In the absence of evidence tending to show express agreement for lien, the libel was dismissed. In the case under consideration the same state of facts exists. * * * In accordance with the principles laid down in *The Havana* (D. C.) 87 Fed. 487, affirmed in 92 Fed. 1007, 35 C. C. A. 148, and the other cases therein cited, the libel will be dismissed."

It is true, in the course of the opinion the district judge signified his belief that the libelants had agreed to wait for their pay until the schooner had earned the money. This view, however, did not go to the substantial merits of the controversy, but only to the question of when the libelants' right to sue accrued. Moreover, the rule as to the conclusiveness of a judgment or decree does not apply to points which come only collaterally under consideration, or are incidentally considered, or can only be argumentatively inferred from the decree. *Hopkins v. Lee*, 6 Wheat. 109, 5 L. Ed. 218. To give conclusive effect to a judgment or decree upon a question in another suit between the same parties, it must appear that the precise question was raised and determined in the former suit; and if, upon the face of the record, anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered in evidence. *Russell v. Place*, 94 U. S. 606, 608, 24 L. Ed. 214. In that case the rule as to the conclusiveness of a verdict and judgment was thus stated:

"To render the judgment conclusive, it must appear by the record of the prior suit that the particular matter sought to be concluded was necessarily tried or determined,—that is, that the verdict in the suit could not have been rendered without deciding that matter; or it must be shown by extrinsic evidence, consistent with the record, that the verdict and judgment necessarily involved the consideration and determination of the matter."

Guided by the above-cited decisions of the supreme court, we hold that the record of the prior suit here relied on as a defense does not show a decree operating in bar or as an estoppel. The prior suit was a proceeding in rem to enforce an alleged lien against the vessel; the latter suits were in personam to enforce the personal liability of the owners. The subject-matter of suit was not the same in the two

instances, nor was the purpose of suit the same. The failure to show a lien necessarily led to the decree dismissing the libel in rem without regard to any other question. And, finally, we are satisfied, upon an examination of the record, that the decree of dismissal of the prior libel was made on the sole ground that no lien against the vessel was shown. The decree in each of these cases is reversed, and the causes are remanded to the district court for further proceedings.

THE CITY OF DUNDEE et al.

(Circuit Court of Appeals, Third Circuit. May 8, 1901.)

No. 6.

1. COLLISION—ANCHORAGE OUTSIDE OF DESIGNATED GROUNDS—NEGLIGENCE.

The regulations of the port wardens of Philadelphia, providing that "vessels will be allowed to anchor" in certain designated parts of the Delaware river, are permissive and directory, and, while the defiant or needless disregard of them by a vessel would be evidence of negligence, there may be circumstances under which a ship is justified in anchoring outside of the designated grounds, without being chargeable with negligence, as where, in the judgment of an experienced pilot, they are so fully occupied that a place outside is safer, and other ships are also anchored outside, and in the vicinity of the place selected.

2. SAME—FERRYBOAT AND ANCHORED STEAMSHIP.

Evidence held insufficient to establish fault on the part of a steamship anchored in the Delaware river at Philadelphia for a collision caused by a ferryboat striking her in a fog.

3. PILOTS—NEGLIGENT SERVICE—LIABILITY OF PILOTS' ASSOCIATION

The Pilots' Association of the Bay and River Delaware, which is an unincorporated association of pilots, whose objects are limited to the management of pilot boats and the furtherance of the interests of its members in various ways, but which has no power to make contracts for pilotage, its members acting individually in that matter, does not stand in the relation of principal as to such contracts, and is not liable for the negligence or fault of one of its members in the performance of a contract made by him for such service.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

John G. Lamb, for appellant.

Henry R. Edmunds, for the City of Dundee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. This is an appeal from the decree of the district court for the Eastern district of Pennsylvania, in admiralty. 103 Fed. 696. The City of Dundee arrived at Philadelphia about 8 p. m. on September 17, 1899, and, under direction of her pilot, who was a member of the Pilots' Association of the Bay and River Delaware, was anchored at a point near the middle of the Delaware river, above Washington street wharf, Philadelphia, and above Kaighn's Point slip of the Delaware River Ferry Company, on the eastward

or New Jersey side of the river. The place at which the City of Dundee was anchored was outside of and above the anchorage grounds prescribed by the regulations of the board of port wardens of the port of Philadelphia. The night of September 17, 1899, was clear, but a thick fog came up very early on the morning of September 18th. The ferryboat City of Reading started out on her first trip at 5:30 on the morning of September 18th, from Kaighn's Point, Camden, to Chestnut street wharf, Philadelphia. When she left her slip, at 5:30 a. m., the weather was thick, heavy, and foggy. She made one round trip, going up the river from Kaighn's Point, on the eastern side of the river, and crossing to Chestnut street, returning on the western side, and crossing to Kaighn's Point. She then made another trip to Chestnut street, and was returning to Kaighn's Point, when the collision complained of in the libel happened. The fog continued thick, and there is no testimony that those in charge of the City of Reading had seen the City of Dundee, or had any knowledge of her presence in the river. On the trip on which the collision happened, the Reading left Chestnut street slip at 6:46 a. m. The tide was ebb. She was properly officered and manned and equipped. The captain was at the wheel, and the assistant pilot was in the pilot house with him. Two lookouts were stationed forward,—one on the upper deck, in front of the pilot house, and the other on the main deck. When she left the slip, she proceeded down the river on the western side, blowing her whistle frequently, as required by law, and sometimes stopping to locate signals from other vessels. On this trip the fog became very dense, so that it was not possible to see more than 20 feet ahead. There were two steamers and a schooner anchored in the river above the Dundee, and consequently outside the anchorage grounds referred to, the schooner being the vessel next north of the Dundee.

The bells on these vessels seem to have been heard on the Reading by the officers and passengers; none of the witnesses from the Reading, however, saying that they heard any bell or other signal from the Dundee. They also testified that they heard the bell on the Kaighn ferry slip on the New Jersey side, and it appears that the officers were especially listening for that, as they were governed by its sound as to when to starboard the wheel to go across the river. The Reading then stopped to allow the ferryboat America, of the same line, going up the river, to pass her. The America passed the Reading to the eastward. The Reading then started ahead under one bell, and turned to go across the river to her slip at Kaighn's Point. After she had gone ahead under one bell, making a few turns of her paddle wheels, the pilot said he heard a small jingle bell, and at the same time the lookout reported something ahead, and the pilot immediately saw the anchor chain of the Dundee 10 or 15 feet ahead. The Reading was at once stopped and reversed, but the ebb tide threw her across the bow of the Dundee, tearing out her guard, and breaking in the side of the cabin of the Reading. For this damage the master of the Reading libeled the

City of Dundee. The master of the City of Dundee presented his petition to the court, under the fifty-ninth admiralty rule of the supreme court, asking that the Pilots' Association of the Bay and River Delaware might be made parties to the proceedings, which petition was granted. Testimony was taken, and after the hearing the court below dismissed the libel, holding that the charge that the steamship was negligent, because she failed to give the customary signals, was not sustained, and that the steamship should not be held liable for the conduct of the pilot, even if it be conceded that the injury was caused by his having anchored her in an improper place, and without sufficient excuse. The court also held that, as the pilot was not individually a party, the question of his blameworthiness is not material, unless he was the agent of the other respondent,—the pilots' association,—so that his misconduct, if any existed, could be attributed to his principal. But the court also held that, though the pilot was a member of the association, the association itself had nothing to do with the pilotage of vessels upon the Delaware river, but was an unincorporated society, intended to further the interests of the pilots, as a beneficial association, but does not attempt to take charge of vessels, nor to conduct them safely between the capes and the city of Philadelphia, the court concluding its opinion as follows:

"I think, therefore, that as the steamship was not at fault, and as the association was not liable for the conduct of the pilot, no fault has been shown entitling the libellant to recover."

The grounds upon which the City of Dundee is charged by the libellant with liability for the collision, and its consequent damage, are set forth as follows in the libel:

"(1) Because the steamship City of Dundee was anchored at an improper place, and at a place forbidden by the regulations of the board of port wardens of the port of Philadelphia. (2) Because the steamship City of Dundee did not sound a bell or give any other signal to indicate her presence in time to avoid a collision. (3) Because the bell which was rung was not loud enough to be heard at a sufficient distance to avoid a collision."

As to the first ground of liability, we are referred by the libellant to certain regulations adopted by the board of port wardens, April 3, 1899, as to anchorage of vessels at the port of Philadelphia. These, among other things, provide that "vessels will be allowed to anchor in the Delaware river, (a) in the channel between Cooper Point and Petty Island, so as not to interfere with the vessels going to and from Cooper Point; (b) east of lines drawn between" certain buoys thereafter described. Such regulations by such authority are directory and permissive, and may be enforced by the state authority which adopted them, provided they do not interfere improperly or unnecessarily with the free navigability of waters open to interstate and foreign commerce. A defiant or needless disregard of them would constitute an important fact in the consideration of negligence.

It is plain, however, that circumstances may exist which would justify a vessel in anchoring beyond or outside the limits thus pre-

scribed, and which would involve no imputation of negligence in so doing. Assuming that the vessel is liable for the act of her pilot, the facts disclosed by the record, in our opinion, justify the anchorage of the Dundee in the place she was found on the morning of the collision, and outside the anchorage grounds prescribed by the port wardens' regulations, and remove any imputation of negligence that otherwise might be raised as an element in determining the general question of liability. The pilot—one of the most experienced on the Delaware river—testifies, and his testimony is not controverted, that he came up the river with the Dundee and anchored her on Sunday night, the 17th of September, 1899, in the place where she was found the next morning by the City of Reading; that she was anchored, under his direction, in about the middle of the river; that the anchorage was selected because it was the best he could find; that he watched all the way up from Gloucester, and could not see any other place so safe as this; that he came up slowly through the anchorage ground, and stopped often to find a place; that he anchored above the anchorage ground; that a number of other vessels were anchored in that neighborhood; that there were two foreign steamers just above the Dundee, and one four-masted schooner just east of her, and a steamer below, and that the whole anchorage ground was filled up below them; that he had seen the steamers above where he anchored, in their position outside the anchorage grounds, for four or five days; that it was about 8 o'clock when he anchored,—a beautiful moonlight night; that there was no sign of fog during that evening, and that after anchoring the ship he left it, and went to his home, in Philadelphia. The fog came up early the next morning, and created the condition that conduced to the accident. We think this uncontradicted testimony of the pilot is sufficient to negative the first position taken by the libellant, that the Dundee had anchored at an improper and unlawful place.

It becomes necessary, then, to consider the second ground upon which the liability of the steamship is urged; that is, that she "did not sound a bell or give any other signal to indicate her presence in time to avoid a collision." Though no ground of liability is found in the anchoring of the Dundee at the place where the collision occurred, if there were negligence in omitting the proper and usual signals required by the supervening condition of fog on the morning of the 18th, the steamship must be held liable for the consequence of a collision, which, in that case, would be attributable to such negligence as a proximate cause thereof. This liability would be solely that of the Dundee, in the absence of contributory negligence on the part of the City of Reading. The Reading appears, from the testimony, to have left its wharf at Chestnut street, Philadelphia, about 6:46 a. m. The fog which had been prevailing since daylight had not lightened, and it was with difficulty that objects could be seen a few feet ahead of the steamer. She appears to have proceeded slowly down the western side of the river, stopping once or twice at the sound of bells, until a point was reached where the

pilot and those on the lookout heard the Kaighn's Point slip bell, on the opposite side of the river, in such relative position as induced them to starboard the helm, and turn the boat across the river, in the direction of its slip, on the New Jersey side. The pilot, assistant pilot, and lookouts on the Reading testified that they did not hear the bells on the Dundee. So, also, certain of the passengers testified that they heard no bells on the Dundee. They did hear bells on the vessels anchored above the Dundee, on their way down. One of the passengers testified that he was "standing outside, listening for signals, the same as others; saw the City of Dundee before she struck, about ten feet away, loom up so quick, and heard no bell from the Dundee, but heard ferry house bell [on the other side of the river]." The same passenger also testified that, as they passed the steamer lying above the Dundee, he heard her bell, and several of the men on her speak to the men on the Reading about the Dundee being further down the river.

In criticising this testimony of the witnesses who were on the Reading, and who did not hear the bells on the Dundee, it is to be observed that some of them heard no bells after leaving Chestnut street, except the Kaighn's Point bell, while others heard the bells on several of the vessels above the Dundee, and which they passed before coming to her. It is to be noticed that those who heard the bells of the steamers and schooner lying just above the Dundee heard them as they passed them, and the Dundee was still below them, and they were never in the same position relatively to her that they were to the other vessels whose bells they heard.

It is, at all events, apparent that the officers on the Reading, as well as the passengers, were listening, naturally enough, for the Kaighn's Point bell, and had their attention strained in that direction, as by it they were to direct their course across the river. Opposed to this negative testimony is that of the master, first officer, and quartermasters on the Dundee, all of whom testified that the regular bell used in fogs on the bridge amidship was rung at intervals of a minute or oftener, while a steel triangle was hung upon the taffrail at the stern, and was constantly sounded. The captain of the Dundee states that, just before the ferryboat collided, the man was ringing continuously right over his head on the bridge, he being in his cabin. The first officer testifies "that he went on duty at 4 o'clock; that it was not then foggy; that the fog came up at a quarter to 6; that he then started the ringing of the bell; that he stationed a man to keep up ringing every minute, or oftener, if any vessel sounded whistles very close; he did it." He also testifies that, at five minutes of six, he stationed a man at the triangle aft. He says, in answer to the question, "Will you say, under oath, that the bell was ringing in this fog just before the collision, or the time of the collision?" "Yes, sir; I am sure the bell was ringing every half minute. It was oftener than a minute." The quartermasters who were examined all testified to the same effect. The quartermaster stationed at the bell testifies that he was ringing constantly after the fog. He says he heard the whistle from the

Reading, and kept the bell then going almost continuously. So, also, as to the ringing of the triangle. There does not appear to have been any special watch set upon the Dundee. The absence of such a watch might have been a ground for criticism, were it not that it appears from the evidence that about one-half the crew were on deck, variously stationed, and at work, during the time in question. It appears that there were five quartermasters and others of the crew, in all nineteen people, on the deck of the Dundee; one quartermaster specially stationed at the bell, another at the triangle, and the others occupied variously around the deck. It does not appear, therefore, that any greater precaution was necessary than was actually exercised, or that any different result would have occurred had there been a special anchor watch.

But, more than this, there was the testimony of one in no way related to, or interested in, the Dundee,—the mate of the Charing Cross, anchored about 600 feet below the Dundee. He says that he never saw the Dundee before, and has never seen any one connected with her since, the collision. He, in part, testifies as follows:

“Q. Do you remember the City of Dundee being anchored there? A. Yes, sir; I saw her there. Was on deck from 6 to 8 o'clock. Q. Were you ringing your fog bell? A. Yes, sir. Q. Will you say whether or not you heard the City of Dundee ringing her fog bell? A. Yes, sir; the same as our own. Q. You are certain about that, are you? A. Yes, sir. Q. What kind of bell was it? A. Ordinary ship bell. Q. You heard it distinctly, did you? A. Yes, sir. Q. Have you any doubt it was the City of Dundee's fog bell you heard? A. No doubt at all. She was in the same position all the time; she was the closest ship to us. Q. I understood you to say that the direction you heard the Dundee's bell from was just where the Dundee was? A. Yes, sir; all the time.”

If those in charge of the Reading were not at fault, the collision was the result of an inevitable accident, for which no legal liability rests anywhere. The court below was clearly right in declining to sustain the charge of negligence on the part of the steamship, in failing to give customary signals.

The third ground of liability, as stated in the libel, is because the bell which was rung was not loud enough to be heard at a sufficient distance to avoid a collision. What we have already said in regard to the negative testimony of those on board the Reading, as contrasted with the positive testimony of those on board the Dundee, will suffice to dispose of this point. The same testimony which supports the allegation that the bell and triangle were continuously and properly sounded establishes the sufficiency of the bell upon the bridge, and also establishes the extra precaution of the triangle upon the stern.

The court was clearly right, also, in its opinion that the libel could not be maintained against the Pilots' Association for the Bay and River Delaware. “It was and is an association *inter sese*, and its objects are limited to the management of its pilot boats, and the division of the moneys received from its members, according to their respective shares, as set forth in its rules. It has no power to contract for pilotage service. The pilot offers himself and serves

in his individual capacity, and is paid in that capacity. He has no power to bind all or any of his associates; his contracts, his acts of omission and commission, not relating to the purposes of the association. He is not engaged in the business of the association, but is a licensee of the states of Delaware and Pennsylvania respectively, and is governed by the laws of said states as to his conduct and acts as pilot." No contracts of pilotage are made with this association, and no pilot, in conducting a vessel through the bay and river Delaware, is in any wise acting as agent of such association.

It is not necessary that we should pass upon the opinion expressed by the court below, that the steamship could not be held liable for the conduct of the pilot, even if it be conceded that the injury was caused by his having anchored her in an improper place, and without sufficient excuse, but we do not wish that our silence should be taken as sanctioning this proposition.

A careful review of all the evidence convinces us that the decree of the court below, dismissing the libel, was right, and the same is hereby affirmed.

THE ANDREW J. WHITE.

(District Court, E. D. New York. March 22, 1901.)

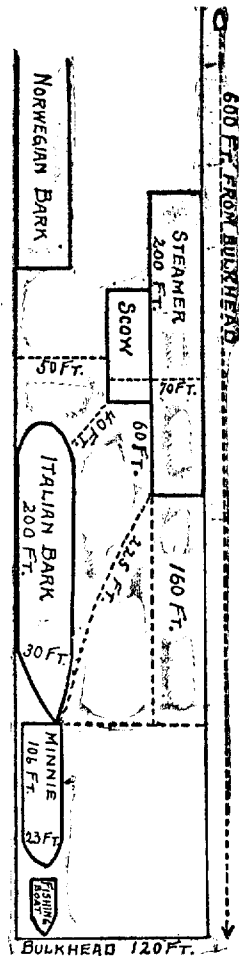
TOWAGE—LIABILITY OF TUG FOR INJURY TO TOW—WRONGFUL ASSUMPTION OF AUTHORITY BY MASTER.

A tug was engaged to perform towage services by the master of a barkentine, which lay at the foot of a slip in which a number of other vessels were moored. The owner of the tug refused to take the tow from inside the slip, and the master of the latter agreed to deliver her at its mouth. When the tug arrived, however, the barkentine had not been brought out of the slip, and the master of the tug gratuitously undertook to bring her out. The undertaking was dangerous, and was not executed with proper care on the part of either vessel, in consequence of which the barkentine came in collision with another vessel in the slip, and was injured. *Held*, that after the refusal of the owner of the tug to undertake the service, which was known to the masters of both vessels, the master of the tug had no authority to bind her, or to subject her to liability, by wrongfully undertaking it, and that the attempted maneuver was therefore at the sole risk of the tow.

In Admiralty. Suit against a tug for injury to her tow from collision.

Black & Kneeland, for libelants.
James J. Macklin, for claimant.

THOMAS, District Judge. The tug Andrew J. White attempted to take the barkentine Minnie out of the slip between the Twenty-Sixth and Twenty-Seventh street piers, Brooklyn, N. Y. The latter collided with a scow. Hence the injury which is the subject of the libel. The first necessity is to understand the slip and its incumbrances, which the following diagram shows approximately:



Distance from inner end of scow to line drawn from stern of Minnie, approximately 225 feet; distance from inner end of steamer to same line, approximately 160 feet; distance from inner end of steamer to scow, 60 feet; distance from stern of Italian bark to stern of Minnie, approximately 200 feet; distance from inner end of scow to stern of Italian bark, 40 feet; clear space outside of scow for passage, approximately 50 feet.

There were other vessels in the dock, but no attempt is made to accurately place any save the fishing vessel, Minnie, Italian bark, steamer, scow, and, tentatively, the Norwegian bark. The evidence respecting the last-named vessel is contradictory, but on the diagram it is placed as far abaft the Italian bark as any evidence in the case justifies. The widths of some of the vessels are not given in the evidence, but the smallest dimension is adopted compatible with the nature or known length of any particular vessel. There is slight evi-

dence that the slip was 100 feet wide, but the width of 120 feet is here adopted as more probably correct. If the relations of the several vessels in the slip as above given be deemed unsatisfactory, yet any other arrangement consonant with the evidence of either party should lead to the same conclusion.

The problem was to pull the Minnie's stern from under the bow of the Italian bark, thereupon adjust her course during the distance of 220 feet, so that she would pass clear of the scow and obstructions on the opposite side, and pass through the narrow openings exhibited above. The passage was possible, under very nice adjustments, if duly executed pursuant to careful precautions. As the libelants' counsel states in the presentation of another feature of the case: "The barkentine was being towed out of a narrow and incumbered slip, where care was necessary, and any disobedience of orders was certain to cause embarrassment, if not disaster." The highest care was necessary. The slightest negligence in preparation or execution of orders, any deviation from the right course, even slight acceleration of speed beyond that just suitable, the failure of the tug to go to port at precisely the right instant, the failure to order down the anchors at the very exact moment required, or to obey such order with accuracy, would lead to collision and injury. The evidence illustrates all this. The headline that was to check the speed of the Minnie was thrown off when it ran out, or, as some of the witnesses for the Minnie stated, long before it ran out, if the length ascribed to it by the captain of the Minnie be accepted. There was nothing there to check the vessel's speed. The captain of the tug claims that he supposed that it would not be thrown off; that he directed it not to be. But when he discovered that it had been, and that he was in a dilemma, he did not at the instant order the anchor down, but directed a line from the barkentine to the Italian bark. When he discovered that there was no one on the bark to take the line he ordered down the anchor, but it is probable that the Minnie was so near the scow that the order could not be executed with sufficient quickness to save the contact; at least, it was not. Both parties entered upon a dangerous endeavor. It was unnecessary. The scow could have been moved easily, and the parties interested had power to compel its removal to another berth. It was negligent for either or both of them to undertake this maneuver. Hence, under ordinary circumstances, the damage would be placed on both.

But there is another element in this case that may not be overlooked. It is admitted that on the previous evening the captain of the Minnie made a towage contract with the agent of the owners of the tug, and that the agreement was that the captain of the Minnie should have her hauled down to the mouth of the slip ready for the tug. The evidence shows a practical refusal on the part of the owners of the tug to take the barkentine from inside the slip. Upon the arrival of the tug the next morning to do the work, the captain of the tug states that the following took place:

"Q. Did you have any talk with the captain of the barkentine? A. I says to the captain, 'You should have had this vessel hauled down.' I said, 'Here

is a hard place to get her out of here now.' He said, 'I couldn't get her hauled down, because we didn't get loaded till 7 o'clock last night.' * * * Q. Did you refuse to take him then? A. No; I didn't refuse to take him then. Q. What was said about taking him? A. Nothing was said; we went to work to try to get her out of there."

The situation, then, is that the captain of the Minnie knew that the owner of the tug declined to have the tug draw the barkentine out of the slip, and that the master of the tug, in undertaking the office, assumed to do an act which the owner had declined specifically to allow him to do. And he knew, moreover, or should have known, that the service which she was undertaking required so careful maneuvering as to be dangerous. Hence, the service on the part of the tug was not only gratuitous, but, to the knowledge of the parties immediately participating, it was done against the will of the owner. Undoubtedly, the fact that the service was gratuitous would not preclude liability in case of sufficiently negligent execution of the work; but, where the master of a tug undertakes a service known to him and to the master of the tow to be wrongful as regards the owner of the tug, the doctrine that the act of the master is binding upon the vessel should not be applied. The master speaks authoritatively in the absence of the owner. In this case, the owner had withdrawn that authority by stipulating with the captain of the barkentine that it should not be exercised. Hence the master of the tug was acting as the servant or helper of the captain of the vessel, gratuitously doing a duty which the latter person had undertaken to do as regards the owner of the tug, and wrongfully using his employer's tug in this service. Of course, it is to be considered that the master of the tug might prefer to pull the tow out of the slip rather than to await the slow process of her own crew working her out, but that does not meet the vital objection that he was doing a thing which he had no right to do. He knew this. The captain of the barkentine knew it, and had agreed that it should not be done. This court should not sustain the asserted rule that a captain of a vessel may make a specific contract for towage with the owner of a tug, which carefully excludes hauling from the slip on account of recognized danger, but the master of the tug, on arrival, may annul the provision for taking from the slip, and assume the risk thereof, which his employer has rejected, and which the captain of the tow assumed. The libel is dismissed.

BOARD OF LIQUIDATION OF CITY OF NEW ORLEANS v. UNITED STATES ex rel. WARNER et al.

(Circuit Court of Appeals, Fifth Circuit. March 5, 1901.)

No. 964.

1. FEDERAL COURTS—ANCILLARY JURISDICTION—MANDAMUS.

A federal court has jurisdiction, as ancillary to an action therein in which a judgment was rendered against the city of New Orleans, to award a writ of mandamus against the board of liquidation of the city debt to compel such board to pay or fund the judgment as required by the state statutes. Such jurisdiction is not affected by the fact that the board was not a party to the principal suit, since it is a department of the municipal government created by statute, and charged with the sole duty of liquidating the indebtedness of the city.¹

2. SAME.

The jurisdiction of a federal court to award a writ of mandamus is not dependent on the laws or practice of the state, but is derived from the federal statute originally section 14 of the judiciary act of 1789, and now Rev. St. § 716.

8. MUNICIPAL CORPORATIONS—NEW ORLEANS—INDEBTEDNESS FUNDABLE UNDER STATUTE.

Warrants issued by the city of New Orleans under a contract made in 1876 constitute floating debt claims, within the terms of legislative act No. 67 of 1884, which provides that the board of liquidation of the city debt "is hereby authorized and required, and it is made the duty of said board, to retire and cancel the entire debt of the city of New Orleans now in the form of executory judgments and registered, * * * and that which hereafter may become merged into judgments and likewise registered, except the floating debt or claims created for and against the year 1879 and subsequent years; that it is the full intent and meaning of this act to apply solely the privileges thereof to * * *, and to such floating debt or claims against said city for 1878 and previous years, merged and to be merged into executory judgments." Such provisions are, moreover, mandatory, and vest the board with no discretion to refuse to pay or fund, as provided in the act, any judgment rendered on a claim embraced within its terms.

4. SAME—JUDGMENTS.

The New Orleans funding act, passed as part of Act No. 110 of 1890, and ratified by the constitutional amendment adopted in 1892, appropriates the proceeds of the sale of \$10,000,000 of constitutional bonds to the payment of judgments and the outstanding bonds of the city "matured or subject to be called." *Held*, that the board of liquidation, charged with the duty of administering the fund, could not defend against an application for a writ of mandamus to require it to pay or fund a judgment fundable under such law on the ground that the bonds remaining in its hands were required to retire outstanding unmatured bonds not shown to be subject to call, such bonds not being within the terms of the act, and, even if they were, having no right of precedence over judgments.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

The following is the opinion of the circuit court (SWAYNE, District Judge):

It appears from the undisputed facts in this case that the relators lately recovered judgments against the city of New Orleans for considerable

¹ Supplementary and ancillary proceedings and relief, see note to Toledo, St. L. & K. C. R. Co. v. Continental Trust Co., 36 C. C. A. 195.

amounts, based on drainage warrants issued by the city in discharge of the consideration of a contract of purchase and compromise entered into between it and Warner Van Norden, transferee of the Mississippi & Mexican Gulf Ship-Canal Company, on the 7th day of June, 1876; that writs of *fi. fa.* were issued on the judgments, which were returned *nulla bona*, prior to the filing of the petition herein; and that the judgments have been registered in the office of the comptroller of the city, under the provisions of legislative act No. 5 of 1870. The relators have brought this proceeding praying for the issuance of a writ of mandamus for the purpose of compelling the board of liquidation of the city debt to fund their judgments. Their claim to relief is based on the provisions of various articles of the constitution and acts of the legislature of the state. By article 254 of the constitution of 1879, the general assembly was directed at its next session after the adoption of the constitution to enact such legislation as might be proper to liquidate the indebtedness of the city of New Orleans, and apply its assets to the satisfaction thereof. In obedience to this mandate, the legislature at its next session passed Act No. 74 of 1880, which authorized the city to issue 3 per cent. bonds in exchange for the unbonded valid indebtedness of the city not in judgment. At the same session, Act No. 133 was passed, which created a board of liquidation, composed of six citizens, giving them exclusive control of all matters relating to the bonded debt of the city. The third section of the act authorized and empowered the board to retire and cancel the entire valid debt of the city of New Orleans, except the floating debt created prior to the date of the act, and for this purpose required the city to issue \$10,000,000 of its bonds, to be used by the board to take up such indebtedness. This section of the act was subsequently amended by Act No. 67 of 1884, in the following language: "Be it enacted that section 3 of Act 133, approved April 10, 1880, be amended and re-enacted so as to read: That the said board of liquidation of the city debt be, and it is hereby authorized and required, and it is made the duty of said board, to retire and cancel the entire debt of the city of New Orleans now in the form of executory judgments, and registered, under the provisions of Act No. 5 of 1870, and that which hereafter may become merged into judgments and likewise registered, except the floating debt or claims created for and against the year 1879 and subsequent years; that it is the full intent and meaning of this act to apply solely the privileges thereof to executory judgments at present rendered against said city and to such floating debt or claims against said city for 1878 and previous years merged and to be merged into executory judgments, whether absolute or rendered against the revenues of any particular year or years previous to the year 1879; that for the purpose of retiring and cancelling said judgment debt the said board is authorized and required to sell the bonds to be issued under this act at not less than par value and apply the proceeds thereof to the payment of the said judgment as above specified, or issue said bonds in exchange for said judgments." These enactments seem to have remained in abeyance until 1890, when, by joint resolution No. 110 of that year, another funding act was passed, substantially of the same character as that of 1884, and submitted to the people for ratification by a constitutional amendment, which was adopted in 1892. The third section of this act, so ratified, provides that the \$10,000,000 of bonds therein required to be issued shall be sold by the board of liquidation, and the proceeds deposited to the credit of a fund to be called the "Bond Sale Fund," "which said fund shall be used solely and exclusively for the purpose of retiring by payment all said now outstanding valid bonds of the city of New Orleans, matured or subject to be called, including the certificates or bonds issued under the fourth section of the Act No. 58 of 1882, and including judgments now or hereafter rendered on floating debt claims prior to 1879, entitled to be funded under Act No. 67 of 1884." The board of liquidation admits that of the \$10,000,000 of bonds issued under these funding laws there remain in its hands, unsold, bonds to the amount of \$991,500, applicable to the payment and retirement of the bonded and judgment indebtedness of the city, but denies that the relators are entitled to the relief prayed for in their petition. The defenses set up in the answer may be stated under the following heads: First. That this is an original

proceeding for a mandamus, not ancillary to the suit in which the judgments of relators were recovered, of which the court has no jurisdiction. Second. That the judgments of the relators are not based on floating debts or claims against the city, entitled to be paid under any of the said funding laws. Third. That the funding of said judgments is discretionary with the board of liquidation, and that it cannot be coerced by the courts. Fourth. That the board is in duty bound to retain enough of said bonds to meet all outstanding unmatured bonds of the city,—this on the theory that the bonded debt is entitled to priority over the judgments.

None of these defenses are, in my opinion, well pleaded. The objection to the jurisdiction is based upon the theory that the present proceeding, although it seeks to enforce a remedy provided by statute for the payment of judgments against the city, is an original suit, not ancillary to the relators' judgments, because it is brought against the board of liquidation, which, it is claimed, is a third person, entirely distinct from the city. The city and board of liquidation are, no doubt, for certain purposes, separate corporations, but it does not follow that the board is not a part of the municipal government of the city of New Orleans. Its only function under the law creating it is that of a statutory trustee to fund the debt of the city, and to receive and disburse the revenues applicable thereto. But, in my opinion, it is not necessary to define the true relation existing between the board and the city. It is enough, for the purposes of this case, that the relators are entitled to obtain satisfaction of their judgments in the manner provided by these funding laws. The right to a mandamus against one corporation charged by statute with the payment of a judgment against another has the direct sanction of the supreme court of the United States in the case of *Labette County Com'rs v. U. S.*, 112 U. S. 221, 5 Sup. Ct. 109, 28 L. Ed. 699. Says Justice Matthews in this case: "The objection that the circuit court had no jurisdiction to issue its mandamus to the plaintiffs in error is based upon the supposition that, because they are not parties to the judgment against Oswego township, and are not officers or representatives of that municipal corporation, but are officers of the county of Labette, the proceeding against them is the exercise of an original jurisdiction, which does not belong to that court. It is quite true, as it is familiar that there is no original jurisdiction in the circuit court in the mandamus. * * * But it does not follow, because the jurisdiction in mandamus is ancillary merely, that it cannot be exercised over persons not parties to the judgment sought to be enforced. An illustration to the contrary is found in that class of cases of which *Krippendorf v. Hyde*, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145, is an example."

There seems to be no foundation for the further contention made by the board that the circuit court of this district has no jurisdiction to issue the writ of mandamus in any case, because it has not been shown that the remedy was adopted from the state practice by the practice act of 1872, or any general order of this court. The writ was authorized by the fourteenth section of the original judiciary act of 1789, now section 716 of the Revised Statutes, and is not derived from any practice act of the state. *Bath Co. v. Amy*, 13 Wall. 244, 20 L. Ed. 539; *Riggs v. Johnson Co.*, 6 Wall. 167, 18 L. Ed. 768; *Rosenbaum v. Bauer*, 120 U. S. 450, 7 Sup. Ct. 633, 30 L. Ed. 743.

The contention that the drainage warrants upon which the judgments of the relators are based, which were issued under the contract made by Warner Van Norden with the city of New Orleans in 1876, do not constitute a claim against the city, or form part of the floating debt of the city entitled to be funded under Act No. 67 of 1884, is equally untenable. The debts upon which these judgments were rendered necessarily originated under the contract of 1876, and the judgments themselves fix the date when the debts or claims represented by the warrants became due by allowing interest from June 6, 1876. That the warrants became claims when issued, admits of no doubt. Payment not being provided for by the city, they were floating debt claims, and, as such, are included within the class of indebtedness fundable under the law. *Duchenne v. Board*, 51 La. Ann. 1142, 26 South. 55; *People v. Wood*, 71 N. Y. 374.

The argument that the indebtedness represented by the warrants is not a claim, or a floating debt claim against the city, intended to be funded by

the lawmaker, because it had never been recognized and carried on the books of the city as a liability, is supported by neither reason nor authority. It is enough that these funding laws are so written as to include that indebtedness in express terms.

But it is contended, admitting all this to be true, that it is entirely discretionary with the board whether it will fund relators' judgments or not. I have carefully examined the various statutes defining the powers of the board, and find no provision of the law tending to support this proposition. Act No. 67 of 1884 is not, in any sense, a directory or permissive statute, but it is in the highest degree mandatory. The language of the act is, "That the board of liquidation of the city debt be, and is hereby, authorized and required, and it is made the duty of said board, to retire and cancel the entire debt of the city of New Orleans," etc. But, even if the language of the statute granting authority to the board had been permissive in form, it would be treated, on principle, as mandatory in fact. Says the supreme court in *Supervisors of Rock Island Co. v. U. S.*, 4 Wall. 446, 18 L. Ed. 423: "The conclusion to be drawn from the authorities is that, where power is given to a public officer, whenever the public interest or individual rights call for its exercise, the language, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depository to meet the demands of right, and to prevent a failure of justice." The board of liquidation, being without discretion to refuse to fund the relators' judgments, its action is clearly subject to judicial review. *Creole Steam Fire-Engine Co. v. City of New Orleans*, 39 La. Ann. 981, 3 South. 177. Whether a judgment is fundable is necessarily an issue in all proceedings for mandamus in cases of this character, to be determined by the court in the same manner as the other issues. *Nelson v. St. Martin's Parish*, 111 U. S. 716, 4 Sup. Ct. 648, 28 L. Ed. 574.

The only other question requiring consideration is whether the board of liquidation has the right to retain a sufficient amount of these bonds to satisfy the prior writs of mandamus granted in the suits of *Mrs. Fisher et al.* and *Mrs. Wilder et al.*, and also a sufficient amount to meet certain outstanding unmatured bonds of the city, which it is claimed are fundable. I understand that the relators' attorneys concede that enough bonds should be reserved to satisfy these prior writs, but deny the authority of the board to retain any bonds to refund bonds that are not yet due. The contention of the relators as to the unmatured bonds is correct. The funding act passed as part of Act No. 110 of 1890, which was ratified by the constitutional amendment adopted in 1892, appropriates in express terms the proceeds of the sale of the \$10,000,000 of constitutional bonds to the payment of judgments and the outstanding bonds of the city, "matured or subject to be called." As it appears that all the outstanding bonds are unmatured, and it does not appear that any are subject to be called, or have been called, they are necessarily excluded from the benefit of the funding laws. Even if this were not so, I find nothing in these laws giving bonds a priority over judgments in the application of the proceeds of the sale of constitutional bonds, and the court can give none. When a creditor has accepted the offer to fund, and has made a demand for payment, it is not for the board of liquidation to refuse because some other creditor may present himself at some future day, and make a like demand. The maxim is, "*Qui prior est tempore potior est jure.*"

B. K. Miller, for plaintiff in error.

John D. Rouse, Wm. Grant, and Richard De Gray, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. All the reasons urged for reversing the judgment below in this case are fully met and answered in the opinion filed by the acting circuit judge, and found in the record. The judgment of the circuit court is therefore affirmed.

YOUTSEY v. HOFFMAN et al.

BAILEY v. CINCINNATI LEAF TOBACCO WAREHOUSE CO.

(Circuit Court, D. Kentucky. March 25, 1901.)

1. RECEIVERS—EFFECT OF APPOINTMENT—RIGHT TO FILE PLEADING.

A receiver does not, by virtue of his appointment, become a party to the litigation, so as to entitle him to file a pleading therein of which other parties are required to take notice.

2. REMOVAL OF CAUSES—TIME FOR MAKING APPLICATION.

In a suit in a state court to wind up the affairs of a corporation, pending a reference to a commissioner to take proofs and report upon the claims against the corporation, the receiver, by leave of court, filed what he called an "answer and set-off," in which he admitted the correctness and validity of the claims which two persons had proved before the commissioner, but pleaded as a set-off a claim for damages against them arising out of their alleged misconduct as officers of the corporation. Such claim was not one which the state statute authorized to be pleaded as a set-off or counterclaim, no order was entered making the receiver a party to the suit, and no process was issued upon his pleading. Without any appearance by the persons against whom such claim was made, a joint judgment was rendered against them thereon for a large sum. Subsequently they appeared specially and moved to set the judgment aside, and pending such motion one of them pleaded to the merits as to the claim made against him by the receiver's pleading, and at the same time filed a petition and bond for removal, being a citizen of another state. After removal, the receiver moved to remand. *Held*, that the receiver was not a party to the suit, nor entitled to file any pleading therein; that the pleading filed by him was in legal effect a petition instituting a new action, in which the court could acquire jurisdiction of the defendants only by due service of process; and that, treating the action of one of them in pleading to such petition as an appearance which conferred such jurisdiction over him, his application for removal made at the same time was timely.

3. SAME—SEPARATE CONTROVERSY.

The liability of officers of a corporation for damages alleged to have been sustained by the corporation by reason of their misconduct, where no conspiracy is alleged, is several, and an action against two such officers to recover damages on that ground is separable as to each defendant.

On Motion to Remand to State Court.

C. J. & W. W. Helm (Paxton Warrington and A. J. Marsh, of counsel), for receiver.

Lawrence Maxwell, Jr., Wright & Anderson, and S. J. Crawford, for defendant Hoffman.

EVANS, District Judge. On July 2, 1900, S. C. Bailey, a citizen of Kentucky, brought an equitable action in the Campbell circuit court against the Cincinnati Leaf Tobacco Warehouse Company, a Kentucky corporation, as sole defendant, in which the plaintiff sought to have the affairs of the corporation wound up, and its assets distributed among the persons entitled thereto. Soon afterwards James C. Ernst was appointed the court's receiver in the action, and subsequently the case was referred to the master commissioner, who was directed to take proof and ascertain and report the claims against the defendant. Under this reference, H. H. Hoffman and Henry Feltman, among others, proved before the master their claims against

the corporation. Objection was made to this proof, and the commissioner so reported. This being the situation, and before the commissioner finally reported on those claims, Ernst, on August 17, 1900, was discharged as receiver, and J. J. Youtsey was appointed in his stead. On October 6, 1900, Youtsey, as receiver, as the order of that date shows, "moved for leave to file an answer and set-off, and he was given leave to do so," but it did not otherwise specify the purpose in view. There was no notice given of this motion of this outside person, nor was any order entered making the receiver a party to the action. On the 10th of October, but without any actual notice of his application to do so, unless the very brief publication in the court's bulletin can be called such, he accordingly filed his answer and set-off. It had reference alone to the claims which H. H. Hoffman and Henry Feltman had proved before the master, the validity and justice of all of which he therein expressly admitted, thus avoiding all litigation as to them so far as he was concerned; but he insisted that the defendant corporation had a large demand against them, which he then proceeded to plead as a set-off. This demand was based entirely upon the charge that Hoffman and Feltman were, respectively, the president and treasurer of the corporation (each being also a director), and that, being so, they had violated their respective duties and obligations as such, by reason of which the company had been greatly injured and damaged, by paying dividends which were not earned, and under cover of which they sold their holdings of the company's stock. Youtsey, the receiver and officer of the court, had never theretofore in any wise been made a party to the action. As stated, he admitted the justice of the claims filed by Hoffman, and sued him upon a different one, and in respect to which Hoffman had never appeared in court. No summons or other process was issued upon the pleading thus filed in the case by the receiver; nor was any appearance thereto entered, though its pendency and the proposed prospective steps to be taken thereon were noted in a vague way upon the official bulletin of the court, published under its general rules. Assuming that it had in this way acquired jurisdiction of the persons both of Hoffman and of Feltman, the court rendered judgment against them jointly for nearly \$90,000 on October 27, 1900. Early in November, 1900, Hoffman and Feltman appeared specially, and only for that purpose, and, upon grounds stated in writing, moved the court to vacate and set aside the judgment thus rendered against them; and these motions were set for hearing at a future date. On the 9th of December the receiver filed his written objections to the pending motions of Hoffman and Feltman, unless, as he therein expressed it, they would file pleadings to the merits and waive all technical objections. Thus matters stood for more than 20 days, and until in January, 1901, when Hoffman did plead to the merits, and, at the time of doing so, he being a citizen of Ohio, also filed his petition and bond for a removal of the action to this court. Upon the filing of the record here, Youtsey, the receiver, moved to remand the case to the state court, and thus raised the interesting and difficult questions which have been very ably argued, and which are now to be determined.

Under the practice in Kentucky, it would have been admissible for the corporation or any of its creditors, or for any party to the suit, when Hoffman and Feltman attempted, *pro interesse suo*, to prove and establish their claims before the master, and thereby, quoad those claims, became parties to the suit, to contest the same either before the commissioner, or upon exceptions to his report after it was made. The parties in interest were perfectly competent to do this, and had the undoubted right to do it. It may be possible, also, that in this way those parties might have disclosed to the court the claims of the corporation against Hoffman and Feltman as demands which ought to be insisted upon and litigated. The court would doubtless then, especially if the justice of their claims was admitted, have directed the withholding from distribution of their shares of the assets until the counter demands against them had been settled or adjudicated. Then the work of the officer of the court—the receiver—could have begun with a suit or suits at law against Hoffman and Feltman. The receiver, as the officer of the court in a case, is not in any sense a party to the litigation in which he is appointed, but he has power, under section 302 of the Civil Code of Practice, and under the control of the court, “to bring and defend actions.” The latter part of this phrase must, of necessity, however, mean that he may defend actions to which he is a party, inasmuch as it may be regarded as axiomatic that no one not a party to an action can plead therein. True, under the practice of the courts, persons may be made parties to a suit either by a pleading, or, in a qualified way, by intervention *pro interesse suo*, under a reference to a master; or, upon an application by one who shows the propriety of it, the court may, by an order, cause him to be made a party. But neither of these courses was pursued by the receiver in this instance; nor did he ever become a party, unless, *ipso facto* the filing of his so-called answer and set-off, he became such without further order of the court. The receiver did not apply for leave to intervene before the master, nor did he bring a separate action. He elected, after the possibly intrusive order of October 6, 1900, to proceed otherwise; and, by a movement which seems to be more ingenious than correct, he has sought not to do either of those things, but, while avoiding both, to come nearer to a plenary proceeding than would have been the case had he obtained permission to contest before the master. Whether, if the corporation, or any of its stockholders or creditors who might have proved claims against the corporation, had excepted to his demands, Hoffman could have removed the case, even if the settlement of those demands had involved a determination of a claim pleaded by any of his opponents similar to the one now irregularly presented by the receiver in the form of a set-off, may admit of much doubt, as he had, as to his demands, probably submitted himself to the jurisdiction of the state court in the proceeding then pending, and, by proving and filing his claims before the commissioner of that court, had become, as to them, at least, a quasi party to that suit; but, as the receiver in the case—the mere officer of the court—was not then a party to the suit, it is clear that the permission given to him to file an answer and set-off in a suit to which he was not previously made a party was

altogether unauthorized and irregular. His pleading, under the circumstances, even when coupled with the leave of the court, must therefore be regarded as the beginning of a new action, and its irregular injection into the one already pending cannot give it a higher value or better position than an independent action would have done in determining the question now before us. And this must be the result, although there is a misnomer of his pleading. There does not, indeed, appear to be anything in the Civil Code of Practice of Kentucky which makes or expressly authorizes the making of the court's receiver a party to the cause as a litigant therein, and certainly there is no authority in the Code for permitting the receiver, merely as such, and without in fact being made a party defendant, to file a counterclaim or set-off, of which other parties to the cause are required to take notice without a regular service of process thereon. He may, of course, as already shown, sue in his own name, in bringing any plenary action of his own, but no one except an actual party defendant can file a set-off.

But, however all this may be, nothing in the record could justify the rendition of the judgment of October 27, 1900. As the claims filed by Hoffman were admitted to be just, thus closing the receiver's case as to them, and as there were new and distinct claims stated and set up in the so-called answer and set-off of the receiver, which had no connection with Hoffman's claims, due process of law manifestly required that actual notice, in the way of the service of a summons, should be given to Hoffman, in order to bring him before the court upon that pleading. The necessity for this is especially emphasized by the fact that, under the Civil Code of Practice (subsections 1, 2, § 96), the matter thus pleaded was neither a counterclaim nor a set-off, and could not be made a set-off by erroneously so misnaming it in the pleading. The new matter might possibly have been embraced in a cross petition if the receiver had been, or if he became, a defendant to the suit (subsection 3, § 96), but that would have required the issual and service of a summons (sections 97, 39). Under these conditions, and notwithstanding the very abbreviated notices published in the bulletin, the court must hold that the judgment of October 27, 1900, was *coram non iudice*, so far, at least, as it may stand in the way of Hoffman's right to remove the action. Hoffman not having been then before the court at all, so far as the new matters stated in the answer and set-off were concerned, and having appeared specially only when he subsequently moved to vacate and set aside that judgment, and not having entered a general appearance in the cause, with respect, at least, to the pleading of the receiver, the time for answering that pleading had never arrived, and did not arrive previous to the voluntary filing at the same time of Hoffman's pleading to the merits, and his petition for the removal of the cause. In other words, the receiver, merely as such, was never a party to the suit, unless the filing of the answer and so-called set-off made him a defendant without an express order of the court to that effect, which I doubt; and certainly the receiver, as such, was not entitled *ex officio* to plead therein any set-off against Hoffman, who was, at most, only a quasi party to certain

other issues in the suit. Section 96 of the Civil Code of Practice is as follows:

"Sec. 96. (1) A counter-claim is a cause of action in favor of a defendant against a plaintiff or against him and another, which arises out of the contract, or transaction, stated in the petition as the foundation of the plaintiff's claim, or which is connected with the subject of the action. (2) A set-off is a cause of action arising upon a contract, judgment, or award, in favor of a defendant against a plaintiff, or against him and another; and it cannot be pleaded except in an action upon a contract, judgment or award. (3) A cross-petition is the commencement of an action by a defendant against a co-defendant, or a person who is not a party to the action, or against both; or, by a plaintiff against a co-plaintiff, or a person who is not a party to the action, or against both; and is not allowed to a defendant, except upon a cause of action which affects, or is affected by the original cause of action; nor to a plaintiff, except upon a cause of action which affects, or is affected by, a set-off or counter-claim."

The receiver's pleading, as filed, did not conform to these provisions, and his calling it a "set-off" did not and could not make it such, nor oblige anybody to so treat it; and Hoffman, particularly, was not so bound, as he was in no sense a plaintiff to the action. The receiver therefore had no right to a judgment at all, and manifestly none without the service of a summons. The attempt by the receiver, while admitting the justice of Hoffman's claims, in respect to which alone he had become a quasi party to the equity suit, to make Hoffman's assertion of those claims before the commissioner the jurisdictional basis of an attempt to bring in that suit what is, in substance and effect, a new and independent action at law by the receiver against Hoffman upon a cause of action supposed to have accrued to the corporation defendant, is certainly most irregular; and the mere effort thus to superimpose a new suit upon an old one under the guise, or, rather, the disguise, of a pleading entitled in the old action, and misnamed an "answer," instead of a "petition," should not succeed so as to defeat the right of removal. But an irregularity in merely modal matters, however gross it may be, can be waived, though the waiver of such irregularity in form does not and cannot change the substance and essential characteristics of the proceeding in this case, nor make it in reality anything except a new suit upon a different cause of action between the receiver, on the one side, and Hoffman, on the other. Such a waiver applies merely to the form of proceeding, and not to the substance of it; and even this irregularity of mode was not waived by Hoffman until he filed his response to the receiver's pleading, at which time he also filed his petition for the removal of the cause to this court. If I am right in these views, Hoffman's waiver only extended to the objection that the new suit should have been separate from the old one, instead of being unwarrantably and irregularly entitled in it, and also to the objection that the new suit should have been by a petition, rather than in the form of an answer.

Hoffman appears, therefore, to have been in time in his application for a removal, and he was certainly so if we are authorized to treat the proceeding of the receiver as one which should be regarded as a suit which is separate and distinct from the original action, so

far as the right of removal is concerned. It is manifest that the original action cannot be removed by Hoffman, but can his right to a removal of the action now instituted against him by the receiver be defeated by the course—the utterly irregular course—of proceedings adopted by the receiver in this instance? If the receiver had exercised his authority under the Code to bring a separate action upon the demand now claimed as an offset, and set up as such in his pleading, manifestly the right of Hoffman to remove would have existed. Can this right be defeated by the unwarrantable grafting of a new suit upon an old one under the guise of a pleading called unwarrantably an “answer and set-off,” instead of a petition? It seems to me so clearly unjust to say so that I shall not say it, but will hold that not only was the petition for a removal filed in time, but that the right of Hoffman to remove cannot be defeated by the unauthorized and irregular proceeding adopted in this case. To hold otherwise would accord to a misconceived remedy and a misnamed pleading much greater efficacy in defeating a removal than could be given to those that were altogether proper, and which, being so, would have required that service of a summons which was avoided by the plan pursued. In my judgment, the receiver had the right and authority to bring an action at law against Hoffman upon a cause of action which he supposed to exist, growing out of the facts mistakenly pleaded as a set-off, and in that way to have sought the judgment of a court upon a legal demand which he conceived to be one of the assets of the corporation; but the failure of the receiver to do this, and his adoption and pursuit of the other course, should not, in my opinion, defeat Hoffman’s right to remove. Indeed, as previously stated, I think that for the purposes of this motion the proceeding of the receiver should be treated as a new and separate action, and as one entirely disassociated from the old one, especially as the Civil Code of Practice prohibits the pleading of his demand as a set-off.

We have not overlooked Judge Barr’s opinion in the case of *Fidelity Trust & Safety-Vault Co. v. Newport News & M. V. Co.* (C. C.) 70 Fed. 403; but it seems to have no special bearing upon the questions now to be determined, though much pressed upon the attention of the court at the argument. In that case there had been an attempt to serve a summons upon the defendant. In order to test the validity of that service, the defendant entered its special appearance in the state court, and under cover thereof filed a plea in abatement, insisting that the service was not valid. To this plea a demurrer was filed, and at the hearing the state court sustained the demurrer. While Judge Barr’s opinion does not so state in terms, we may assume that this determination of the state court proceeded upon the idea that the service upon the defendant was sufficient in law, and that the defendant was, by virtue thereof, actually before the court when it attempted to enter only a special appearance. In Judge Barr’s opinion much more than the time for answering fixed by the state law and the rule of the state court had been consumed in the proceedings in the case, and for that reason he held that the petition for a removal came too late. This statement of that case will show how entirely it differs from this, where there was the very reverse of an attempt to

serve a summons, or to question the validity of one that had been made.

This leaves only the question whether there is a separable controversy disclosed in the so-called answer and set-off pleaded against H. H. Hoffman and Henry Feltman, and which must be regarded as the initial pleading in this particular litigation, and which should always be so considered. A careful examination of that pleading, and treating it, in substance and effect, as a petition, instead of an answer, leaves no doubt in my mind that the causes of action therein stated against Hoffman, a citizen of Ohio, one officer, and Feltman, a citizen of Kentucky, another officer, are entirely separate, and in no sense joint. The obligations of each officer, if any, which may arise upon the averments of the pleading, are several and separate, particularly as no conspiracy is charged. The duties of each to their employer, the corporation, were separate and distinct. Their liabilities are therefore equally separate and several, and the proper judgment upon that pleading must necessarily be against each of them separately. And it may be added that neither one of them is a necessary, proper party to an action upon the obligation of the other.

The petition for a removal having been filed in time in the state court, and the cause of action against Hoffman alleged by the receiver being clearly separable from that alleged against Feltman, the court, after some hesitation, has reached the opinion that the motion to remand this action to the state court should be, and it is, overruled.

YOUTSEY v. HOFFMAN et al.

(Circuit Court, D. Kentucky. May 28, 1901.)

1. DISMISSAL—RIGHT OF PLAINTIFF TO DISMISS AS TO REMOVING DEFENDANT.

A plaintiff has the right to dismiss his action at any time before trial as against one of two or more defendants upon whose application the cause was removed into a federal court on the ground of a separable controversy; and the fact that plaintiff is a receiver of a state court, suing by leave or direction of such court, does not require him to show its authority for such dismissal before the federal court will entertain his motion; nor can the dismissal be prevented by a motion by such defendant for leave to file an amended answer pleading a set-off, made after the motion for leave to dismiss has been made and taken under advisement.

2. REMOVAL OF CAUSES—REMAND—EFFECT OF DISMISSAL AS TO REMOVING DEFENDANT.

Where, after a cause has been removed into a federal court by one of two or more defendants, who alone is a citizen of another state, on the ground of a separable controversy, the suit is dismissed as to such defendant, the federal court has no further jurisdiction, and the cause will be remanded to the state court.

3. SAME—JURISDICTION OF FEDERAL COURT—SETTING ASIDE JUDGMENT OF STATE COURT.

A federal court, into which a cause has been removed by one of two or more defendants on the ground of diversity of citizenship, and that there was a separable controversy, has no jurisdiction to set aside a judgment rendered by the state court therein as against another defendant, who is a citizen of the same state as plaintiff.

On Motion by Plaintiff for Leave to Dismiss as to One Defendant and to Remand to State Court.

Paxton & Warrington, A. J. Marsh, and C. J. & W. W. Helm, for plaintiff.

Lawrence Maxwell, Jr., L. J. Crawford, and Wright & Anderson, for defendants.

EVANS, District Judge. On the 13th day of May, 1901, the plaintiff, Youtsey, receiver, moved the court to discontinue, without prejudice, his action against H. H. Hoffman, a citizen of Ohio, upon whose petition alone the case had been removed, and to remand the case as to Henry Feltman, a citizen of Kentucky; and the motions were then taken under advisement. The court entertains no doubt of the right of the plaintiff, Youtsey, to discontinue his action, and thus abandon his claim to recover, in the pending suit, anything against Hoffman. The authorities upon the point are altogether clear. *City of Detroit v. Detroit City R. Co.* (C. C.) 55 Fed. 572; *McCabe v. Railway Co.* (C. C.) 107 Fed. 213. The receiver's motion, therefore, to discontinue the action as against H. H. Hoffman, is sustained. It seems to the court that there is no force in the suggestion that the receiver, who brought this suit under the orders of the Campbell circuit court, should not be permitted to discontinue it without showing an authority therefor from that court. That appears to be a matter entirely between the Campbell circuit court and the receiver, with which Hoffman is not concerned; and, besides, it may be presumed that the receiver, through his counsel, has authority to discontinue, without showing any order from the court which appointed him. This court only looks to the parties before it, and does not stop to inquire whether they are influenced by some one else. The motion to discontinue was made and taken under advisement on the 13th day of May, and, the situation being thus, the defendant Hoffman, on the 16th day of May, moved for leave to file what, under the Kentucky practice, is really an amended answer, but which he denominated a "set-off" against the plaintiff's claim. Under the circumstances, however, it seems to the court that the motion to discontinue should take precedence, and that the motion for leave to file the amended answer or set-off should not be sustained, and it is accordingly overruled. For the purposes of this motion the justice of the case seems to require that the plaintiff should not be prejudiced by the delay of the court in deciding the motion to discontinue, particularly as, when the set-off is filed, the motion of the plaintiff to discontinue his action would not, if sustained, take the set-off out with it.

The ground for the removal of this action into this court was that there was a separable controversy between Youtsey, a citizen of Kentucky, and Hoffman, a citizen of Ohio, which could be settled, as between them, without the presence of Feltman, or any other defendant, as a party to the action. The court was of opinion that there was such a separable controversy, and upon that ground alone overruled the motion to remand the action to the state court. It might, as an original proposition, be quite difficult clearly to see how anything was really removed into this court except that separable and

distinct controversy; yet it will be seen from many decisions, notably those of *Barney v. Latham*, 103 U. S. 205, 26 L. Ed. 514, *Hyde v. Ruble*, 104 U. S. 407, 26 L. Ed. 823, and *Brooks v. Clark*, 119 U. S. 502, 7 Sup. Ct. 301, 30 L. Ed. 482, that the supreme court holds to the doctrine that the whole case came here upon the removal, even while other controversies therein were separate and distinct from that between Youtsey and Hoffman, and while those other controversies were between citizens of Kentucky alone. But, with that doctrine previously established, the supreme court has since repeatedly held that, where the separable controversy upon which the case was removed has been discontinued or settled, the case, or what remnant of it may remain in the federal court, must be remanded to the state court for further proceedings as to those controversies. *Transportation Co. v. Seelingson*, 122 U. S. 519, 7 Sup. Ct. 1261, 30 L. Ed. 1150; *Torrence v. Shedd*, 144 U. S. 533, 12 Sup. Ct. 726, 36 L. Ed. 528. Similar rulings have been made by the circuit courts. *Bane v. Keefer*, 66 Fed. 612; *Prince v. Railroad Co.*, 98 Fed. 1. It appears to be the doctrine of the supreme court, deducible from the two lines of authority just indicated, which in no wise conflict, but which seem to supplement the one the other, that as to all other matters in a case, even though altogether separable, the proceedings remain in a state of suspended animation until the controversy upon which the removal had taken place is finally disposed of, and that then, with that matter out of it, the case must be returned to the state court. There does not seem to be any support for the proposition that, after the petitioning defendant has been dismissed, the case is still within the jurisdiction of the federal court, although involving no controversy except one between citizens of the same state. The cases cited from 122 U. S. 519, 7 Sup. Ct. 1261, 30 L. Ed. 1150, and 144 U. S. 533, 12 Sup. Ct. 726, 36 L. Ed. 528, seem to the court to meet the question now before us, and to indicate the only rule by which a decision of that question can be governed. Upon the authorities, and because it seems to the court that, if there is any controversy here as between Youtsey and Feltman, this court has no jurisdiction of it,—it being entirely between citizens of Kentucky,—the motion to remand to the state court in order that the case may be tried as to such controversies as have not been disposed of by the discontinuance of the suit against Hoffman must prevail.

For similar reasons this court would seem to have no jurisdiction to set aside the judgment of the state court as against Henry Feltman, although a few days ago we had occasion to rule very expressly in this case (108 Fed. 693) that the judgment of the state court against Hoffman, obtained in precisely the same way and at the same time as that against Feltman, was palpably and unquestionably void, and sustained the motion to set it aside for that reason. The court was enabled to set aside the judgment against Hoffman because the question of so doing was properly before this court for determination, but the question as to setting aside the judgment against Feltman does not seem to be within the jurisdiction of this court, all parties to that controversy being citizens of Kentucky. The court is of opinion that the question of setting aside the judgment against Feltman

must be left to the decision of the state tribunals, where it seems properly to belong, and where the motion for that purpose was made before the removal of the case.

KANSAS LOAN & TRUST CO. v. ELECTRIC RY., LIGHT & POWER CO.
OF SEDALIA, MO., et al. (WESTERN ELECTRICAL
SUPPLY CO., Intervener).

(Circuit Court, W. D. Missouri, Central Division. May 10, 1901.)

1. RAILROADS—FORECLOSURE OF MORTGAGES—PREFERENTIAL CLAIMS.

The right of one furnishing supplies to an insolvent railroad company to a preference over the mortgagee is dependent on the fact that there has been a diversion of the net earnings of the mortgaged property over and above the necessary expenditures for operation, and that such diversion has inured to the benefit of the mortgagee, and the burden rests upon the claimant of such preference to establish such facts.

2. SAME—REFERENCE—REPORT OF MASTER.

Where the claim of an intervener in a railroad foreclosure suit to preference of payment over the mortgagee has been referred to a master, his findings should show whether there has been a diversion of net income since the intervener's claim accrued, and whether, if so, it inured to the benefit of the mortgagee, and his report should contain a summary statement of the evidence on which his conclusions are based, with references to the evidence in the record, showing the amount diverted, and the particular manner in which it was used, to enable the court to see, from the facts found, whether it went into improvements of the property or its betterment, or the payment of interest.

3. EQUITY—REFERENCE—EVIDENCE OBJECTED TO.

On a hearing before a master, where evidence is offered, and its competency or admissibility is objected to, the master should receive it, subject to the objection, so that the court may pass upon the matter on review.

Frank Hagerman, Willard P. Hall, and J. W. S. Peters, for complainant.

Scarrit, Griffith & Jones, Fred Fuller, Geo. A. Whitcomb, and W. S. Shirk, for defendants.

H. T. Williams, for intervener.

PHILIPS, District Judge. This cause has been submitted to the court on exceptions filed to the special master's report allowing the claim of the intervener as a preferred claim, to be paid out of the proceeds of the sale of the mortgaged premises prior to the claim of the mortgagee thereon. The master's report, as submitted to the court, with the other papers in the case, presents the matters in controversy in such shape that it is impossible for the court to intelligently understand and pass upon the matters in dispute. As the intervener's right to a preferential claim is dependent upon the fact that there has been a diversion of the net earnings of the mortgaged property over and above the necessary expenditures for operation, and that such diversion has inured to the benefit of the mortgagees (*Bank v. Doud* [C. C. A.] 105 Fed. 123), the burden of proof rests upon the intervener to establish this fact. If the net earnings of the operation of the railroad over and above the expenses of operating

were in fact diverted into improvements of the mortgaged property, and for its betterment, thereby enhancing the value of the mortgagee's security, to enable the court to determine such fact the master's report should contain a summary of the evidence, showing not only the fact of diversion, but approximately the amount thereof; and if it is claimed that such diversion inured to the benefit of the mortgagee in the way of improvements of the property, or in paying interest on the mortgage debt, or dividends and the like, the master should report and show by the evidence before him into what property the money diverted went, so that the court can see from the facts found whether it went into improvements of the property or its betterment. In other words, the facts found should show what money went in a particular direction, and in what it was invested, so that the court can see from the facts found whether or not the mortgagee received a benefit from the diversion, so as to postpone its lien to that of the claim of the intervener.

The master's report in this case, for instance, finds that "large sums from current earnings were diverted from the payment of current operating expenses to payment for betterments and improvements during the period from May 1, 1898, to February, 1900, when the receivers were appointed; but I am unable to tell how much was so diverted." The first objection to this statement is that the master has taken a period ranging from May 1, 1898, to February, 1900, covering a period of nearly two years anterior to the appointment of the receivers, and beginning a year and a half nearly before the intervener's account against the defendant companies was created. This intervener has nothing to do with the earnings of the road, or their diversion by the road, prior to the creation of its debt. The creditor can only concern himself about diversions of the current earnings after the creation of his debt. It devolves upon the intervener to show what sums were diverted after the creation of his claim, and he must show by his evidence into what the diverted sum went, so that the court can determine whether it was an improvement or betterment which inured to the benefit of the mortgagee. If the master is unable to ascertain from the evidence presented by the intervener how much was diverted, and into what particular property the diversion went, the intervener's claim must fail for want of proof.

The report further says: "I find that the earnings for that period were \$4,105.57 over and above the operating expenses, according to the testimony of Mr. Van Riper." As the term "that period" evidently refers back to the period from May 1, 1898, to February, 1900, how is the court to determine how much of that was earned between the creation of the intervener's claim and the appointment of the receivers?

The report further finds "that the receivers put \$5,715.87 of the earnings of the company into betterments and improvements during the year ending March, 1901." There is no summary of the evidence given by the master as a predicate for this conclusion of fact, and no finding by him of what constituted the betterments and improvements. In other words, the report of the master is simply a con-

clusion drawn by him from the evidence, rather than a summary statement of what the evidence is from which the conclusion is drawn. The court observes from the testimony taken before the master in the cross-examination of the witness Van Riper that he testified from extracts or memoranda made from the books of the company kept by him, showing for what purposes the moneys had been expended by him, and, when counsel for complainant asked that such books be made a part of the testimony in some way, the master sustained objection by intervenor's counsel to this request. This should have been admitted, and possibly from these books or accounts kept the master could have ascertained whether or not the moneys were used for betterments or improvements. In this connection, the court observes that at the hearing before the master, where evidence is offered and its competency or admissibility is objected to by the adverse party, the master should receive the evidence, subject to the objection, and the court will be able then to pass upon the matter on review.

One of the principal objects in referring cases like this to the master for hearing is to relieve the court from the labor and time of hearing a case either ore tenus or on depositions, and to have the assistance of the analysis and substance of the testimony by the master, with proper reference to the testimony of the witnesses, and the page of the testimony where it can be found, to enable the court the easier to determine whether the conclusion drawn by the master from the facts is supported by the evidence.

The court will therefore refer this matter back to the master, with directions to admit the books, or a transcript therefrom, called for from the witness Van Riper by complainant's counsel, which was excluded by the master; and for the master to make an amended report herein, setting out the substance of the testimony in the case before him respecting this claim, with an ascertainment, if found in the evidence, of what were the current gross earnings from the operation of the property on which the lien is sought to be enforced after the creation of the intervenor's claim up to the time of the appointment of the receivers, and what were the net earnings, if any, during that period after deducting the ordinary expenses of operating the property; and, second, what were the gross earnings from the operation of the property during the receivership up to the year ending March 1, 1901, and what were the net proceeds after deducting from the gross earnings the expenses of operation, including repairs and wear and tear; and, third, whether there was any diversion of such net proceeds into other properties, and when diverted, and how much and into what were such diversions placed, if there be evidence showing such facts. If the master is unable to determine such facts from the evidence which has been submitted in the case, including the books kept by Van Riper aforesaid, he will report such conclusion.

WILSON v. MARTINEZ.

MARTINEZ v. WILSON.

(Circuit Court of Appeals, Fifth Circuit. May 7, 1901.)

No. 1,002.

**BUILDING AND LOAN ASSOCIATIONS — RIGHTS OF BORROWING STOCKHOLDERS —
CONSTRUCTION OF CONTRACT.**

Petitioner became a stockholder in defendant building and loan company, and by her contract of subscription agreed to pay a fixed sum monthly on each share of stock until the same became matured by reaching its par value, no time for such maturity being fixed by the by-laws. The by-laws authorized the company to loan its funds to members on such terms and conditions as should be therein prescribed, and provided that such loans should be repaid according to the terms agreed on. Petitioner borrowed \$1,800, the par value of her shares, securing the same by a pledge of her stock, and also by a mortgage conditioned for the payment of \$2,356.20, "the same being principal, interest, and premium of a loan from said company, * * * which said loan is evidenced by 77 promissory notes of even date with this mortgage, each for the sum of \$30.60." One of said notes matured each month, and included, besides interest and premium on the loan, the monthly installment due on petitioner's stock; and on the payment of each note she was credited with such installment on the books of the company. *Held*, that such installments constituted the "principal" of the mortgage debt, and on payment of all the notes such debt was extinguished, and that there was nothing in the contract which entitled the company, or its receiver in insolvency, to hold the mortgage as security for the payment of further installments, although the stock had not matured by reaching its par value.

Appeal and Cross Appeal from the Circuit Court of the United States for the Southern District of Alabama.

Jas. W. Gray, for appellant.

R. T. Erwin, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. On June 16, 1899, Joachim A. Manorita filed his bill of complaint in the United States circuit court for the Southern district of Alabama against the Fidelity Trust & Loan Company, a building and loan association incorporated under the laws of the state of Alabama, and doing business in the city of Mobile, in that state. The bill averred that the company was insolvent, and prayed for the appointment of a receiver to take charge of its assets, and that at the final hearing the court would distribute the assets equitably among those entitled thereto. Thereupon the circuit court appointed W. K. P. Wilson (the appellant and cross appellee) receiver of the company, and by decree vested the receiver with authority to exercise the powers of foreclosure and sale vested by any mortgage or other written instrument held by the company. Under this power the receiver undertook to sell the property of Laura J. Martinez (the appellee and cross appellant) under the power of sale contained in a mortgage made by her on the 6th of February, 1893, to the company, and to that end gave notice by publication, as required by the mortgage. The appellee

and cross appellant thereupon filed her petition in the cause of *Manorita v. Loan Co.* on November 28, 1899. The receiver answered this petition, and such proceedings were had that the matter came on for hearing before the circuit court on January 30, 1900, upon an agreed statement of facts and argument by counsel representing the parties in interest, and the court, on April 4th, announced its views in an opinion by Judge Toulmin, reported in 101 Fed. 8, from which we make the following liberal excerpt:

"The petitioner avers that nothing is due on the mortgage mentioned in the petition, and that there is nothing owing on or secured by said mortgage, except the last note mentioned therein, payment of which is offered, and tender thereof made. Petitioner prays that the receiver be restrained from selling the property described in the mortgage, and that he be directed to accept the amount of money tendered, and to surrender said note, and to cancel and surrender said mortgage. The receiver, answering, admits that all the notes mentioned in the mortgage, except the last one, have been paid, and admits the tender alleged, but denies that the mortgage was executed to secure only the notes described therein, and insists that a large sum of money in addition to the last-mentioned note is due on said mortgage, to wit, the sum of \$1,200. There is nothing in the answer that shows how said sum is due, and nothing in the mortgage which specifically shows that the money loaned to petitioner was an advance on her stock in the company. There is nothing in the mortgage as to the probable time of the maturity of the stock, or when the shares would reach their par value. There is nothing in the mortgage to indicate that the maturity of the loan depended on the maturity of the stock. The mortgage recites that it 'is intended as security for the payment of the sum of \$2,356.20, the same being principal, interest, and premium of a loan from said company, * * * which said loan is evidenced by 77 promissory notes of even date with the mortgage, each for the sum of \$30.60.' Among other covenants contained in the mortgage, the mortgagor agrees to keep and perform promises and engagements made and entered into with said company according to the true intent and meaning of its by-laws and articles of association, the effect of which, I presume, is that she will pay all fines, fees, penalties, etc., in accordance with the by-laws of the company. The agreed statement of facts shows that the petitioner was a shareholder in said company. Her certificate of stock and the by-laws of the company are in evidence. They provide that each shareholder shall pay a monthly installment of 35 cents on each share for every month until maturity. The articles of association of the company provide that, when funds are on hand, the company shall lend the same to any shareholder on such security and on such terms and conditions as may be prescribed by the by-laws, and that the loans made are to be paid according to the terms agreed on. The mortgage provides, as I have said, that petitioner would keep and perform the promises and engagements made according to these by-laws and articles of association; also that the property will be kept insured, and the taxes paid, etc. It further provides that, if default shall be made in the payment of any of said notes, or any part thereof, or in case of failure to duly observe and keep the by-laws of the company, or, in case of a breach of any of the covenants and agreements contained therein, the whole of the principal, interest, premium, fines, dues, and costs shall at once become due and payable, at the option of the company; and the right is given the company to sell the real estate conveyed by the mortgage, and out of the proceeds of sale, after paying certain expenses, to reserve enough to pay all principal, interest, premium, dues, fines, taxes, insurance, or other evidences thereby secured to be paid. It is further provided that, if the mortgagor fails to effect insurance on the property, or to pay the taxes on it, as she covenants and agrees to do, and the company effects such insurance, and pays the taxes, as it is therein authorized to do, then the amounts so paid shall be a lien on the premises, added to the amount to be secured by the mortgage; but there is no provision in the mortgage that, on failure to pay fees, fines, or dues, there shall be a lien

on the property to secure their payment. The mortgage provides that it is to be void if the full payment of the principal and interest be made as therein specified, and if each of the covenants be well and truly kept and performed, as specified and provided for. It matters not whether the money received by the petitioner and secured by the mortgage be called a loan or simply an advance to her on her shares. The mortgage was given to secure the repayment of the money in the manner and upon the terms therein mentioned. *Association v. Read*, 93 N. Y. 474. Payments upon stock are not payments on the mortgage debt, and do not ipso facto work an extinguishment of so much of the mortgage. The payment on one is not necessarily a payment on the other. *Southern Building & Loan Ass'n v. Anniston Loan & Trust Co.*, 101 Ala. 582, 15 South. 123, 29 L. R. A. 120. While the mere fact that a payment on stock is not itself—that is, has not the effect of—a payment on the mortgage, yet there is nothing in the articles of association or in the by-laws to prevent the parties to the transaction from so contracting. The mortgage is the contract, and it prescribes the manner and the terms in and upon which the money is to be repaid, and they are not in contravention to the by-laws or the articles of association. The agreed statement of facts shows that the sum of money evidenced by the notes, the payment of which is secured by the mortgage, was made up of monthly installments on stock, and interest and premiums on loan, and the pass book in evidence shows that the money, when paid on the notes, was so applied; thus showing the construction put on the contract by the parties themselves. So, then, the monthly payments on stock were designated in the mortgage as principal. There is no other provision in the mortgage that can be considered as securing such monthly payments. The mortgage, by its terms, was executed to secure a specific sum of money, being principal, interest, and premium, and, in addition thereto, such sums as the company would have had to pay out for insurance and taxes. If 'principal' therein mentioned was not meant to be the monthly payments provided for by the by-laws, then such monthly payments have not been made. But it is evident that 'principal,' as that term is used in the mortgage, and monthly payments on stock, are the same thing, while it is not clear what is meant by 'dues' spoken of. Let us suppose that the affairs of the company had not, by this time, gotten into the court and the hands of a receiver, can it be questioned that, on payment of all the notes provided for (there being no default shown in any of the other covenants contained in the mortgage), the petitioner would be entitled, not only to the surrender of the notes, but also to the cancellation and surrender of the mortgage? If her shares of stock had not been matured at that time, she would still be obligated to continue the monthly payments on them, for her promise and engagement as a shareholder bound her to make such payments until the maturity of her stock. But she has given no security that she would make such payments after the maturity and payment of the notes. The only effect of her failure to keep this promise and undertaking would be a forfeiture of her stock. She would then be, as to forfeiture and penalties, on the same footing with non-borrowing shareholders, who give no security for monthly payments on their stock. To hold that the mortgage was given to secure the payment of the principal of the loan, to wit, \$1,800, interest and premium, and also to secure the payments on stock, as contradistinguished from such principal, would, it seems to me, place the borrowing shareholder in a worse condition than the nonborrowing shareholder. There would be no equality in this. Surely, such a condition was not contemplated in the organization of the company, in the contract for subscription of stock, or in the contract for the loan. The position of the petitioner seems to be this: She had advanced or loaned to her the estimated par value of her stock at its maturity. She was required to repay in monthly installments the amount advanced, with certain charges, as interest and premium, added thereto, in a given or definite period of time; and she was required to give security (both real estate and a transfer of her stock) that she would make the payments as specified. It was an advancement or a loan to her of a sum of money, with an agreement to repay it in monthly installments, with interest, and a 'bonus' for the loan, for the repayment of which she gave the security required. There is

no default shown in the payment of the notes or in the keeping and performing of any of the provisions of the contract. Without such default, there is no forfeiture of the mortgage, and no power in the company to sell the property conveyed by it. If I am correct in my construction of the contract, there was nothing owing on the mortgage debt at the time the affairs of the company went into the hands of the receiver, except the last note of \$30.60, which became payable a short time thereafter, payment of which was tendered to the receiver, and by him refused. It appears that the receiver then sold the property, and at the sale himself became the purchaser."

A careful consideration of the record in this case and of the able oral and printed arguments submitted by the distinguished counsel representing the parties, convinces us that the views of Judge Toulmin, as above stated, are sound. We can add nothing to the admirable clearness and force with which he has presented them. The sound construction which he announces of the contract between the parties seems to us to require that the full relief sought by the mortgagor should have been granted to her. When we consider the terms of the charter, and of the by-laws, and of the mortgagor's application to become a shareholder, and of the certificate of stock, with the indorsements thereon, issued to her, and of her application for the loan, and the terms of the mortgage, the constituent elements of the 77 notes, and the practical construction put on all of these by the dealings of the parties for a number of years, we cannot question that on payment of all the notes provided for (there being no default shown in any of the other covenants contained in the mortgage) the mortgagor is entitled not only to the surrender of the notes, but also to the cancellation and surrender of the mortgage. We do not feel called upon to consider on this appeal and cross appeal the unsettled and somewhat confusing questions touching the obligations of the appellee and cross appellant as a shareholder of the stock of the company. If she is obligated to make any further payments on her stock after the maturity and payment of the notes (as to which we now express no opinion), she has given no security by the mortgage in question that she will make these further payments. The security therefor is the pledge of her stock, and the provisions for its forfeiture in case of her default in these covenants. She stands, in this respect, on the same footing with nonborrowing shareholders, who give no other security for the monthly payments on their stock than the liability of the stock to forfeiture according to its terms and the provisions of the by-laws. As Judge Toulmin so well says:

"To hold that the mortgage was given to secure the payment of the principal of the loan, to wit, \$1,800, interest and premium, and also to secure the payments on stock, as contradistinguished from such principal, would, it seems to us, place the borrowing shareholder in a worse condition than the nonborrowing shareholder. There would be no equality in this. Surely such a condition was not contemplated in the organization of the company, in the contract for subscription of stock, or in the contract for the loan."

In conformity with the views we have expressed, the decree passed April 4, 1900, from which this appeal and cross appeal were taken, is amended so that it shall read as follows:

"This cause coming on to be heard on the petition of Laura J. Martinez on the 30th day of January, 1900, upon an agreed statement of facts, and

being submitted thereon for decree, and having been argued by counsel representing the parties in interest, after due consideration it is now ordered, adjudged, and decreed by the court that the sale of the petitioner's mortgaged property by the receiver in this cause be, and the same is hereby, set aside and annulled; and, it appearing to the court that all the notes evidencing the loan, except the last one, have been paid and surrendered, and that the money to pay the last one has been duly tendered to the receiver, and, on his refusal to accept it, was paid into this court, it is further ordered, adjudged, and decreed by the court that the receiver be, and he is hereby, required and directed to cancel the mortgage made by Laura J. Martinez and Joseph Martinez, her husband, to the Fidelity Trust & Loan Company on February 6, 1893, and to surrender it, together with the last note now in his hands, to the said Laura J. Martinez."

And, as thus amended, the decree of the circuit court passed on April 4, 1900, is affirmed.

HENDERSON v. RIES.

(Circuit Court of Appeals, Fourth Circuit. May 7, 1901.)

No. 372.

1. PARTNERSHIP—CONSTRUCTION OF ARTICLES—RIGHTS OF PARTNERS ON DISSOLUTION.

Plaintiff entered into a partnership with defendant, who was an inventor, the purpose of the firm being to promote and utilize defendant's inventions. The articles provided that such future inventions of defendant as should be agreed upon should become the property of the firm, and plaintiff should be joint owner thereof, in consideration of his paying all expense of obtaining patents in this and such foreign countries as should be chosen, and of maintaining such foreign patents for at least five years. *Held*, that on a dissolution plaintiff was not entitled to repayment of the sums expended by him under such provision.

2. SAME.

Such articles also provided that plaintiff should furnish the money necessary to pay the partnership expenses until its earnings should justify the joint payment of the same by the firm; that he should advance the money needed to promote and develop the inventions and patents owned by the firm, for which he was to be reimbursed from the receipts of the partnership when it was in condition to warrant such repayment, the amount, however, not to exceed 25 per cent. of the total received for the use or sale of any one invention or patent. *Held*, that on a dissolution of the partnership plaintiff was entitled to repayment of all sums advanced under either of such provisions, but that the liability therefor was that of the firm, and not of defendant individually.

3. SAME—LIEN OF PARTNER FOR ADVANCES.

On the dissolution of a partnership, which has no outside debts, or after such debts have been paid, a partner who has made advances to the firm, which he is entitled to have repaid, has an equitable lien therefor on the property of the partnership.

Cross Appeals from the Circuit Court of the United States for the District of Maryland.

John N. Steele and George Whitelock, for plaintiff.

John P. Poe (Arthur Stuart, on the brief), for defendant.

Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

SIMONTON, Circuit Judge. This case comes up on cross appeals from the circuit court of the United States for the district of Maryland. Albert H. Henderson and Elias E. Ries were co-partners "in the joint business enterprise or pursuit of utilizing, promoting, manufacturing, selling, or, in any manner that may be mutually agreed upon, using any of the inventions, improvements, letters patent, privileges, power, or authority in which they, the said partners, are joint owners." The co-partnership articles were dated June 11, 1888. Its duration was indefinite. Either party could dissolve it by giving notice of 60 days in writing, giving reasons for the desire to dissolve. Thereupon the co-partnership shall be dissolved 60 days after the date of said notification. After some ineffectual negotiations respecting the purchase by Ries of his partner's interest, Ries gave the notice of his intent to dissolve the co-partnership March 20, 1896. Thereupon A. H. Henderson filed his bill for an accounting between the co-partners, and a settlement of the affairs of the co-partnership. The articles of the co-partnership are set out as an exhibit to the bill. They are verbose and obscure. Out of them grows the controversy. The co-partnership property is described in the second article. All inventions, improvements, and letters patent in which the co-partners shall thereafter become joint owners shall be assigned, set over, and conveyed to the co-partnership, and thereupon shall become the sole property of the co-partnership, for its sole use, benefit, and behoof. Ries was an inventor. So the third article provides that, if he shall make or obtain any inventions, improvements, or letters patent, and both parties shall agree to become joint owners in any or all of them, Henderson shall be entitled to one undivided half interest in any or all of such inventions, improvements, and letters patent in consideration of the payment by him of all fees and expenses incurred in the preparation, prosecution, and procurement of letters patent of the United States and such foreign countries as may mutually be agreed upon, and on the further consideration of the payment by him (Henderson) of all necessary fees, annuities, taxes, and expenses for maintaining such chosen foreign letters patent legally in force for a period of not less than five years. This article also provides that Henderson could acquire an undivided half interest in any or all the inventions, improvements, and letters patent which Ries might thereafter make or obtain on payment of such consideration as they might agree upon. In the fourth article Henderson covenants to pay all expenses in maintaining and continuing the co-partnership until its earnings shall justify the joint payment of such expenses by both parties. Thus we see that Henderson binds himself to pay all fees and expenses incurred in obtaining letters patent of the United States and of foreign countries, and the necessary charges for maintaining the patents in foreign countries for at least five years, and contents himself for reimbursement by the receipt of a half interest in such patents. He then binds himself to pay the expenses of maintaining

and continuing the co-partnership—presumably clerk and office hire—until the business warrants the payment of these by the firm. The fifth article then provides that Henderson shall advance all necessary moneys, funds, etc., for obtaining protection and insuring the promotion and development of the inventions, improvements, and letters patent of which he is the joint owner with Ries. In consideration thereof he is to be repaid and reimbursed in full for all such expenses so incurred. The means of reimbursement are to be derived and deducted from moneys or equivalent consideration received by the co-partnership. The condition of the co-partnership must be such as to warrant such repayment. In no case will he require for such repayment more than 25 per cent. of the total amount received for the use or sale of one invention, improvement, or letters patent. The sixth article deals with the same subject. This repayment shall be made either periodically or in toto, according to the amount of and to the circumstances attending the profit or sale accruing from the use or sale of any one invention, improvement, or letters patent, and that shall be mutually determined by the parties as to the particular manner in which such repayment shall be made. This is obscure. It seems, however, to apply only to the mode in which the 25 per cent. spoken of in the fifth article shall be applied. The tenth article provides that the parties shall from time to time meet, and render to each other information of what they have done in the co-partnership business. If, upon the comparison of their transactions, it appears that the co-partners have profited by the duration of the partnership, they will each to the other deliver his share of the profits; from the entire profits first deducting the repayment to Henderson incurred by him as set out in the fifth and sixth articles, and dividing the remainder equally between them. The eleventh article provides how the partnership shall be dissolved, and upon such dissolution all property, inventions, improvements, letters patent, and all assets whatsoever then belonging to said co-partnership shall be equally and equitably divided between both co-partners, share and share alike, and each party shall in that event receive from the co-partnership an assignment and reconveyance of his undivided right, title, and interest therein.

The answer having been put in, and the cause coming up for a hearing, the court below held that Henderson could make no claim for repayment of moneys disbursed under the third article. The court held, however, that under the fourth, fifth, and sixth articles, he could claim payment in full for all moneys paid out under them, and the case was sent to a master to take that account. The master reported that on the taking of this account there was due to Henderson by the co-partnership a balance of \$7,718.52. This was confirmed by the court, and Ries was ordered to pay his share thereof as a member of the co-partnership, there being no funds as profits, the sum of \$3,859.26, half the gross sum. To this decree both parties except, and have filed their assignments of error. The complainant assigns for error: (1) That the court held that Henderson could not recover for moneys paid out under the third article of the co-partnership. (2) That the court erred in not holding Ries personally respon-

sible for all advances made by Henderson, and in holding that these were debts of the co-partnership. The same ruling is practically assigned as error in the fourth assignment. The third and fifth assignments go to the master's report, and will be noted hereafter.

As to the first assignment: The court below held that Henderson could not call upon Ries for reimbursement of moneys paid out under the third article. There can be no doubt that under this article Henderson could become a joint owner in such of the future inventions, improvements, and letters patent of Ries as he and Ries should agree upon; and for his joint interest, and in consideration for the acquisition of such joint interest, should pay all fees and expenses incurred in the preparation, prosecution, and procurement of letters patent of the United States and of foreign countries, with the additional consideration of the payment of all fees, annuities, taxes, and expenses for maintaining the foreign patents for a period of five years at least. And for such other inventions, improvements, and letters patent as they did not agree to be joint owners in Henderson could get a half interest by paying such sum of money as they could agree upon. The joint ownership in the one case and the half ownership in the other was the equivalent of and the satisfaction for the money paid out. It will be noted that the only word used in this article as to the moneys is the word "payment." Compare that with the provisions of the fifth article. There the word used is the "advancement." The word "payment" indicates a finality. The word "advancement" indicates the return of the money advanced in some way.

As to the second assignment of error: The complainant insists that the advancements made under the fifth article were to be repaid by Ries to Henderson. But this article does not say so. On the contrary, it says "that the money or equivalent consideration for such repayment shall be derived from the moneys or equivalent consideration received by this co-partnership," "at such time as the condition of the partnership shall warrant," in no case to exceed 25 per cent. of the total amount received by the co-partnership for the sale or use of one patent. In the tenth article the payment of these advances is provided for out of the profits of the co-partnership. There is no error in this.

The third and fifth assignments of error require a further statement in order to understand them. Anterior to the formation of the co-partnership, on June 11, 1888, there were two agreements entered into between Henderson and Ries; one on August 27, 1885, the other February 23, 1886. The agreement of August 27th recites: That Ries had devised new and useful improvements in underground conduits and conductors for electric railways, and that Henderson is desirous of assisting him in perfecting the device. That the parties had agreed to co-operate in bringing the device to perfection, and that the invention and letters patent should be their joint property; Henderson to bear all expenses to be incurred in making or conducting any experiments with the device and taking out letters patent; the amount of such expenses to be returned out of the net proceeds in any manner arising out of the invention or letters patent, until the

whole sum so paid be repaid. An effort was made by complainant to amend his bill, and put in a claim for moneys paid under this agreement. This was refused, with leave to complainant to offer in evidence such testimony as might be admissible if said amendment were allowed, and reserving the liberty to renew his motion at the final hearing if he be then advised that the amendments are material. If the assignment of error is intended to cover this refusal of the court to allow the amendment, it is not reviewable here. *Bullitt Co. v. Washer*, 130 U. S. 142, 9 Sup. Ct. 499, 32 L. Ed. 885; *Central Trust Co. v. Grant Locomotive Works*, 135 U. S. 207, 10 Sup. Ct. 736, 34 L. Ed. 97. If, however, it goes to the conclusion of the court after consideration under the privilege allowed complainant to introduce the agreement in evidence, we see no error. Clearly, by this agreement the defendant, the inventor, contributed the result of his inventive capacity, and the complainant, the capitalist, contributed his money, to a common enterprise. They shared equally in the profits. The defendant was under no greater obligation to repay to the complainant the money he furnished than the complainant was to pay him for the value of his inventions. Each contributed his part, and each shared the common result. So, also, with respect to the agreement of February 23, 1886. This relates entirely to certain specifically enumerated patents, in which at that date an undivided half interest had been assigned by Ries, the patentee, to Henderson; and it has no connection whatever with the co-partnership agreement entered into subsequently on June 11, 1888. This last-named paper—the basis of the bill in this case—expressly deals with all inventions, improvements, and letters patent in which they, the said co-partners, shall hereafter become joint owners.

The defendant also obtained leave to appeal, and is here on 10 assignments of error. These go to the conclusion that complainant was entitled to be repaid from the co-partnership assets any part of the advances made under the fourth, fifth, and sixth articles of co-partnership, especially that he was not entitled to repayment of any moneys obtained from John M. Dennison under agreements between Ries, Henderson, and Dennison, one of which is dated April 21, 1892; that complainant has a lien on the co-partnership property for advances, and the right to sell the same in satisfaction of his lien; to the confirmation of the master's report on the amount due to Henderson.

We concur with the court below in the opinion that the language of the fourth, fifth, and sixth articles of co-partnership are to be construed as securing the complainant, Henderson, for the repayment and reimbursement in full for all expenses incurred under these articles. Indeed, the language is express, and can bear no other interpretation. It is expressly provided that Henderson shall be paid for these advances. The defendant insists that Ries is not personally liable for them. In this the court below and this court also concur. This being so, then the advances must be paid by the co-partnership. In order to understand the assignment of error as to Dennison, a brief statement is necessary. Finding himself unable at the time to meet the necessary payments, Henderson borrowed

from Dennison funds for this purpose, and persuaded Ries to join with him in assigning one-third interest in all the patent rights owned by the firm as security for any advances Dennison might make. Subsequently Henderson repaid to Dennison all the moneys advanced by him for these purposes, and procured from Dennison an assignment to him of the one-third interest so held as collateral. As Henderson was bound to make these advances, when he repaid the money to Dennison, and the latter assigned the collateral to him, he necessarily held the interest so assigned for the benefit of the co-partnership. And this he has recognized and admitted. Having thus fulfilled his agreement by becoming responsible for and meeting the advances, he has entitled himself to the credit therefor.

As to the lien: The court below held that all advances made by Henderson were made to the co-partnership, and that Ries was not individually liable therefor. In this we concur with him. This being so, the advances became and were a debt of the firm to Henderson. In winding up the business of the firm, this debt must be paid to him, in subordination, it is true, to the claims of outside creditors. As there are in this case no creditors of this class, then Henderson is the only creditor of the co-partnership. The rule is universal that, before co-partners can share in the assets of a dissolved co-partnership, all of the debts must be paid; and the creditors of the co-partnership have a right to be paid out of the assets for such payment. Henderson, being a creditor of the co-partnership, has such a right. 2 Daniell, Ch. Prac. & Pl. (3d Am. Ed. by Perkins) 1247. In Lindl. Partn. p. 352, it is thus stated:

"Each partner may be said to have an equitable lien on the partnership property for the purpose of having it applied in discharge of the debts of the firm, and to have a similar lien on the surplus assets for the purpose of having them applied in payment of what may be due to the partners, respectively, after deducting what may be due from them as partners to the firm. This right, lien, quasi lien, or whatever else it may be called, does not exist for any practical purpose until the affairs of the partnership have to be wound up, or the share of the partners has been ascertained."

See, also, *Clay v. Freeman*, 118 U. S. 106, 6 Sup. Ct. 964, 30 L. Ed. 104; *Hobbs v. McLean*, 117 U. S. 567, 6 Sup. Ct. 870, 29 L. Ed. 940.

We see no error in so much of the decree as confirms the master's findings on the amounts due complainant. The decree of the circuit court is affirmed in all respects.

BERLINER GRAMOPHONE CO. v. SEAMAN.

(Circuit Court of Appeals, Fourth Circuit. May 7, 1901.)

No. 403.

1. APPEAL—APPEALABLE ORDER—CONTINUING INJUNCTION.

An interlocutory order entered by a circuit court on a motion to dissolve a temporary injunction, refusing such motion and continuing the injunction until final hearing, is appealable, under section 7 of Act March 3, 1891, creating the circuit courts of appeals, as amended by Act June 6, 1900, as an order "continuing an injunction."

2. SAME—JURISDICTION—TIME OF ISSUING CITATION.

The issuance and service of a citation on appeal is not jurisdictional, but is a matter of procedure, and the mere fact that citation is not issued until after the time limited for taking the appeal has expired does not defeat the jurisdiction of the appellate court.

Appeal from the Circuit Court of the United States for the Western District of Virginia.

Marshall McCormick, for appellant.

John T. Harris, for appellee.

Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

SIMONTON, Circuit Judge. This cause presents an appeal from the circuit court of the United States for the Western district of Virginia. It comes up now on a motion to dismiss the appeal. On June 25, 1900, the circuit court of the United States for the Western district of Virginia, at the suit of Frank Seaman, and on his ex parte application, granted an ad interim injunction against the Berliner Gramophone Company. Thereupon the said company entered a motion to dissolve the injunction. This motion was heard on the existing state of the pleadings and many affidavits on 1st November, 1900. The court on that day refused the motion and continued the injunction until the final hearing. On the same day the gramophone company presented its petition that an appeal be allowed. The prayer of the petition was granted, and on 29th November the bond for costs was given, approved, and filed. No citation was issued either when the appeal was allowed or when the bond was filed. In the meantime the appellant proceeded to print the record, and on the 6th of February, 1901,—a day before the first day of the first session of this court after the appeal was allowed,—the record was filed with the clerk, and at the same time a citation bearing date the 6th of February, 1901, returnable 16th February, 1901, was served on the appellee. The present motion is to dismiss the appeal and to strike the case from the docket upon the ground that the citation was not issued within the 30 days allowed for the appeal, and that for this reason this court has no jurisdiction over the proposed appeal. It seems to be admitted that the appeal was not taken in open court. So a citation was necessary. The question therefore is, is it necessary that the citation, as well as the petition, allowance, and bond for appeal, be issued and filed within the 30 days allowed for an appeal?

A question of some interest presents itself at the threshold. By the seventh section of the act of 1891 constituting this court an appeal was allowed to this court when an injunction is allowed or continued by an interlocutory order or decree in a cause in which an appeal from a final decree may be taken to this court. 1 Supp. Rev. St. p. 904; 26 Stat. 828. By the act of February 18, 1895, this jurisdiction was enlarged so as to embrace cases in which, by an interlocutory order or decree, an injunction shall be granted, continued, refused, or dissolved, or an application to dissolve an injunction shall

be refused, in all cases in which an appeal from a final decree would be allowed to this court. 28 Stat. 666. By Act June 6, 1900 (St. 1899-1900, p. 660), the seventh section of the act of 1891 was amended, and by it an appeal was allowed to an interlocutory order or decree granting or continuing an injunction or appointing a receiver in all cases in which an appeal from a final order or decree could be had to this court. All of these acts provided that the appeal must be taken within 30 days from the entry of the interlocutory order or decree. Two circuit courts of appeals have held that this act of 1900 repealed the act of 1895, so that an appeal will lie to this court from an interlocutory order or decree when it grants or continues an injunction, and not when it refuses or dissolves an injunction, or refuses to dissolve an injunction. *Westinghouse Air-Brake Co. v. Christensen Engineering Co.* (C. C. A., 2d Cir.) 104 Fed. 622, and *Wire Co. v. Boyce* (C. C. A., 7th Cir.) *Id.* 173. Without expressing any opinion on this point, we are of the opinion that in the present case an appeal lies to this court. It is true that the case came up on motion to dissolve an injunction, but the order appealed from continued the injunction, and so is within the statutes of 1891 and 1900. As the statutes are remedial in their character, they should be liberally construed, and the jurisdiction should not be taken away unless the statute required it.

As the citation was not issued and filed within the 30 days after entry of the interlocutory order, does this defeat the jurisdiction of this court? In other words, is the issue of the citation a matter of procedure, or is it jurisdictional? As a general rule, a citation is necessary to perfect an appeal, the citation being notice (*Cohen v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257), and every appellee should have notice of the appeal (*Jacobs v. George*, 150 U. S. 415, 14 Sup. Ct. 159, 37 L. Ed. 1127). There are exceptions. If an appeal be taken in open court, no citation is necessary. If it be taken out of court, the issue and service of the citation can be waived. *Alviso v. U. S.*, 5 Wall. 824, 18 L. Ed. 492; *Sage v. Railroad Co.*, 96 U. S. 712, 24 L. Ed. 641; *Richardson v. Green*, 130 U. S. 114, 115, 9 Sup. Ct. 443, 32 L. Ed. 872. If the citation can be waived, clearly its issuance is not jurisdictional. No consent or waiver of parties can confer a jurisdiction,—especially one resting on a statute. *U. S. v. Curry*, 6 How. 113, 12 L. Ed. 363. A review of the authorities will show that the mere fact that the citation was issued after the time limited within which to make appeal has expired does not defeat the jurisdiction of the appellate court. In *Mendenhall v. Hall*, 134 U. S. 567, 10 Sup. Ct. 616, 33 L. Ed. 1012, it appeared when the case was reached on the docket that Hall had not been served with notice of appeal. The supreme court then directed a citation to be served on him, or, if he be dead, on his administratrix. The dates of that case are important. Final decree April 14, 1886; appeal allowed April 30, 1886, and bond executed September 9, 1886; record filed in supreme court October 12, 1886; citation issued as before stated, and executed January 13, 1890. The court in this case says:

"There is no ground to question the jurisdiction of this court to proceed to a hearing of the appeal. The record was filed in this court on the day to

which the appeal was returnable. Our jurisdiction did not depend upon a citation being issued."

Evans v. Bank, 134 U. S. 330, 10 Sup. Ct. 493, 33 L. Ed. 917, is to the same effect.

In *Edmonson v. Bloomshire*, 7 Wall. 306, 19 L. Ed. 91, Justice Miller says:

"The prayer for the appeal and the order allowing it constituted a valid appeal."

In that case there was no bond, and the supreme court allowed a bond to be given after the cause was in that court. In *Shute v. Keyser*, 149 U. S. 651, 13 Sup. Ct. 960, 37 L. Ed. 884, the citation was defective, and the supreme court would have allowed a new citation to be taken out, had not appellees waived it by a general appearance. There they say that a citation is not jurisdictional.

In *Mattingly v. Railroad Co.*, 158 U. S., at page 56, 15 Sup. Ct. 726, 39 L. Ed. 895, the chief justice says:

"The final decree was entered July 10, 1889, appeal allowed January 2, 1891, and bond given and filed in accordance with the allowance and approved January 13, 1891. It is true, the citation was not signed until the 14th April, 1891, and not served until 17th of the month, but neither the signing nor the service of the citation was jurisdictional. Its only office is to give notice to the appellees."

In *Jacobs v. George*, 150 U. S. 415, 14 Sup. Ct. 159, 37 L. Ed. 1127, four rules are laid down as settled: (1) Where an appeal is allowed in open court, and perfected during the term at which the decree or judgment appealed from was rendered, no citation is necessary. (2) Where the appeal is allowed at the term of the decree or judgment, but not perfected until after the term, a citation is necessary to bring in the parties; but if the appeal be docketed here at our next ensuing term, or the record reaches the clerk's hands seasonably for that term, and legal excuse exists for lack of docketing, a citation may be issued by leave of this court, although the time for taking the appeal has elapsed. (3) Where the appeal is allowed at a term subsequent to that of the decree or judgment, a citation is necessary, but may be issued, properly returnable, even after the expiration of the time for taking the appeal, if the allowance of the appeal were before. (4) But a citation is one of the necessary elements of an appeal taken after the term, and if it is not issued and served before the end of the next ensuing term of this court, and not waived, the appeal becomes inoperative. *Hewitt v. Filbert*, 116 U. S. 142, 6 Sup. Ct. 319, 29 L. Ed. 581; *Richardson v. Green*, 130 U. S. 104, 9 Sup. Ct. 443, 32 L. Ed. 872; *Evans v. Bank*, 134 U. S. 330, 10 Sup. Ct. 493, 33 L. Ed. 917; *Green v. Elbert*, 137 U. S. 615, 11 Sup. Ct. 188, 34 L. Ed. 792. See, also, *Daenell v. Trust Co.*, 34 U. S. App. 630, 19 C. C. A. 477, 73 Fed. 314; and *Railroad Equipment Co. v. Southern Ry. Co.*, 34 C. C. A. 519, 92 Fed. 541.

It appearing in this case that a citation has been issued before the term ensuing next after the entry of the order appealed from, the court has jurisdiction, notwithstanding that the citation was issued more than 30 days after the date of the order. The motion to strike the case from the docket is refused.

SAMUELS v. REVIERE et al.

(Circuit Court of Appeals, Fifth Circuit. April 30, 1901.)

No. 934.

RES JUDICATA—MATTERS CONCLUDED—QUESTIONS WHICH MIGHT HAVE BEEN LITIGATED.

Defendant in an action of trespass to try title set up as a defense that plaintiff's title was based upon an execution sale which was void because the land was at the time the homestead of the execution defendant, who was defendant's grantor. Pending the action, defendant filed a bill in equity seeking the cancellation of the plaintiff's deed upon the ground of irregularities in the sale. This suit finally resulted in a decree dismissing the bill. *Held*, that such decree rendered the question of homestead raised by the answer in the action at law res judicata, since such question went to the validity of plaintiff's deed, which was the matter in issue in the equity suit, and should have been, if it was not, raised and decided in such suit.

In Error to the Circuit Court of the United States for the Northern District of Texas.

This is an action of trespass to try title, and was brought in the court below by S. L. Samuels, the plaintiff in error, a citizen of the state of New York, against the defendants in error, W. J. Reviere, Jr., James Reviere, Mack Wilder, and Samp Richardson, citizens of the state of Texas, to recover 200 acres of land. The three last named defendants by answer said that they occupied the premises as tenants of W. J. Reviere, Jr., and they disclaimed all other interest. W. J. Reviere, Jr., in his answer, pleaded not guilty; and he further alleged specially that he had purchased the land in September, 1892, from J. M. Reviere, who was at that time the owner and in possession of it; that J. M. Reviere was a married man, and entitled to a homestead under the laws of the state of Texas, and that the land in controversy was his homestead; that the right which the plaintiff asserted to the land was acquired by the levy of an attachment thereon, and by the sale of the land under an execution in his favor against J. M. Reviere while it was the homestead of the latter, and that the levy upon and sale of the land by the plaintiff under his attachment and execution were nugatory and invalid as against the homestead rights of J. M. Reviere, under whom the defendant W. J. Reviere, Jr., claimed. On the 8th of May, 1896, the defendant W. J. Reviere, Jr., and J. M. Reviere, as complainants, filed their bill in equity against S. L. Samuels in cause No. 127, in the same court, setting up therein the pendency of this action, and alleging that the proceedings whereby Samuels had acquired title to the land under his judgment and execution against J. M. Reviere were invalid, owing to irregularities, and the failure to comply with the statute, in connection with the levy of the writ of attachment, and for inadequacy of price at the execution sale at which Samuels had purchased the land, and alleging that Samuels was asserting title to the land in this suit under illegal and void proceedings, and praying that they be annulled and set aside, and that the deed of the sheriff to him be canceled. Among other averments, the bill contained the following: "And this plaintiff makes known to the court that in said action of trespass to try title he is defending the same upon matters cognizable at law alone, but, in addition to said matters cognizable alone at law, he has other equitable defenses, such as more fully shown and set up hereinafter. Complainants make known, aver, and charge that said tract of land involved in said action at law at the time that said defendant S. L. Samuels levied his attachment thereon, and at the time he sold the same under his execution as aforesaid, was, and now is, of the reasonable value of five thousand dollars, and these complainants state to the court that they are informed, and so believe and charge, that the said sale of said tract of land by the defendant herein, S. L. Samuels, whereby he became the purchaser thereof for said sum of \$85, as aforesaid, was attended with such irregularities in the

failure to levy upon the personal property, coupled with the character of his action by publication, thereby evincing a want of notice, whereby the complainant J. M. Reviere would have had no opportunity to have appeared and paid off the said indebtedness involved in the suit of S. L. Samuels against him in said justice court of precinct No. 1, McLennan county, Texas, and coupled with the fact that he, the said S. L. Samuels, became the purchaser of said property at his own sale, whereby he could not become an innocent purchaser for value, not having expended anything on the faith of his purchase, the sale at such an insignificant sum as he paid therefor, and upon such an inadequacy of price at such sheriff's sale, would be regarded as unconscientious in him, the defendant, as the purchaser of the property, to hold the same, and would amount to a fraud upon the rights of this complainant, W. J. Reviere, Jr., as the owner of said property, and vendee of J. M. Reviere, to attempt to hold the same against his rights. And these complainants aver and charge that they are informed by their counsel in this case and believe that the amount paid by the said S. L. Samuels, being so shockingly disproportionate to the value of said property, in a court of equity and in conscience would not be regarded as any consideration whatever, and that the mere fact of the defendant herein attempting to hold said property under the circumstances would be regarded as conclusive evidence of fraud, and especially a fraud upon the rights of this complainant, W. J. Reviere, Jr., the now owner of said land." The bill contained a prayer for an injunction against the prosecution of the suit at law, and for a decree canceling the sheriff's deed to Samuels. Samuels filed an answer to this bill, and proof was taken, and the cause was regularly tried on the pleadings and proof. A decree was rendered by the circuit court granting relief to the complainants by annulling and canceling the conveyance from the sheriff to Samuels. After such decree was entered, Samuels appealed to this court, and here the decree of the lower court was reversed, and the cause remanded, with instructions to dismiss the bill. The trial in both courts was on pleadings and evidence going to the merits. The opinion of this court, with a statement of the case, is reported in *Samuels v. Revier*, 34 C. C. A. 294, 92 Fed. 199. The lower court, pursuant to the decision of this court, on April 10, 1899, entered a final decree dismissing the bill. To return to the present suit at law: On the 21st of April, 1899, the plaintiff (the plaintiff in error here) filed in this cause his first supplemental petition, pleading the decree of the court in the equity cause as res judicata to the plea of defense of homestead set up by the defendant W. J. Reviere, Jr., in his answer. W. J. Reviere, Jr., filed exceptions to the replication or supplemental petition of res judicata, and the court sustained the exceptions. The case was then tried on the issues, and a verdict was found, and judgment rendered for the defendant W. J. Reviere, Jr. The case is brought here by the plaintiff, S. L. Samuels, to reverse that judgment.

E. A. Jones and Wm. Sleeper, for plaintiff in error.

John L. Dyer, for defendants in error.

Before PARDEE and SHELBY, Circuit Judges.

SHELBY, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The case we are considering is an action at law by Samuels against Reviere to recover 200 acres of land. Pending this suit, being in possession of the land, Reviere filed a bill in equity against Samuels to cancel the deed by which Samuels claimed the land. A decree was entered canceling the deed, but on appeal the case was reversed, and remanded to be dismissed. The trial was on the merits in both the circuit court and the court of appeals. The question here is as to the effect of the decree dismissing the bill. Samuels, the plaintiff in error, contends that it is res judicata as to the defense of Reviere that, when the land was sold by the sheriff and purchased by Sam-

uels, it was the homestead of J. M. Reviere, W. J. Reviere's vendor, and therefore was not subject to execution sale. Samuels' contention is that this defense is a thing adjudged in the chancery case. Reviere, on the other hand, contends that he did not, by the bill, seek the cancellation of the sheriff's deed to Samuels on the ground that the land was a homestead, and that the question of homestead, not being in issue in the equity case, is not settled by the decree. It is true that the bill in equity did not seek a cancellation of the deed because of the lands having been a homestead. The grounds alleged in the bill are that the sale was for a grossly inadequate price, and that the defendant in execution had personal property that should first have been levied on. The one aim of the bill, however, was to obtain a cancellation of the sheriff's deed. If the decree of the circuit court canceling the deed had not been reversed, it would have ended Samuels' claim to the land. It would have been, as to him, in this case, *res judicata*, settling the invalidity of his deed to the land. The case having resulted finally the other way, and the bill having been dismissed on the merits, it would seem just that the decree should be equally conclusive as against Reviere that the deed was valid. It is unquestionably a general rule that at law or in equity a judgment or decree is conclusive between the parties upon the matters determined. The contention of Reviere, however, is that the matter set up in his plea in reference to the homestead is not determined, because he did not put it in issue. He sought to have the deed canceled because of gross inadequacy of price at the sheriff's sale, and because of other irregularities not raising the question of homestead. It is well settled, however, that an adjudication is final and conclusive, not only as to the matters actually determined, but as to all matters which the parties might have litigated and have had decided as essentially connected with the subject-matter of the litigation, and coming within the legitimate purview of the original action. It is not meant by this that a suit is conclusive against the plaintiff as to a matter constituting another cause of action, which he might have joined with the claim asserted in his action. He need not, of course, assert such separate cause of action merely because he would have been permitted to join it. The rule does mean, however, that when a suit is brought for a specific purpose,—as, for example, a bill in equity to remove cloud from title by canceling an adversary conveyance,—the plaintiff must assert in his cause of action all grounds upon which he claims that the deed he is attacking is invalid. He cannot be permitted to file a bill asking to have a deed canceled, asserting its invalidity upon one ground, and retain another to assert at some other time or in some other forum. He must present his entire case. He cannot be permitted to withhold part of his case with or without notice in his bill. It follows that the decree is as conclusive as to these matters which he should present and withholds as it is against those actually presented. *Freem. Judgm.* (4th Ed.) § 249, p. 441; *Case v. Beauregard*, 101 U. S. 688, 25 L. Ed. 1004; *Perry v. McLendon*, 62 Ga. 598; *Beloit v. Morgan*, 7 Wall. 619, 622, 19 L. Ed. 205; *Parrish v. Ferris*, 2 Black, 606, 17 L. Ed. 317. If the land in controversy was a homestead, and not

subject to sale, equity would have had jurisdiction in the first instance to have enjoined the sale (Freem. Ex'ns, § 439; Webb v. Hayner [D. C.] 49 Fed. 601; Van Ratchiff v. Call, 72 Tex. 491, 10 S. W. 578); and, of course, there is jurisdiction in equity to cancel the sheriff's deed, after such sale of the homestead is made, because of its being a cloud on the title. This claim of homestead could have been set up in the bill in equity, and, if it had been sustained by the evidence, it would have justified the court in canceling the sheriff's deed. This question, therefore, is a thing adjudged. It is not proper that it should be retried. The decree in the equity case is an answer to the plea of homestead set up in this case. In holding that this defense of homestead was not concluded by the decree in equity, the circuit court erred. The judgment of the circuit court is reversed, and the cause remanded for a new trial.

NONPAREIL CORK MFG. CO. v. KEASBEY & MATTISON CO. et al.

(Circuit Court, E. D. Pennsylvania. May 15, 1901.)

No. 37, April, 1899.

1. **LIBEL—GROUNDS OF ACTION—CONSTRUCTION OF LANGUAGE USED.**

Defendants, in a letter to a third person, stated, "You recommend something which the experience of all practical men demonstrates is a fraud,"—referring to an article made and sold by plaintiff. *Held*, that such language did not justify an innuendo attributing to it a personal application to plaintiff, and as charging that plaintiff was guilty of fraudulent and dishonest methods in its business, especially where it fairly appeared from subsequent portions of the letter that the word "fraud," as applied to the article spoken of, was used as meaning that it was short-lived and useless for the purpose for which it was intended.

2. **SAME—DISPARAGEMENT OF GOODS.**

Statements made by a defendant in letters or circulars which merely disparage, and express an unfavorable opinion of, the goods of plaintiff, a business rival, will not support an action for libel, or to recover damages for injury to plaintiff's business.

Action for Libel. On demurrer to plaintiff's statement

J. S. Levin and Samuel B. Huey, for plaintiff.

Henry La Barre Jayne, for defendant.

DALLAS, Circuit Judge. It is not necessary to separately consider the 10 causes which have been assigned in support of the demurrer to the plaintiff's statement. That statement does not, in my opinion, set forth a cause of action, and therefore the demurrer must be sustained. The matters which are complained of as false and defamatory are specified as follows:

(1) It is alleged that in a letter written by the defendants to Edward Atkinson these words were used, "You recommend something which the experience of all practical men demonstrates is a fraud," and that in the same letter there was set forth an alleged statement by a certain customer of the plaintiff relative to the character of the "covering" manufactured by the plaintiff, in these words, to wit:

"That it is a short-lived affair; that it warps, twists, chars, and becomes generally disintegrated, useless, and dangerous as a non heat conducting cover to be applied to steam pipes."

The averment, by way of innuendo, with respect to this matter, is:

"The said defendants meaning and intending thereby that the plaintiff, in the conduct of its business, was guilty of fraudulent, corrupt, and dishonest methods, and that the covering so manufactured and sold by the plaintiff was inferior in quality and character to the other coverings, and unsuited for the purpose for which it was sold, and that the use thereof was dangerous, and that the plaintiff, knowing the alleged inferior and dangerous quality thereof, procured the sale of the same by misrepresentations and fraudulent practices."

(2) It is alleged that the defendants published a circular letter containing the following:

"Cork has been recently exploited in various cities of the United States as a steam pipe and boiler covering. When it was first presented for our consideration, we expressed the opinion that, it being organic, it would carbonize and burn, as hair felt does; that under the most favorable conditions it carried with it an element of danger; and that it could never become a permanent standard material for the covering of heated surfaces. We refer you herein, without further comment, to localities and people that have had practical experience with cork covering, and, from the nature of the reports we have concerning the same, feel warranted in continuing to believe that our opinion, as above stated, as to cork's value for covering steam pipes and boilers, was correct."

As to this matter the innuendo is:

"Meaning and intending thereby that the covering so manufactured and sold by the plaintiff was inferior in quality and character to other coverings, and especially to the coverings manufactured and sold by the defendants, and that it was unsuited for the purpose for which it was sold, and that the use thereof was dangerous."

It will be observed that it is only the matter contained in the letter to Atkinson which is averred to be libelous of the plaintiff personally. This, and this alone, it is claimed, touches its character or reputation. But, although the innuendo attributes to it a personal application, I do not think it is capable of such interpretation. In the absence of the word "fraud," it would be impossible to construe the language of the Atkinson letter to be in any sense defamatory of the plaintiff; and it seems to be clear that that word, when read in the light of the context, could not reasonably be so construed. It relates, not to the plaintiff, but to the "covering," and the statement is, not that it is a fraud, but that the experience of practical men demonstrated it to be so; and, upon reading further, we find precisely what is meant by this, for the statement from a customer of the plaintiff which is quoted is that it (the covering) is a short-lived affair, etc., and thus we have the word "fraud" defined as descriptive of a thing which is short-lived, etc., and this definition accords with the sense in which, as a colloquial corruption, that word is sometimes used. The action is, in other respects, not strictly an action of libel, but a special action on the case for disparaging the plaintiff's goods; and, with reference to this view of it, I deem it necessary only to repeat what was said by Lord Denman in *Evans v. Harlow*, 5 Q. B. 624:

"A tradesman who offers goods for sale exposes himself to observations of this kind, and it is not by averring them to be false, scandalous, and malicious and defamatory that the plaintiff can found a charge of libel upon them. To decide so would open a very wide door to litigation, and might expose every man who said his goods were better than another's to the risk of an action."

From the whole declaration it plainly appears that what the defendants are charged with is really but the expression of an unfavorable opinion of the goods of its competitor. But such expressions are not uncommon among rivals in trade, and their correctness in each instance is for determination by those whose custom is sought, and not by the courts. Judgment for defendant.

PATILLO et al. v. ALLEN-WEST COMMISSION CO.

(Circuit Court of Appeals, Eighth Circuit. April 11, 1901.)

No. 1,461.

1. ACCOUNT STATED—SUFFICIENCY OF COMPLAINT.

A cause of action on an account stated is founded upon the express or implied promise to pay the amount that has been found to be due on an accounting, and it is necessary in such an action to allege the ultimate facts that there has been such an accounting, and that a balance has been struck, to which the parties have mutually assented. A complaint which sets out a contract under which plaintiff claims an amount as due from defendants, and alleges that plaintiff sent defendants a statement showing the amount claimed thereunder, which was received without objection, and that defendants afterwards made a payment on the contract without objection, is not sufficient, either at common law or under a code, as a complaint on an account stated, but must be treated as a suit for the breach of the contract, the facts so alleged being merely evidentiary.

2. TRIAL—DIRECTION OF VERDICT.

Where the terms of a contract are in issue, evidence that statements of account based on plaintiff's theory of the contract were sent to defendants, which were retained, and not immediately objected to, is entitled to consideration upon such issue, but it does not justify the direction of a verdict for plaintiff, the question of the weight and effect of such evidence being for the jury in connection with all the other evidence.

3. APPEAL—DECISION AS LAW OF CASE—LIMITS OF RULE.

While the rule that an adjudication by an appellate tribunal becomes the law of the case on all subsequent trials is a wholesome one, which should be enforced, yet it should be confined to questions that were actually considered and decided, and not extended to dicta or intimations contained in an opinion which may be thought to foreshadow the views of the court on other questions.

4. USURY—WHEN QUESTION FOR JURY.

Plaintiff made advances to defendants under an agreement by which defendants were to ship cotton to plaintiff to be sold on commission. Plaintiff claimed that by the terms of such contract defendants were to ship 100 bales for each \$1,000 advanced, or to pay plaintiff the commissions on such amount should the quantity shipped be less. Interest on the advances was also charged at the highest legal rate. In an action by plaintiff to recover such constructive commissions, defendants pleaded usury, and offered evidence which tended to show that it was not contemplated by the parties that they would ship the quantity required to fulfill such contract. *Held*, that the question whether such

provision of the contract, if established, was a device to cover usury, was one which should have been submitted to the jury.

Sanborn, Circuit Judge, dissenting in part.

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

The Allen-West Commission Company, the defendant in error, sued J. G. Patillo, G. W. Smith, J. A. Patillo, J. P. Smith, and W. N. Smith, the plaintiffs in error, who were partners doing business under the firm name of Smith, Patillo & Co., for the sum of \$3,013.28, and accrued interest, basing its right to recover that amount on the following allegations, which were contained in its complaint: "That * * * in the early part of the year 1891 defendants applied to the plaintiff to transact their business as cotton factors and commission merchants at the city of St. Louis, and to make them advances of money to be used in their business * * * as the same might be needed, and agreed with plaintiff, if it would make such advances, to ship plaintiff one hundred bales of cotton for every \$1,000 of spring and summer advances, and, if they should fail to ship said amount of cotton, to pay plaintiff the customary commission of \$1.25 per bale for each bale they might fail to ship; and further agreed to carry out said agreement as long as they should retain and have the use in their aforesaid business of plaintiff's money and advances during the spring and summer. That thereupon plaintiff, during said year and subsequent years, transacted business with and for the defendants in their capacity as cotton factors and commission merchants, making them large advances of money for the purpose of enabling them to carry on their business and control the shipment or sale of the cotton of their customers. * * * That during the continuance of said business, down to and including the year 1893, it furnished the defendants at stated periods, and at other times when requested, statements of the accounts between them, which were received without objection. That at the end of the year 1893 plaintiff furnished defendants a statement of account showing a balance due it for advances made by plaintiff to defendants and for commissions on cotton which defendants had theretofore failed to ship to plaintiff under and in accordance with their aforesaid agreement, whereupon shortly thereafter defendants, without objection, paid plaintiff on said account the sum of \$2,996.27, leaving a balance due plaintiff of \$2,504.75, which sum, with interest thereon, and the further sum of \$508.53, due for commission on four hundred and seven bales of cotton, which, under the understanding and agreement between plaintiff and defendants as aforesaid, defendants should have shipped to plaintiff during the season of 1893 and 1894, and did not ship, is now due by defendants to plaintiff." To the aforesaid complaint the defendants below filed an answer, wherein they specifically denied entering into the agreement aforesaid to ship 100 bales of cotton for each \$1,000 of advances, and to pay the plaintiff a commission of \$1.25 a bale for each bale less than the aforesaid number which they might fail to ship; and wherein they specifically denied that they had agreed to carry out said agreement as long as they should retain and have the use of any of the plaintiff's money. They also denied that the plaintiff during the year 1891 and subsequent years made them large advances under the aforesaid agreement, but averred, on the contrary, that the last advance made to them was in February, 1892, after which time no more money was advanced. They admitted the receipt from the plaintiff of several statements of account down to and including the year 1893, but averred that, as soon as they knew that the plaintiff was charging them with commissions on cotton which had not been shipped, they denied the correctness of any such charge, and ceased to accept any further advances, and commenced paying the plaintiff the amount which was due to it as fast as they could. The defendants admitted the receipt of a statement of account from the plaintiff at the end of the year 1893, which showed a charge against them for commissions on cotton that had not been shipped; and they admitted that they made a payment to plaintiff in the sum of \$2,996.27 after the receipt of such statement. They denied the averment, however, that such payment was made without any objection on their part, and alleged, to the

contrary, that in February, 1894, they tendered to the plaintiff a check for the sum of \$3,000, if it would give them a receipt in full of their account up to that date,—that amount being all, as they claimed, which was then due to the plaintiff; that this tender was refused, and that afterwards, in February, 1894, they paid the plaintiff \$2,996.26, which was all that they then owed, and directed the plaintiff to apply said payment to the undisputed part of its account,—that is, to the payment of the balance due for advances actually made,—and gave directions that no part thereof should be applied to any charge for commissions for the sale of cotton which had not been shipped. The defendants further denied that they owed the plaintiff the two amounts stated in its complaint, to wit, \$2,504.75 and \$508.53, and averred that, to make up said sums, the plaintiff had charged the defendants on June 24, 1892, with the sum of \$1,025, as and for 820 bales of cotton not shipped during the previous season, and on September 1, 1893, had charged the defendants with the sum of \$1,189.75 as and for cotton which had not been shipped during the previous season, and that it had again charged the defendants on September 1, 1894, with the sum of \$508.75 as and for cotton that had not been shipped pursuant to the pretended agreement during the previous season, and that these three charges, together with interest thereon, constituted the sum for which the plaintiff craved judgment. The defendants averred that the three charges aforesaid were illegal, and not founded upon any consideration, and that for all of the advances actually made by the plaintiff they had paid to it interest at the rate of 8 per cent. per annum. Some other allegations were contained in the answer, which need not be stated in the present connection. At the conclusion of the trial under the aforesaid pleadings the lower court gave the following instruction: "The defendants have offered no testimony tending to show that they did not receive in due course of mail the accounts of the plaintiff containing the charges for commissions on cotton not shipped; nor have they introduced any evidence tending to show that they objected to any item in said accounts. You are therefore instructed that the said accounts have become accounts stated, and not open to impeachment, save for fraud or mistake. No evidence of fraud has been introduced, and no evidence of mistake, save the charging by plaintiff of interest from July 1 to September 1, 1891, on the commission due on the latter date. Deducting this interest erroneously charged, you will find in plaintiff's favor for the amount sued for, with interest at 6 per cent. per annum to date." In accordance with this direction, the jury returned a verdict in favor of the plaintiff below for the sum of \$4,074.15, on which a judgment was subsequently entered. To reverse this judgment the case has been brought to this court on writ of error.

J. W. House (H. A. Tillett, W. S. McCain, and F. L. McCain, on the brief), for plaintiffs in error.

J. M. Moore (W. B. Smith, U. M. Rose, W. E. Hemingway, and G. B. Rose, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is apparent from the instruction given by the trial court which terminated the action that the trial judge construed the complaint as a declaration upon an "account stated," and that he disposed of the case upon that theory. This, as we think, was an erroneous view of the pleading. The pleading in question set out the terms of a special contract of a peculiar nature, under the terms of which, as it was alleged, large sums of money had been advanced by the plaintiff to the defendants. It then averred that certain statements had been rendered to the defendants, and "received without objection," and that after the rendition of one account only, which con-

tained a charge for constructive commissions on cotton not sold, one payment had been made by the defendants "without objection." A pleading in such a form cannot be regarded as a good declaration upon an "account stated," either at common law or under the Code. At common law it was necessary to aver that the defendant on a certain day was indebted to the plaintiff for a certain sum of money found to be due to the plaintiff on an account then and there stated between them which the defendant promised to pay. The cause of action in such cases is founded upon the express or implied promise to pay the amount that has been found to be due upon an accounting, and it is necessary in such actions to allege the ultimate facts that there has been such an accounting and that a balance has been struck, to which the parties have mutually assented. The minds of the parties must meet when an account is stated the same as when any other agreement is made; that is to say, it must be conceded by each that a certain sum is due from one to the other. *Charman v. Henshaw*, 15 Gray, 293, 294; *Railroad Co. v. Kimmel*, 58 Mo. 83; *Stenton v. Jerome*, 54 N. Y. 480, 484; 1 Chit. Pl. (16th Am. Ed.) p. 447; 1 Am. & Eng. Enc. Law (2d Ed.) pp. 437, 444, 445. How the ultimate facts aforesaid may be established by testimony is a different question; but a complaint cannot be held to be sufficient, which, without alleging the ultimate facts above stated, merely recites evidence which has some tendency, or even a strong tendency, to establish them. This is the rule which obtains under the Code as well as at common law, and it has been held, wherever the question has been mooted, that an allegation that an account has been delivered by the plaintiff to the defendant, and received by the latter without objection, there being no further averment as respects the accounting, falls far short of stating a good cause of action on an account stated. *Emery v. Pease*, 20 N. Y. 62, 64; *St. Louis Lager-Beer Bottling Co. v. Colorado Nat. Bank*, 8 Colo. 70, 5 Pac. 800; *Ward v. Farrelly*, 9 Mo. App. 370. It has been decided, however, that a declaration upon an account stated may be sustained where it contains an allegation that an account was stated between the plaintiff and the defendant, and that a certain balance was found to be due, although the pleader fails to allege a promise to pay. This is upon the theory that the law will imply the promise from the fact that an account was stated, and a balance was found to be due. *Mine & Smelter Supply Co. v. Parke & Lacy Co.* (decided at the present term) 107 Fed. 881; *Heinrich v. Englund*, 34 Minn. 395, 26 N. W. 122; *Bouslog v. Garrett*, 39 Ind. 338. The doctrine above stated is by no means technical, but rests upon the ground that, when an account has been stated between two persons, and a balance agreed upon, it gives rise to an independent cause of action, which rests upon a new consideration, namely, the fact that the parties have mutually waived such objections as they may have had to each other's accounts. The items of the account become merged in the balance that has been struck so as to preclude inquiry as to any of the original items of indebtedness, unless the account is surcharged and falsified on the ground of fraud, illegality, or mistake. (See authorities above cited.) It is also well settled, in accordance with the general rule that a

litigant cannot declare upon one cause of action and recover upon another, in other words, that a plaintiff cannot recover as upon an account stated if his complaint fails to state a cause of action of that nature. *Machine Co. v. Wilson*, 39 Minn. 467, 40 N. W. 571; *Packet Co. v. Platt*, 22 Minn. 413.

Although the trial court found that an account had been stated, and a balance agreed upon, and although it decided the case upon that theory, yet it did not confine the testimony at the trial to the issues which properly arise in an action founded upon an account stated, namely, to testimony tending to show that there had been an accounting and an agreement between the parties as to the balance due. Without objection on either side, much evidence was introduced bearing upon the question whether the defendants made the alleged contract to pay commissions on cotton not shipped, out of which the alleged indebtedness arose; and that seems to have been the principal issue which was litigated at the trial. It was also the principal issue presented by the pleadings. The complaint averred the making of a contract to pay commissions on cotton not shipped, and the answer denied that the defendants had ever entered into such an agreement. Under these circumstances the action must be treated as one to recover damages for a breach of the alleged agreement, and it must be so treated on the present occasion, because the complaint is clearly insufficient and wanting in the necessary averments to make out a cause of action upon a stated account. Unless the complaint be treated as stating a cause of action of the kind last indicated, it fails to state any cause of action upon which a recovery can be had.

It results from the views already expressed that the primary question arising upon this record is whether the trial court was justified in saying that upon the uncontradicted evidence in the case the defendants had made the alleged contract to pay constructive commissions on cotton not shipped, and by the terms thereof were obligated to pay commissions for the sale of 2,182 bales of cotton in the aggregate which the plaintiff had neither handled nor sold. If the existence of the agreement aforesaid and the failure to ship the number of bales of cotton last mentioned were facts which were established by uncontradicted evidence, then the judgment below might be sustained, although it was entered under an erroneous view of the cause of action which was stated in the complaint. On the other hand, if there was a conflict of evidence as respects the making of the alleged agreement, or a conflict of evidence as respects the amount of cotton that had not been shipped, then the case should have been submitted to the jury. It may be conceded that a witness for the plaintiff testified to the making of the alleged contract, and that advances were made to the defendants thereunder, and it may also be conceded that certain statements of account which were sent to the defendants, and the action that was taken by the defendants with respect thereto, afforded persuasive evidence that such a contract had been made, or, at least, that the plaintiff company at an early day claimed that it had been made. But, on the other hand, there was direct and positive evidence on the part of the defendants, which was elicited from the very member of the

firm with whom the contract was said to have been negotiated, that he never entered into such a contract as was alleged, to pay constructive commissions, either with the plaintiff company or with any one else. There was other evidence which tended to show that in the spring of the year 1892—about a year after the contract was said to have been made—a traveling agent of the plaintiff company, who came to the defendants' place of business to solicit additional shipments of cotton, was advised that the defendants disputed the existence of the alleged agreement, of which they had been advised a short time previously, and that they ceased to accept further advances, and that they ceased to make shipments thereafter except to pay off prior advances. There was also testimony which tended to show that such action was taken as soon as the defendants learned that the plaintiff claimed that the prior advances had been made in pursuance of the alleged agreement, and that it would insist upon that claim. Without going further into details respecting the evidence, it is obvious, we think, that the issue as to the existence of the alleged contract on which the plaintiff's right to recover is solely dependent, inasmuch as its entire claim is for constructive commissions, was one which the court, under the pleadings and the testimony, had no right to determine, but should have submitted to the jury for its determination. The fact that statements of account had been sent containing charges for commissions on cotton not shipped, which were retained, and not immediately objected to, or not objected to for a considerable period, was evidence tending to support the plaintiff's contention; but it was not the only evidence in the case, and it did not justify the trial court in directing a verdict for the plaintiff. The jury were entitled to say, in the light of all the facts and circumstances of the case, whether such a contract as was alleged had been entered into, and advances made in accordance therewith, and whether they would regard the defendants' conduct with reference to the various statements of account as a conclusive admission on their part that it had been made, and that they were indebted to the plaintiff in the sum claimed.

Learned counsel for the plaintiff company insist, however, that the case was tried below in substantial conformity with the decision of this court when the case was before us on a former writ of error (33 C. C. A. 194, 90 Fed. 628); and that our former decision has become the law of the case, which must control the decision on the present occasion, whether the result attained is right or wrong. We are not able, however, to assent to that proposition. The substantial question presented by the record now before us, as already explained, is whether the case was properly withdrawn from the consideration of the jury. No such question arose on the former record, because the case was submitted to a jury, who returned a verdict for the defendants, finding that the alleged agreement for constructive commissions was not proven, and, as a result of that finding, that there was no indebtedness. Nor did this court on the former appeal decide the question which we have above considered,—whether the complaint stated a good cause of action upon an account stated. It is true that

some remarks were made arguendo which might be taken as indicating that the evidence which was offered on the former trial was considered sufficient to support a declaration upon an account stated if the action had been cast in that form; but it cannot be said that the former opinion is an adjudication that the plaintiff sued upon an account stated, and that it was a sufficient complaint for that purpose, and that this ruling has now become the law of the case. A fair and reasonable interpretation of the former opinion, omitting some expressions found therein which have no necessary connection with the point actually decided, is that the first judgment in favor of the defendants was reversed, and the cause remanded for a new trial, because the trial court refused to instruct the jury, as it was asked to do, concerning the weight which should be given to certain letters that had passed between the parties, and concerning the duty which was imposed upon the defendants, when they received certain letters and statements, to make their objections thereto known. It was the refusal of this request which led to the former reversal; but it was not determined that upon the facts disclosed by the former record, even if it should be conceded that they were the same as those disclosed by the present record, the court should have directed a verdict for the plaintiff. A conclusion of that sort, if it had been expressed, would not have been assented to by at least one member of the court who took part in the former decision. While the rule that an adjudication by an appellate tribunal becomes the law of the particular case on all subsequent trials is a wholesome rule, and one that should be enforced, yet the rule should be confined to questions that were actually considered and decided, and it should not be extended so as to embrace dicta or intimations contained in an opinion which may be thought to foreshadow the views of the appellate court on other questions.

By an amendment to the defendants' original answer, the contents of which have been heretofore stated, the defendants pleaded, in substance, that the alleged agreement under which the plaintiff claimed commissions on cotton not shipped—which constitutes all of the claims sued on—was corrupt and usurious, and was made with the intent to obtain a greater rate of interest than either the laws of Arkansas or Missouri allowed. The defendants offered some testimony at the trial which tended to show that the amount of cotton which they could reasonably expect to ship in any one year at the time the alleged contract was made would not, in any event, exceed 800 bales, and possibly not more than 600 bales, and that such advances as were made in the spring of 1891 would necessitate the paying of constructive commissions on a large amount of cotton. In view of this plea, the defendants, at the conclusion of the trial, requested the court to give the following instruction, in substance: That, if the jury believed from the evidence that the defendants in the spring of 1891 did agree with the plaintiff to ship it cotton to the extent of 10 bales for every \$100 advanced to it, and upon a failure to ship such cotton they were to pay plaintiff at the rate of \$1.25 per bale for cotton not shipped, and that the plaintiff advanced the defendants about \$15,000, which, under the contract,

would have required the shipment of 1,500 bales; and if they also believed that at the time of making the contract, if it was made, it was not reasonably expected by the plaintiff that the defendants could ship such an amount of cotton,—this fact would be a circumstance to be considered in determining the question of usury; and if they found that the contract, so far as it related to the payment of \$1.25 per bale for cotton not shipped, was a mere scheme or device concocted by the parties to cover up a usurious charge for the loan of money, and thereby obtain a greater rate of interest than that authorized by law, then such contract could not be enforced. Inasmuch as the case must be remanded for a new trial for reasons already stated, we think it proper to observe that if, on the next trial, the facts are substantially the same as those disclosed by the present record, such an instruction as is above outlined should be given, leaving the jury to determine whether the alleged contract, if it was in fact made, was made in good faith, or was made without any expectation that the requisite amount of cotton would be shipped to cover the advances, and whether the contract was, as stated in the instruction, a mere device to secure a usurious rate of interest. It appears that the highest rate of interest was charged for such advances as were made, and, in addition thereto, \$1.25 upon each \$10 that was not represented by a shipment of one bale of cotton. Under these circumstances we are of opinion that it was properly a question for the jury to decide, in the light of all the facts and circumstances, whether the contract was not usurious. *Cockle v. Flack*, 93 U. S. 344, 23 L. Ed. 949; *Harmon v. Lehman*, 85 Ala. 384, 5 South. 197, 2 L. R. A. 589; *McKenzie v. Garnett*, 78 Ga. 257; *Shattuck v. Clark* (Tex. Civ. App.) 34 S. W. 404; *Uhelfelder v. Carter's Adm'r*, 64 Ala. 532.

There are no other questions presented by the record which we deem it necessary to consider on the present occasion. For the reasons disclosed above, the judgment below must be reversed, and the cause remanded for a new trial. It is so ordered.

SANBORN, Circuit Judge (concurring). "Where an itemized account showing a balance is duly rendered, the party receiving it is bound within a reasonable time to examine the same, or procure some one to examine it, and object, if he disputes its correctness. If he omit to do so, he will be deemed, from his silence, to have acquiesced, and will be bound by it as an account stated, in the absence of fraud or mistake. *Lockwood v. Thorne*, 11 N. Y. 170, 62 Am. Dec. 81; *Davenport v. Wheeler*, 7 Cow. 231; *Wiggins v. Burkham*, 10 Wall. 129, 19 L. Ed. 884; *Philips v. Belden*, 2 Edw. Ch. 1; *Langdon v. Roane's Adm'r*, 6 Ala. 518, 41 Am. Dec. 60; *Oil Co. v. Van Etten*, 107 U. S. 325, 1 Sup. Ct. 178, 27 L. Ed. 319; *Bank v. Morgan*, 117 U. S. 96, 6 Sup. Ct. 657, 29 L. Ed. 811. This is especially true in respect to accounts rendered between merchants, and between merchants and their factors. *Manufacturing Co. v. Starks*, 4 Mason, 297, Fed. Cas. No. 11,802; 1 Am. & Eng. Enc. Law, 121." *Porter v. Price*, 80 Fed. 655, 26 C. C. A. 70, 72, 49 U. S. App. 295, 300; *Atkinson v. Allen*, 71 Fed. 58, 60, 17 C. C. A. 570,

572, 36 U. S. App. 255, 260; Commission Co. v. Patillo, 33 C. C. A. 194, 90 Fed. 628, 632. Proof of the facts that an account is stated by one merchant to another, who is his debtor, and is received and retained by the debtor without objection, therefore constitutes a good cause of action. It necessarily follows that the pleading of these facts under the Code, which prevails in the state of Arkansas, and declares that the complaint shall contain only "a statement in ordinary and concise language, without repetition, of the facts constituting the plaintiff's cause of action" (Mansf. Dig. 1884, § 5026), is a good plea of an account stated. Moreover, it is too late to aver in this court for the first time that the complaint in this action does not sufficiently plead a stated account. It is an invariable rule of practice that an objection to the sufficiency of a complaint which might have been fatal on demurrer will not be sustained when made for the first time in an appellate court, if the facts material to support the judgment or decree are fairly inferable by any reasonable intendment from what is alleged in the pleading. *Adam v. Norris*, 103 U. S. 591, 595, 26 L. Ed. 583; *Lincoln v. Iron Co.*, 103 U. S. 412, 415, 26 L. Ed. 518; *Railroad Co. v. Lindsay*, 4 Wall. 650, 656, 18 L. Ed. 328; *Ankeny v. Clark*, 148 U. S. 345, 355, 13 Sup. Ct. 617, 37 L. Ed. 475; *Morrow Shoe Mfg. Co. v. New England Shoe Co.*, 6 C. C. A. 508, 57 Fed. 685; *Loewer v. Harris*, 6 C. C. A. 394, 57 Fed. 368; *Herrick v. Leveller Co.*, 8 C. C. A. 475, 60 Fed. 80; *Manufacturing Co. v. Mellon*, 7 C. C. A. 439, 58 Fed. 705; *Railway Co. v. McLaughlin*, 17 C. C. A. 330, 70 Fed. 669; *Drake v. Barton*, 18 Minn. 462, 444 (Gil. 414). The facts material to support the judgment below on the ground that there was an account stated between the parties are not only fairly inferable from the complaint, but are clearly set forth therein. The case has been twice tried without objection to the sufficiency of this pleading. It was reversed by this court on the first trial upon the express ground that the evidence of the account stated was pertinent to the issue, and conclusive. This court said in closing the opinion:

"If the law will presume an agreement from silence in any case, we think it will in this case, and that the accounts which have been rendered by the plaintiff, and received by the defendants without objection, must be considered as stated or settled accounts, and as liquidated by the parties, as fully so as if they had been signed by both. The balance is a debt as a matter of contract implied by the law. It is to be considered as one debt, and a recovery may be had upon it without regard to the items which compose it." 90 Fed. 632, 33 C. C. A. 198.

In my opinion, both upon general principles of law and for the reason that this has become the law of the case under the decision in 90 Fed. 628, the complaint in this case states a good cause of action upon an account stated, and it should be tried upon that theory. I concur in the reversal on the ground that the evidence at the last trial was not conclusive that the plaintiffs in error were estopped from contesting the item of \$508.75, due July 1, 1894, by the accounts that were rendered. But under the decision in 90 Fed. 628, it seems to me that the law of the case is, and ought to be, that the accounts received by the plaintiffs in error estop them from contesting the validity of their debt for the two commissions of \$1,025, due June 24, 1892, and \$1,198.75, due September 1, 1893.

SCULLY STEEL & IRON CO. v. OLD MEADOW ROLLING-MILL CO.

(Circuit Court of Appeals, Third Circuit. May 17, 1901.)

SALES—RIGHT TO RESCIND CONTRACT—REFUSAL OF PERFORMANCE BY OTHER PARTY.

The refusal of a purchaser of manufactured goods, to be delivered in installments, to pay for deliveries made, coupled with a denial of indebtedness therefor, and the assertion of a large and unwarranted claim for damages for nondelivery of other installments, and a notice of the purchase from others of a large quantity of the goods, exceeding the deliveries then demandable under the contract, the increased cost of which was stated to have been charged to the seller, amounted to a refusal to longer be bound by the contract, which justified the seller in treating it as terminated and making no further deliveries thereunder.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

James R. McFarlane, for plaintiff in error.

A. Leo Weil, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. Pursuant to a stipulation in writing, and under sections 649 and 700 of the Revised Statutes of the United States, this cause was tried by the circuit court without the intervention of a jury. The findings of the court upon the facts were special, and the court certified a balance in favor of the defendant under its plea of set-off, agreeably to the provision of the Pennsylvania defalcation act; the plaintiff having waived the question of the right of the court so to do. Judgment accordingly having been entered in favor of the defendant, the plaintiff sued out this writ of error.

We are of opinion that the facts found by the court are quite sufficient to support the judgment. From these findings it appears that the two contracts, one of September 7th and the other of November 25, 1898, for the sale and delivery by the defendant to the plaintiff of stipulated quantities of Bessemer steel sheets for prices and at times specified, and for the alleged breach of which by the defendant the plaintiff claimed damages, were each "contingent upon strikes and delays beyond seller's control"; that early in January, 1899, a strike began at the defendant's works, and caused a shut-down until April 12th, and that this was a sufficient cause and valid excuse for the defendant's omitting deliveries during said period; that on March 8, 1899, the defendant drew on the plaintiff a sight draft for \$5,150.65, the amount of invoices then due by the plaintiff to the defendant for goods furnished under the contract of September 7, 1898; that payment of this draft was refused unjustifiably, the plaintiff, by letter to the defendant dated March 17, 1899, stating the ground of refusal thus: "Noting yours of March 8th regarding your sight draft upon us which was presented and declined, beg leave to say that our claim against your company far exceeds the amount mentioned, and each month in which you fail to deliver as per contract increases the amount;" that the plaintiff had no such

existing claim as alleged in this letter, and the asserted claim for future damages was unwarranted, for the strike was a valid excuse for nondeliveries referred to; that on March 11, 1899, the invoice of January 11, 1899, amounting to \$894.14, for goods delivered under the contract of November 25, 1898, fell due, but no demand for payment was made; and that on March 23, 1899, the plaintiff wrote to the defendant as follows:

"Feeling that there is no intention on your part at the present time to carry out contracts entered into with you, we, in order to fulfill our obligations and to secure sheets for our warehouse, have finally been compelled to enter the market, and have succeeded in purchasing 600 tons for March, April, and May. * * * Our having to buy this material is entirely due to the failure on your part to deliver the sheets as per your contracts. We therefore hand you herewith our invoice, which represents the difference between the prices as per our contracts with you and prices at which these 600 tons were purchased."

In connection with this letter of March 23, 1899, the court made the following finding:

"We find that this letter was, in effect, in connection with the allegation of an unwarranted claim of damages asserted in the letter of March 17th, evidence of the plaintiff's intention, unwillingness, and refusal to pay the invoice of January 11th, then due under the contract of November 25, 1898. We further find that such refusal was without just cause, for the reason that the defendant's failure to make any deliveries under the said contract up to said date was caused by the strike, and the plaintiff had no legal claim for damages for nonfulfillment of said contract in that particular."

On March 28, 1899, the plaintiff wrote to the defendant in reference to the draft thus:

"We had every reason to refuse payment, simply because we do not owe it. On the other hand, on account of the nonfulfillment of your contract, you owe us at present a large sum, and each month amount will increase."

The court found that by the term "contract," in this letter, the plaintiff meant to include both contracts. On April 3, 1899, the defendant, in reply to said letter, wrote to the plaintiff:

"You have refused to live up to your contract with us, and thereby released us from any obligation to send you additional goods."

Accordingly no additional steel sheets were sent. The court found and held that the defendant had rightfully elected to rescind both contracts.

This is not a case of mere failure or refusal to pay for an installment of goods delivered. In connection with the wrongful refusal to pay for deliveries made, we have here on the part of the plaintiff a flat denial of indebtedness, unfounded claims for damages, a going into the market and buying steel sheets to cover deliveries not yet demandable, and the charging the defendant with the difference between the prices paid and the contract prices. By these acts and conduct the plaintiff, we think, evinced an intention on its part no longer to be bound by the terms of the contract. The court was right in regarding the plaintiff's willful and inexcusable refusal to pay, under all the circumstances, as not intended to be restricted to the overdue invoices, but as applicable, also, to deliveries yet to be made. The plaintiff's letter of March 17th wrongfully set up an existing claim for damages far in excess of the

amount of the dishonored draft, and asserted that the damages were still growing. Referring to the false claim contained in this letter, the court below well said, "We think this clearly indicates to the defendant that further deliveries would not be paid for, but would be offset by the unwarranted claim for damages." We agree with the court below that the acts and conduct of the plaintiff manifested an intention to abandon performance of its part of the contracts, and hence that the defendant was set free. These views are abundantly sustained by accepted authorities. *Withers v. Reynolds*, 2 Barn. & Adol. 882; *Freeth v. Burr*, L. R. 9 C. P. 208, 213, 214; *Benj. Sales*, § 593a; *Tied. Sales*, § 210; *Rugg v. Moore*, 110 Pa. 236, 242, 1 Atl. 320.

We see nothing wrong in the court's interpretation of the defendant's letter of February 22, 1899. That letter afforded no excuse for the plaintiff's acts and conduct referred to above. This record, we think, is free from error, and accordingly the judgment is affirmed.

SOUTHERN PAC. CO. v. TARIN.

(Circuit Court of Appeals, Fifth Circuit. April 30, 1901.)

No. 1,021.

CARRIERS—INJURY OF PASSENGER—FAILURE TO WARN PASSENGER OF DANGER.

Defendant's railroad train encountered a washout, and, going too close to the breach in the track, the engine overturned. The cars were pushed back some distance, and a brakeman was sent to get the passengers out, as the water was running alongside the track, and washing away the embankment. He made the announcement, but plaintiff's wife and another passenger, who did not understand English, remained in the car, and no further attempt was made to remove them, although the cars stood upon the track for 30 or 40 minutes, when they overturned, and plaintiff's wife was injured. *Held*, in an action to recover for the injury, that, on evidence showing such facts, it was not error to direct a verdict for plaintiff.

In Error to the Circuit Court of the United States for the Western District of Texas.

T. J. Beall and Wyndham Kemp, for plaintiff in error.

Geo. E. Wallace, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. Jose Tarin brought this action to recover damages of the Southern Pacific Company for personal injuries sustained by his wife, Rosa Tarin, while a passenger on the company's railroad train near Stanwix, in the territory of New Mexico. The accident occurred on July 19, 1899. The petition charges that, through the gross negligence and carelessness of the company and its servants, the car on which the plaintiff's wife was a passenger, and the train to which it was attached, was run off the track, and thrown from the roadbed, and turned over from the embankment, and that Rosa Tarin was thereby thrown with violence against the seats and sides of the car, and seriously and

permanently injured. It charges, further, that the portion of the track at the point where the injuries were received was defective, unsafe, and dangerous for trains to pass over; that the train was negligently and carelessly operated thereon, and the defendant's servants were careless and unskillful in failing to keep a proper lookout, or failing to make proper inspection, in order to discover the condition of the track and avoid accident and injury, and that after the train had been run to this part of the track, and the employes had discovered that they had run into a washout, they backed the train for some distance, and ordered the passengers to alight; that the plaintiff's wife being unable to understand or speak the English language, and ignorant of the fact that the train had run into a washout and was about to be wrecked, remained in the car in which she was riding; that after she had remained in the car about 30 minutes, and as she was attempting to leave her seat and ascertain the cause of the stopping of the train, the car in which she was riding suddenly, and without warning, fell, and was thrown from the track and roadbed and overturned, and she was injured; that the defendant company and its servants were guilty of gross negligence in stopping the train and the car in which the plaintiff's wife was riding, at the place where the track was out of order and liable to be washed out, without notifying her of this fact, and assisting her to dismount from the car, and leave her seat in the car, and go to a place of safety; that, after the car had been stopped, the defendant company and its servants knew that the plaintiff's wife was still in the car, and knew that the car was liable to be overturned and wrecked, and, knowing this, carelessly failed to notify her of the danger, or to remove her out thereof to a place of safety. The company pleaded the general issue, and for further answer specially alleged that if the plaintiff's wife was a passenger on its train at the time and place alleged in the petition, and was injured as therein alleged, which is not admitted, but denied, she sustained the injuries, not by reason of any fault or negligence on the part of the company or its servants in the operation of its train, but that the same was the act of God; that on or about July 19, 1899, while the defendant's train was approaching the bridge near Stanwix, the engineer operating the engine drawing the train discovered a washout, and water running over the bridge; that in the exercise of due care and caution the engineer began to back up the train to get out of danger, when suddenly and unexpectedly an extraordinary and unusual torrent of water, caused by a water-spout, struck the side of the railway track, thereby undermining the train, and causing the engine, baggage car, smoker, and day coach to overturn into the water; that the accident to the train was not caused by any fault of the defendant or its servants, nor was the same due to any defect in the construction of its track, but was caused by an unusual and unprecedented cloud-burst and rainfall, which caused the heavy torrent of water to rush from the hill-side against and under the railway track; and that the injuries, if any, received by the plaintiff's wife were the result of an unavoidable accident. The court instructed the jury that, "under the

facts of this case as developed by the undisputed testimony, the court feels constrained to charge you that the defendant is liable to the plaintiff for damages sustained, if you find from the testimony that Rosa Tarin, the wife of the plaintiff, was injured in the accident about which the witnesses have testified." There was a verdict and judgment for the plaintiff, and the company assigns that the court erred, to its prejudice, in instructing the jury as above recited.

The proof does not tend, in our view, to sustain the special defense made by the plaintiff in error. Taken as a whole, the defendant's testimony clearly shows that just before the train got to Stanwix the engineer discovered red lights of the work train closer to the switch, that there was an opening in the track, and that he ran down pretty close to that, and stopped, and the conductor went ahead to see what was wrong. When the conductor came back, they made an effort to back the train and get it into a safer place. Almost immediately thereupon the engine turned over, carrying with it one or more of the cars attached to it, but leaving the body of the train standing. The crew, with the help of the passengers, began pushing the cars back, at which they were engaged for 30 or 40 minutes. The conductor sent a brakeman through the train to notify the passengers and get them out. He did not speak Spanish, and the plaintiff's wife did not understand English. There was ample time to get all of the passengers out, and easy to get them to a place of safety. They all did get out, except the plaintiff's wife and one other, and none of those who got out was hurt. The dump on which the track was laid was only $2\frac{1}{2}$ feet high. The train stood on it 30 or 40 minutes, with the water running, not over it, but along one side of it, and washing the earth from under the ends of the ties, until this wash had so far advanced that the train turned over. No feature of a cloud-burst or of an excessive fall of rain, there or near, is shown by direct evidence, or by the effect of the water on the track. Some of the witnesses use those terms, but their testimony shows the impropriety of their use. The track was protected at this point by wings constructed to conduct the water to the culvert, where it could pass through. While the train was standing these wings became full, and the one nearest to the train gave away, and there was, of course, a rush of water from that giving away of the wing. But there is nothing in the testimony, when properly analyzed, to bring the occurrence within the defense attempted by the company.

We think the circuit court did not err in the charge given to the jury, and therefore its judgment is affirmed.

CURRIER v. MUTUAL RESERVE FUND LIFE ASS'N.

(Circuit Court of Appeals, Fifth Circuit. May 7, 1901.)

No. 1,017.

INSURANCE—RIGHT OF AGENT TO COMMISSIONS—REFUSAL OF COMPANY TO COMPLETE CONTRACT.

An agent for a life insurance company, soliciting business on commission, although by the terms of his contract he is entitled to commissions only on accepted business, and not unless the premiums from which such commissions are to be paid have been received in cash by the company, may nevertheless recover his commission on applications secured by him from persons able and willing to pay the premiums, which were accepted by the company, but on which the premiums were not paid, where such nonpayment was due solely to the fact that the company changed its rates after the applications were taken, and demanded, as a condition to delivery of the policies, premiums largely in excess of those at which the agent was expressly authorized to take the applications.

In Error to the Circuit Court of the United States for the Western District of Texas.

The plaintiff in error sued the Mutual Reserve Fund Life Association, the defendant in error (hereinafter called "plaintiff" and "defendant"), for commissions alleged to have been earned by him, as the soliciting agent of the defendant, under a written contract of employment at an agreed rate of commissions. In pursuance of his agency the plaintiff solicited and obtained applications for life insurance from officers of the 33d regiment of the United States volunteers. The applications were made in the usual way, and upon the usual forms prescribed by the defendant, and upon proper examination of the applicants by a physician, and were duly forwarded to the defendant by the plaintiff. The defendant pleaded a general denial, and that it was not liable in any way to the plaintiff in any sum of money by reason of said applications, because it had not received the premiums, or any part thereof, for any policies sought to be obtained by said applications, and, not having received or had in any way tendered to it the first or any subsequent premiums for said policies of insurance, it was not liable to the plaintiff in any sum on this account.

There was no conflict in the evidence. It was, in substance: That in August and September, 1899, the plaintiff was soliciting insurance for the defendant in San Antonio and adjacent territory under a written agreement, introduced in evidence, and which provided for the rate of commissions, and further provided that no commissions allowed under the contract shall be payable to the plaintiff "unless the payment from which the same is to be allowed has been received in cash" by the defendant. That at the time there was stationed in San Antonio the 33d regiment of United States volunteers. That at that time the defendant had in force a book of printed instructions which authorized the plaintiff to insure those in the military and naval service at regular rates, plus \$5 additional on the \$1,000; but, to be certain about the matter, he sent to the defendant on August 17, 1899, a telegram asking upon what terms it would accept army officers, war risks, and upon the same day received a reply referring him to page 12, New Rate Circular, for army officers. This New Rate Circular was in the possession of the plaintiff, and upon page 12 it authorized the solicitors of defendant to insure those engaged in the military and naval service in times of war at regular rates, plus \$5 additional, to cover the greater hazard. The plaintiff began on August 18, 1899, to solicit life insurance of the officers of the 33d regiment, employing an assistant, and solicited insurance upon the above terms. He procured applications from a number of them upon the regular blanks of the defendant, and, after the usual medical examination by the local physician, when the same were signed by the applicants, forwarded them to the home office of the defendant. The first of these applications

were dated August 21st; the others, of later dates. All of them were procured and sent to the home office before the plaintiff knew of any change being made in the rates, the last ones being sent September 1st. After September 6th the plaintiff received notice by letter from the defendant of August 30th, saying, "Since writing you on August 17th, regarding the rate for army officers, the executive committee has decided that for officers engaged in actual service there will be an extra loading of \$50 per thousand per annum, the same as was in force during the Spanish-American war," whereupon he solicited no more insurance upon the figures as first given. About September 15th he received policies from the defendant, written according to the applications, upon 10 of the applications, with instructions not to deliver them unless \$50 additional per \$1,000 was paid, instead of \$5, as originally agreed upon. He saw the applicants, and they refused to take the policies at the additional rate. The defendant subsequently telegraphed him to return the policies, which he did, and he returned to several of the applicants the money which they had paid him in advance on the first premium. After the plaintiff had instituted this suit, he received from the defendant the policies on other applications sent in by him, which were written up in accordance with the applications. They were received about October 2d, and the policies were issued on the 27th. The plaintiff also received a letter from the defendant as follows:

"New York, Sept. 26th, 1899.

"George H. Currier, San Antonio, Texas—Dear Sir: Replying to your letter of September 13th and 14th, regarding the applications written up by you on the lives of army officials, I desire to state that I have delayed answering your communications in order to submit all the facts to the executive committee. Having done so, I am now in a position to advise you that all applications written up on the parties above referred to, and now in our hands, bearing date of September 5th, or prior to that date, will be treated, if otherwise acceptable, on the basis of my telegram of August 17th, and all applications now in our hands on the lives of such parties bearing date subsequent to September 5th will be treated in accordance with the order of the executive committee, which you state was received by you on September 5th. Trusting that our action in this matter, which is taken without prejudice, will meet with your approval, I remain,

"Yours, very truly,

"[Signed]

—, Chairman Agency Committee."

In the meantime the applicants, with their regiment, had left San Antonio about September 18th, and sailed from San Francisco for the Philippines about October 1st. When the policies were received, the applicants had gone, and were on their way to the Philippines. The policies were returned to the defendant in accordance with its instructions, and were never reissued or returned to the plaintiff. On cross-examination the plaintiff testified that he was satisfied that if the policies had been issued according to contract, during the time the applicants were at San Antonio, all of them would have been taken promptly; that they were anxious to get the insurance; that he was familiar with the rate book of the defendant, and knew its published rates in force, authorizing him to solicit insurance at the regular rate, plus \$5, but he sent the telegram of August 17th to be certain about it. No premiums on any of the applications were ever paid or tendered to defendant by him, and he never delivered any of the policies to the applicants. The plaintiff also testified that he notified the defendant that the applicants expected to leave soon for the Philippines, and also notified it of the fact when they did leave. There was evidence that the average life of an insurance policy is about seven years. It was agreed upon the trial that all of the applicants mentioned were financially able to pay the premium at the rate upon which the plaintiff solicited their insurance, to wit, regular rates, with \$5 additional for waiver of the war risk. Other correspondence between the parties was introduced in evidence by both sides, showing repeated refusal of the defendant to deliver the policies except at the increased rate, until this suit was brought, but which it is unnecessary to specifically set out here. The court instructed the jury to return a verdict for the defendant.

T. A. Fuller and R. L. Ball, for plaintiff in error.

E. H. Farrar, Thos. F. West, and Tilman Smith, for defendant in error.

Before PARDEE and SHELBY, Circuit Judges, and TOULMIN, District Judge.

TOULMIN, District Judge, stating the case as above, delivered the opinion of the court.

We think the undisputed facts show that the plaintiff in error had done all that he undertook to do under the terms of his employment. He procured applications for insurance in accordance with his instructions and with the rules and regulations of the defendant in error, and forwarded them to the home office of the defendant in error for its action upon them. The applications were in due form, and it is to be presumed that the applicants were insurable risks, and that the risks were satisfactory to the defendant in error. No objection to them was pointed out, and the presumption is that none existed. The only objection made to delivering the policies was that the rate of premium on them was too low. The defendant in error decided, after some of the applications were made and received by it, to raise the premium. It had authorized the rate of premium agreed on, by the plaintiff in error, its agent, and the applicants. It had published the rates of premium in its rate circular, and had specially called the attention of the plaintiff in error to that fact when asked for advice on the subject. Were not the published rates of premium of the defendant in error a promise that it would insure at such rates, and, all prerequisites being complied with and satisfactory, that policies would be issued accordingly? Unquestionably, the defendant in error had a reserved right to reject the insurance for good reasons. But it cannot be justly urged that it reserved the right of arbitrarily refusing to deliver the policies when every prerequisite which it had itself prescribed had been complied with, and thus deprive the agent of compensation for the services rendered in procuring the applications. The defendant in error had proposed to insure at a particular rate. That rate had been agreed on, and the applications procured on that basis. Can it legally refuse to pay the agent his commissions, solely on the ground that it had decided to change its rate, and to charge a higher one, after he had performed the services required of him in procuring the insurance? We think not. We understand the rule of law to be that, while ordinarily an agent is not entitled to his commissions until the transaction is complete, yet, if he has faithfully performed his part of the transaction, and from no fault of his own, but by the refusal of the principal to complete the contract, it is not consummated, the agent will be entitled to his commissions. 4 Am. & Eng. Enc. Law (2d Ed.) 972. Mechem, in his work on Agency, says, "If it be found that an agent has done all that he undertook to do, his right to his compensation is complete, and he cannot be deprived of it because the principal has failed to avail himself of the benefit of the act, or refuses to do what he had agreed to do upon performance." Mechem, Ag. § 611. "An agent employed to sell property

earns his commission if he finds a purchaser who is able and ready to purchase on the terms directed, though the vendor changes his mind and refuses to sell." Story, Ag. § 329; Kock v. Emmerling, 22 How. 69, 16 L. Ed. 292. And "the principal cannot defeat the agent's claim by the refusing to sell at all, or only upon different terms." Mechem, Ag. § 612. "Thus, an agent who is employed to procure a loan for his principal is entitled to his commission when he procures a lender ready, willing, and able to lend the money upon the terms proposed. The principal cannot deprive the agent of his commission by refusing to accept the loan which the agent's efforts have resulted in securing." Mechem, Ag., *supra*. "The rights of an insurance agent, as regards his principal, are, in the main, governed by the rules of law applicable to agents in general. Where there is an express contract, it will govern." 16 Am. & Eng. Enc. Law (2d Ed.) 911.

The defendant in error contends that by its contract with the plaintiff in error it was expressly agreed that no commissions were to be paid to him "unless the payment from which the same is to be allowed has been received in cash by the association," the defendant in error. It is true that the agent may, by special agreement with his principal, so contract as to make his compensation dependent on a contingency. Under such contract, he will be entitled to compensation only on showing that the contingency has happened, or that performance was prevented through some fault or act of the principal. 1 Am. & Eng. Enc. Law (2d Ed.) 1096. "The contract will be conclusive unless it appears that the performance has been waived or prevented by the principal." Mechem, Ag. § 611. "An agent may be entitled to remuneration for his services, although he has not done the whole service or duty originally required. * * * This may arise from the entire performance being prevented by the act of the principal himself." Story, Ag. § 329, note 4. If, then, the right of the plaintiff in error to commissions was dependent on the receipt in cash by the defendant in error of the "payment" (premium) from which the commissions were to be allowed, and the receipt of such premium was prevented by the defendant in error, or if it was a part of the service or duty of the plaintiff in error under his contract to collect and pay over such premium to the defendant in error, and he was prevented from doing so by the defendant in error, he would be entitled to his compensation. The premium was not received by the defendant in error because it prevented the delivery of the policies on which it appears the premium would have been paid.

It is further contended that the right of the plaintiff in error to compensation on the face of his contract was based on "accepted business" solicited by him. The fact is, most of the business on which commissions are claimed was accepted. The policies on some of the applications were issued, but they were not delivered solely on the ground that the applicants refused to pay a higher rate of premium than they had agreed to pay, and higher than the defendant in error had authorized them to be insured for, at the time the applications were made; and it appears that the defendant in error

reconsidered its refusal to issue and deliver the policies on the basis of the rates originally published and authorized, and did issue and authorize some of them to be delivered on that basis. But this action of the defendant in error was so long delayed that the applicants had left for the Philippines, and the delivery of the policies by the plaintiff in error was rendered impracticable, and without his fault so far as is disclosed by the evidence.

Our opinion is that the plaintiff in error is entitled to commissions on all applications received prior to September 6th, and on which policies were issued, and that the circuit court was in error in directing a verdict for the defendant in error. The judgment is reversed, and the case remanded, with instructions to grant a new trial.

WALKER et al. v. HARVEY et al.

(Circuit Court of Appeals, Third Circuit. May 6, 1901.)

No. 21.

TRIAL.—INSTRUCTIONS.—CREDIBILITY OF WITNESSES.

In an action to recover commissions amounting to \$17,500 under an alleged brokerage contract, which defendants denied having made, it was not error to instruct the jury that as bearing upon the credibility of the witnesses, who were the parties, and the probabilities of the case, they might consider the delay of plaintiffs in bringing the action, which was not commenced until nearly six years after the sale upon which the commissions were claimed.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

Archibald R. Dewey, for plaintiffs in error.

George R. Bedford, for defendants in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. This was an action brought on February 8, 1897, by Walker Bros., a firm of brokers, against William J. Harvey and H. Harrison Harvey, to recover the sum of \$17,500 and interest thereon, alleged to be due from the defendants to the plaintiffs for brokerage or commissions for effecting the sale in the spring of 1891 of a controlling interest in the stock of the Wilkesbarre & Kingston Passenger Railway Company. The defendants denied the alleged contract of brokerage, or the employment by them of the plaintiffs, and also denied that the sale was effected by or through the plaintiffs. Upon the trial of these issues there was a verdict in favor of the defendants, and the court gave judgment for them on the verdict.

The plaintiffs submitted to the court the following points or requests for instructions:

"First. If the jury find that defendants authorized plaintiffs, as brokers, to sell their interest in the road, and that plaintiffs, through Mr. Dove, brought the property to the attention of Senator Patterson, and that Senator Patterson and others afterwards purchased the interest of defendants, plain-

tiffs are entitled to pay for their services, whether the subsequent negotiations were made with or without the assistance of plaintiffs. Second. A broker's duty is fully performed when he has procured a purchaser ready and able to buy. Third. Plaintiffs' right to recover does not depend upon Patterson's knowledge or want of knowledge of conditions at Wilkesbarre, nor on what previous negotiations had taken place, if such previous negotiations were ineffectual. Fourth. It is for the jury to determine from all the evidence in the case whether the introduction of Patterson by Lewis had been effectual, or whether the presenting the matter to Senator Patterson by Mr. Dove effected the sale."

These points were not specifically answered, and complaint is made here that the court did not affirm them, or charge the jury in substantial accordance therewith. This complaint, however, does not appear to us to be well founded. The general charge of the court, we think, adequately covered the subject-matter of these several points, and the instructions given to the jury were in substantial harmony with them. Thus, among other instructions to the jury, the court charged as follows:

"The testimony is here that Mr. Dove met Mr. Patterson in Philadelphia about the 11th of February, and called his attention to this road. It will be for you to consider what the effect of that calling attention to Mr. Patterson was. What was then the situation? Was the result of Mr. Dove's work— Did it result in bringing about a sale of this road? Was that the means by which this road was sold to Mr. Patterson? If it was, and there was a contract between the parties, why, they ought to be paid the contract price. But it will be for you to determine, under all the evidence in this case, what did result from that interview, and whether the calling of the attention of Senator Patterson to this road by Mr. Dove was the means of accomplishing the sale of the road."

And again, near the conclusion of the charge, the court said to the jury:

"It will be for you, gentlemen, to take into consideration all these facts; and if, as I have said, you find from the evidence in this case that there was a joint undertaking between these defendants with the plaintiff to sell this road, as has been detailed here by the plaintiff, and that they were to pay him \$17,500 commissions, and that in pursuance of that contract they went ahead and secured a purchaser, and through their securing that purchaser, or their efforts, they became the means of selling this road, then these defendants are liable to pay this sum of money, with interest for these intervening nine years."

We are unable to perceive that that part of the charge relating to the interview between Calvin Bruce Walker and H. Harrison Harvey is open to the objection that it shut out from the consideration of the jury the letters of H. Harrison Harvey dated November 21, 1890, and January 26, 1891. If any contract binding upon H. Harrison Harvey was ever entered into, it was at that interview. The two named persons were the only witnesses as to what then and there occurred. Their testimony was in direct conflict. The court fairly left it to the jury to determine which of these two versions of that transaction was correct. Here we find in the charge this language:

"As I have said, gentlemen, the evidence is between these two men as to that interview; and, if you find from the facts of the case that the weight of the evidence is with Mr. Walker, that, of course, goes to substantiate the contract, if that agreement was afterwards ratified by William J. Harvey," etc.

Now, these letters were part of "the facts of the case." How, then, can it be said that the charge excluded the letters from the consideration of the jury? At the most, the letters merely tended to corroborate the plaintiff's version of the interview, if, indeed, they shed any light whatever upon the transaction. Whether or not the alleged brokerage contract was entered into was disputed, and the testimony of the witnesses was conflicting. As bearing upon the credibility of the witnesses and the probabilities of the case, we cannot say that any error was committed by the court in saying to the jury that they might take into consideration the delay of the plaintiffs in bringing suit. That delay was most unusual, and was a circumstance unfavorable to the plaintiffs. Tayl. Ev. § 121; Whart. Ev. § 1320a. We discover no error in the trial of this case, and therefore the judgment of the circuit court is affirmed.

CITY OF BEATRICE v. MASSLICH.

(Circuit Court of Appeals, Eighth Circuit. April 22, 1901.)

No. 1,439.

1. STATUTES—TITLE OF ACT—NEBRASKA CONSTITUTION.

Mere duplicity or surplusage in the title of a legislative act does not affect its validity, under Const. Neb. art. 3, § 11, providing that "no bill shall contain more than one subject and the same shall be clearly expressed in the title," where the act itself contains but one subject, which is plainly expressed in the title; and the subject is sufficiently stated, within such requirement, by a reference to a particular section of the Compiled Statutes of the state, which is an official publication, where the purpose of the act is only to add further provisions to such section, and they are germane.

2. SAME—AMENDATORY ACTS.

The provision of Const. Neb. art. 3, § 11, that "no law shall be amended unless the new act contains the section or sections so amended and the section or sections so amended shall be repealed," does not require a new act to re-enact an entire section and repeal the original section, where its only purpose is to add to such section new and independent provisions.

3. SAME.

A statute is not invalid, although it purports to be amendatory of a prior statute which had been previously amended or has been held invalid, where the provisions of the new statute are independent and complete in themselves.¹

4. SAME—ACT RELATING TO CITIES—VALIDITY.

The Nebraska act of 1897, entitled "An act to amend sections 27 and 58 and to add subdivisions 58 and 59 to section 22 of article 2 of chapter 14 of the Compiled Statutes, relating to cities of the second class having more than five thousand inhabitants, and to repeal said original sections 27 and 58 of all acts and parts of acts in conflict with this act," is constitutional and valid.

In Error to the Circuit Court of the United States for the District of Nebraska.

¹ Amendment of amended, repealed, or invalid statutes, see note to Wire Co. v. Boyce, 44 O. C. A. 590.

George A. Murphy (Mr. Swain and Alburtus H. Kidd, on the brief), for plaintiff in error.

Chester B. Masslich and C. C. Flansburg (R. O. Williams, on the brief), for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and ADAMS, District Judge.

CALDWELL, Circuit Judge. Chester B. Masslich, the defendant in error, brought this action against the city of Beatrice, Neb., the plaintiff in error, on certain bonds and interest coupons cut from bonds issued by the city of Beatrice for the purpose of defraying the cost of curbing, guttering, and paving the streets in certain paving districts in that city. The assignments of error challenge the constitutionality of the act under which the bonds were issued, because of alleged defects in the title of the act. The bonds recite that they were issued "under and by virtue of an act of the legislature of the state of Nebraska, being subdivision LVIII. of section 52 of article 2, chapter 14, of the Compiled Statutes of 1887 of the State of Nebraska." The act which became subdivision 58 of section 52 is contained in the Session Laws of 1887, and its full title is as follows:

"An act to amend sections 27 and 58 and to add subdivisions LVIII and LIX to section 52 of article 2, of chapter 14, of the Compiled Statutes relating to 'cities of the second class' having more than five thousand (5,000) inhabitants, and to repeal said original sections 27 and 58 and all acts and parts of acts in conflict with this act."

Section 11 of article 3 of the state constitution provides that:

"No bill shall contain more than one subject, and the same shall be clearly expressed in its title. And no law shall be amended unless the new act contains the section or sections so amended and the section or sections so amended shall be repealed.

It is contended that the title of the act does not express its subject with sufficient accuracy and precision. There is apparent duplicity in the title, and it is probably needlessly prolix. In terms it both amends and repeals sections 27 and 58, "and all acts and parts of acts in conflict with this act." All this was mere surplusage in the title. What the act did and what it plainly expressed in its title was to add subdivisions 58 and 59 "to section 52 of article 2 of chapter 14 of the Compiled Statutes," regulating the powers of certain municipal corporations. The added subdivisions were new and original enactments. They were entirely germane to the statute of which they were made a part. The subdivisions and statutes of which they were made a part all related to the powers of certain municipal corporations, and sections 27 and 58 and all other acts in conflict with these new enactments were repealed by implication, and all reference to this fact was mere surplusage. Probably a more concise title would have been:

"An act to add subdivisions 58 and 59 to section 52 of article 2 of chapter 14 of the Compiled Statutes relating to cities of the second class having over five thousand inhabitants."

In legal effect, the act does this, and nothing more, and this is plainly expressed in the title. In *Read v. City of Plattsmouth*, 107 U. S. 568, 2 Sup. Ct. 208, 27 L. Ed. 414, the supreme court of the United States held that an act entitled "An act to amend the act to incorporate cities of the second class and to define their powers, approved March 1, 1871, and to legalize certain taxes therein mentioned," was not in violation of the constitutional provision of the state of Nebraska now under consideration. The court said, "The act, therefore, may be considered as if its title were simply that of 'An act to legalize certain taxes therein mentioned.'"

The duplicity and prolixity in the title do not render it obnoxious to the constitution, because there is no constitutional inhibition against duplicity and prolixity in the title of an act. In a headnote to the case of *Van Horn v. State*, 46 Neb. 62, 64 N. W. 365, it is said:

"Whether or not a bill contains more than one subject is to be determined by examining the substance of the bill. Apparent duplicity in the title alone does not invalidate the act."

In discussing this question, Judge Cooley says:

"The legislature must determine for itself how broad and comprehensive shall be the subject of a statute, and how much particularity shall be implied in the title defining it." Cooley, *Const. Lim.* 144.

It is enough that the subject of the act is clearly expressed in its title. The subject of this act was to add two subdivisions to a specified section of a specified article of the specified chapter of the Compiled Statutes of the state, and this object is clearly expressed in the title. The subject-matter of section 52 was known to all, and the only inquiry is, were the added subdivisions germane to the existing statute of which they were to become a part? Unquestionably, they were, and, that being so, the subject of the act was sufficiently expressed in the title. In *Re White*, 33 Neb. 812, 51 N. W. 287, the supreme court say:

"The first objection to this act is that it is amendatory of chapter 50, Comp. St., and is not complete in itself, and does not repeal chapter 50. The act in question does not purport to change any part of chapter 50 of the Compiled Statutes, but simply adds thereto additional provisions which are to be incorporated in chapter 50 as sections 21 and 22. This is not prohibited by the constitution. The Compiled Statutes were printed under authority of law, and were supposed to contain a correct compilation of the laws in force in the state when the book was published. Being a standard book, the legislature, in amending a statute, may refer to a particular part of the statute set forth in such work. All that is required in such case is a reasonable degree of certainty as to the statute to be amended."

The subject of a statute is one thing, and its detailed provisions quite another; one is the topic, the other its treatment; one is required to be stated in the title, the other is not. The reference to the section and chapter to which the subdivisions are to be added sufficiently indicates the subject of the act. The supreme court of Nebraska has uniformly held that acts with titles like this, "An act to amend section 4 of chapter 55 of the Compiled Statutes of Nebraska," are valid, and that such a title is a sufficient compliance with the requirements of the constitution. *Dogge v. State*, 17 Neb. 140, 22 N. W. 348; *Muldoon v. Levi*, 25 Neb. 457, 41 N. W. 280.

This is the general holding of the courts on the subject. *Steele Co. v. Erskine*, 39 C. C. A. 173, 98 Fed. 215; *City of Omaha v. Union Pac. Ry. Co.*, 36 U. S. App. 615, 20 C. C. A. 219, 73 Fed. 1013; *Swartwout v. Railroad Co.*, 24 Mich. 389; *People v. Pritchard*, 21 Mich. 236; *People v. Kirsch*, 67 Mich. 539, 35 N. W. 157; *State v. Read*, 49 La. Ann. 1535, 22 South. 193; *State v. Stewart*, 52 Neb. 243, 71 N. W. 998. If an act to amend a particular section, without setting out the subject-matter of that section or the amendment thereto, has a sufficient title, then, clearly, an act to add subdivisions to a particular section must likewise be sufficient, if upon an inspection of the statutes they are found to be germane.

Another contention of the plaintiff in error is that the act is void because it does not contain the section as amended, and a repeal of the old section. This contention is answered by the suggestion that the act is not amendatory, but a new and independent legislation. In *Smith v. State*, 34 Neb. 691, 52 N. W. 572, the supreme court said:

"It was not the intention of constitutional prohibition against amendments without repealing the section amended to prevent the amendment of the law upon any given subject by addition thereto of a new and independent provision."

And to the same effect, *Madden v. Lancaster Co.*, 12 C. C. A. 566, 65 Fed. 188; *State v. Arnold*, 31 Neb. 75, 47 N. W. 694; *Strickless v. State*, 31 Neb. 674, 48 N. W. 820.

A further and final contention is that the act of 1887 under which the bonds were issued was an amendment to an act passed in 1885 which was an amendment of a still earlier act, and that as the act of 1885 was held to be void by the supreme court of the state in the case of *Webster v. City of Hastings*, 59 Neb. 563, 81 N. W. 510, the act of 1887, being amendatory of the act of 1885, must fall with that act. But the act of 1887 was not amendatory. It has been declared by the supreme court of the state to be otherwise. In *Von Steen v. City of Beatrice*, 36 Neb. 421, 54 N. W. 677, the court said:

"In fact, so far as it relates to the power of the city with respect to its streets, alleys, and parks, the act of 1887 covers the entire subject, and must be regarded as the charter of the city, and by implication repeals all prior acts in conflict therewith."

But, if the act of 1887 was treated as amendatory of the act of 1885, the result contended for by the plaintiff in error would not follow. While there is some conflict of opinion on the subject, the decided weight of authority and the better opinion is that an amendatory statute is not invalid, though it purport to amend a statute which had previously been amended or for any reason been held invalid. This question is quite fully considered, and all the authorities cited, in the recent opinion of the United States circuit court of appeals for the Seventh circuit in the case of *Wire Co. v. Boyce* (C. C. A.) 104 Fed. 172, to which we refer without citing the cases. Finding no error in the record, the judgment of the circuit court is affirmed.

MORRIS v. DULUTH, S. S. & A. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. April 24, 1901.)

No. 1,496.

1. RAILWAY COMPANIES MAY USE REASONABLE DISCRETION IN CONSTRUCTION.

Railway companies have the right to exercise reasonable judgment and discretion in the construction of their roadbeds, rails, and safety appliances.

2. NEGLIGENCE—UNUSUAL BUT REASONABLE SIZE OF BLOCKING NO EVIDENCE OF.

A railway company used a piece of lumber one inch thicker, six inches wider, and one foot longer than the customary blocking to fill the space between a guard rail and a main rail. *Held*, the use of this blocking of unusual size was but the rightful exercise of the judgment of the company, and was no evidence of negligence, or of liability for an injury resulting from a brakeman's stumbling over it.

3. CONTRIBUTORY NEGLIGENCE—CHOOSING THE MORE DANGEROUS OF TWO METHODS OF DISCHARGING A DUTY IS EVIDENCE OF.

When there is a comparatively safe and a more dangerous way known to a servant, by means of which he may discharge his duty, it is negligence for him to select the more dangerous method, and he thereby assumes the risk of the injury which its use entails.

4. SAME.

A railway train was equipped with two levers,—one on each side of it,—to enable the brakemen to draw a pin between two cars without entering between them. The machinery attached to the lever on the side of the plaintiff was out of order, while that attached to the lever on the opposite side was in good condition. *Held*, the fact that the brakeman chose to, and did, step in between the cars while in motion to draw the pin, instead of using the lever on the opposite side of the train, provided for the purpose, was evidence of negligence contributing to an injury resulting from his stumbling while walking between the cars.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Minnesota.

F. D. Larrabee, for plaintiff in error.

M. D. Munn (N. M. Thygeson, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. In the early morning of April 6, 1899, while it was yet dark, the plaintiff, John Morris, who was the head brakeman of a crew of employes of the defendant, the Duluth, South Shore & Atlantic Railway Company, stepped in between two cars which were moving along a side track at the rate of four miles an hour, and walked along with them, for the purpose of uncoupling them, until he stubbed his toes against the blocking of a guard rail, fell, and was so injured that he lost one of his legs. He sued the railway company for negligence in the construction of the blocking over which he stumbled. The company denied that it was negligent, and alleged that his accident was caused by his own carelessness. There was a trial, and at its close the court instructed the jury to return a verdict for the defendant. This ruling is assigned as error. The assignment presents two questions: Was there any substantial evidence that the defendant was guilty of negligence which caused the injury? And was the plaintiff guilty of any negligence which con-

tributed to it? These questions will be considered in the order in which they have been stated.

The facts disclosed by the evidence which condition the answer to the first question are these: Guard rails on the defendant's railroad were ordinarily slightly curved in form, and were placed about 3 inches distant from the main rail at their nearest points, and 5 or 6 inches distant from these rails at their ends. They were usually 10 or 12 feet long. The ends of the guard rail over whose blocking the plaintiff fell were about 12 inches distant from the main rail. The statutes of the state of Michigan, where this accident happened, required the spaces between the guard rails and the main rails to be blocked, for the purpose of preventing the employes from catching their feet between them; and it is not claimed that the railway company was guilty of any negligence because it used this guard rail, or because it blocked the spaces between the guard rail and the main rail. The contention is that it was negligent because it blocked the space between these rails too much. The customary method of filling the space between such rails on the defendant's railroad was to drive a piece of plank, in the form of a wedge, and two inches thick, between the two rails and between the bases and the balls of the rails, so that the narrow end of the wedge would stop near the middle, while the wide end would rest even with the end of the guard rail. The space over which the plaintiff fell was blocked with a piece of car decking 3 inches thick, which projected 1 foot beyond the end of the guard rail, was 1 foot in width, and was not beveled at its wider end. The best blocking completely fills the space between the bases and the balls of the rails, and leaves no more than 1 inch between the top of the rails and the top of the blocking. The block used in this case completely filled this requirement. In thickness it was the best that could have been provided. It completely filled the space between the bases and the balls of the rails, and the top of it rested about an inch below the tops of the rails. The plaintiff was an old employe of the railway company. He knew that the guard rail was in its place upon the roadbed, but was not aware of the height, length, or width of the blocking which filled the space between it and the main rail. In this state of the facts, it is difficult to perceive how any negligence was chargeable to the railway company. It may be conceded that this company would have been liable for any negligence of which it was guilty in placing unnecessary obstructions upon its track, but the guard rail was not an unnecessary obstruction, and there is nothing in the case to show that the blocking caused any injury which the rail itself would not inevitably have produced. It was 1 inch lower than the ball of the guard rail, and it was no wider than the distance between the main rail and the end of the guard rail. Railway companies necessarily have, and they must exercise, judgment and discretion in the construction of their railroads, and the location and character of the appliances which they use to secure the safety of the operation of their trains; and the fact that the ends of the guard rail were placed in this instance 12 inches, instead of 6 inches, from the main rail, was evidence of nothing but the rightful exercise by the defendant of this judgment and

discretion. It was no proof of any negligence on the part of the company. When the defendant fell, he was walking along the road-bed. He did not come upon the side, but upon the end, of the blocking. If he stubbed his toes and fell over this end of the block when it extended 1 foot beyond the end of the rail, he would inevitably have stubbed his toes and have fallen over it if it had been a foot shorter; and, if there had been no blocking, he would as inevitably have fallen over the guard rail, which was an inch higher than the blocking. So, also, if he stubbed his toes and fell over the blocking, which was one foot wider and 1 inch lower than the guard rail, he must inevitably have fallen over the guard rail, whose ends were rightfully placed 12 inches from the main rail, if there had been no blocking or a lower blocking between the rails. The conclusion is that there was no substantial evidence in this case that the defendant was guilty of any negligence which caused or contributed to the injury of the plaintiff, and the instruction and the judgment of the court were right.

An examination of the second question raised by the specification of error leads to the same conclusion. The plaintiff was the head brakeman of his crew. That crew was engaged in placing the rear one of two cars which were attached to an engine upon a side track. The plaintiff had turned the switch to permit this train to back in upon the side track. His subordinate brakeman was riding the train, and it was necessary to uncouple the rear car, so that it could be left upon the side track. There were two levers, one on each side of this train, provided by the company for the purpose of enabling the brakeman to pull the pin between these two cars and to uncouple them without incurring the risk and danger of stepping between them for that purpose. The machinery attached to the lever on the plaintiff's side of the train was out of order, so that he could not pull the pin by means of that lever. But the machinery attached to the lever on the opposite side of the train was in working condition, and he could have drawn the pin himself, or could have caused his subordinate to draw it by the use of this lever. Notwithstanding this fact, he stepped in between the two cars in the dark, while they were moving about four miles an hour, undertook to pull the pin with his hands, and by this indiscretion induced his injury. When there is a comparatively safe and a more dangerous way known to a servant by means of which he may discharge his duty, it is negligence for him to select the more dangerous method, and he thereby assumes the risk of the injury which its use entails. *Gowen v. Harley*, 56 Fed. 973, 983, 6 C. C. A. 190, 200, 12 U. S. App. 574, 590; *Coal Co. v. Reid*, 85 Fed. 914, 29 C. C. A. 475, 57 U. S. App. 464; *McCain v. Railroad Co.*, 76 Fed. 125, 126, 22 C. C. A. 99, 101, 40 U. S. App. 181, 184; *Russell v. Tillotson*, 140 Mass. 201, 4 N. E. 231; *Gleason v. Railway Co.*, 73 Fed. 647, 19 C. C. A. 636, 43 U. S. App. 89; *Cunningham v. Railway Co. (C. C.)* 17 Fed. 882; *English v. Railway Co. (C. C.)* 24 Fed. 906. The plaintiff knew that he could draw the pin and uncouple these cars in safety by the use of the lever on the opposite side of his train, but he chose to incur the risk and danger of walking between the moving cars and of attempting to draw the pin with his hands. The

lever and the machinery connected with it had been provided by the defendant for the express purpose of enabling the plaintiff to avoid the danger and risk to which he elected to expose himself. His election to adopt this dangerous method of raising the pin directly contributed to his injury. If he had used the appliances provided by his employer to enable him to avoid this danger, he would not have been harmed. His injury was the direct result of his own negligence. The judgment below is affirmed.

FRAME v. PORTLAND GOLD MIN. CO.

(Circuit Court of Appeals, Eighth Circuit. April 13, 1901.)

No. 1,491.

ASSIGNMENT OF ERRORS—FILING BEFORE ISSUE OF WRIT INDISPENSABLE.

The filing of an assignment of errors before the issue of a writ of error is indispensable, under the eleventh rule of the circuit courts of appeals (32 C. C. A. cxlvi.), and the writ will be dismissed if the assignment is not filed before it issues.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Colorado.

This was an action by Mary Frame, the plaintiff in error, against the Portland Gold Mining Company, the defendant in error, for negligence. Judgment was rendered for the defendant upon a demurrer to the complaint, and a writ of error sued out to reverse this judgment.

Paul Reiss (A. L. Doud and A. J. Fowler, on the brief), for plaintiff in error.

James L. Blair (James A. Seddon and Robert A. Holland, Jr., on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

A motion has been made to dismiss the writ of error in this case because the assignment of errors was not filed until after the writ was issued. Section 997 of the Revised Statutes makes an assignment of errors, a prayer for reversal, and a citation to the adverse party essential parts of the record upon which a review of the rulings of a trial court may be invoked in the appellate courts of the United States. Rule 11 of this court (32 C. C. A. cxlvi.) provides that "the plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed." This is a just and reasonable rule. It makes the filing of the assignment of errors before the writ is allowed indispensable to its issue,

to the end that the judge to whom application is made for its allowance may be informed what the alleged errors are upon which the petitioner relies, and may thus intelligently decide whether or not the prayer of his petition should be granted, and also to the end that the opposing counsel and the appellate court may be informed what questions of law are raised for consideration. In the early history of this court attention was sharply called to this rule, and the announcement was clearly made that it would be enforced, although in the early cases in which its enforcement was invoked we carefully examined the errors assigned in order that no injustice might result from the application of the rule. *U. S. v. Goodrich*, 4 C. C. A. 160, 54 Fed. 21, 22; *Union Pac. R. Co. v. Colorado Eastern R. Co.*, 4 C. C. A. 161, 54 Fed. 22; *City of Lincoln v. Sun Vapor Street-Light Co. of Canton*, 8 C. C. A. 253, 59 Fed. 756, 759.

The writ of error in this case was filed on August 18, 1900, and no assignment of errors was presented with the petition, and none was filed until August 20, 1900, two days after the issue of the writ. An affidavit has been presented in explanation of the failure to present the assignment of errors before the writ was issued, but it presents no sufficient excuse for a failure to comply with the rule. The motion to dismiss the writ is granted. *Flahrity v. Railroad Co.*, 6 C. C. A. 167, 56 Fed. 908; *Crabtree v. McCurtain*, 10 C. C. A. 86, 61 Fed. 808; *Lloyd v. Chapman*, 35 C. C. A. 474, 93 Fed. 599, 601; *Insurance Co. v. Conoley*, 11 C. C. A. 116, 63 Fed. 180; *Great Creek Coal Co. v. Farmers' Loan & Trust Co.*, 63 Fed. 891; *Van Gunden v. Iron Co.*, 3 C. C. A. 294, 52 Fed. 838; *Railway Co. v. Reeder*, 22 C. C. A. 314, 76 Fed. 550.

DWYER v. NIXON.

(Circuit Court of Appeals, Second Circuit. May 8, 1901.)

No. 157.

1. INJURY TO EMPLOYEE—DANGEROUS PLACE TO WORK.

Where a servant was asked by the foreman to take a belt off a pulley, the foreman promising to slow down the engine for that purpose, and plaintiff threw the belt off and the machinery stopped entirely, and while engaged in tying the belt up out of the way of other moving parts the machinery was suddenly started, and plaintiff was injured, the case does not come within the rule that the master must supply a reasonably safe place to work in.

2. SAME—PROMISE TO REPAIR.

The statement by the foreman that he intended to move the machinery slowly was not a promise or assurance of the master that defects would be cured or dangerous places made safe.

In Error to the Circuit Court of the United States for the Southern District of New York.

This is a writ of error to review a judgment of the circuit court, Southern district of New York, entered in favor of defendant upon a verdict directed by the court. The action was brought to recover damages for personal injuries.

Jacob F. Miller, for plaintiff in error.
Chas. C. Nadal, for defendant in error.

Before LACOMBE and SHIPMAN, Circuit Judges.

PER CURIAM. Defendant had a machine shop at Elizabeth, N. J., in which plaintiff and five or six other men were employed. This shop and another near it were supplied with power from one engine. While working at his bench, Shaw, the foreman or superintendent, asked him to take a belt off a pulley,—not an unusual performance. The machinery was then running full speed. Inferring that Shaw meant he should take it off while so running, plaintiff replied that he would not take it off, because it was dangerous. Shaw walked away, and then returned and asked him if he would take it off if he (Shaw) had the engine slowed down. To this plaintiff replied that he would, as then there would be no danger. It was necessary that it should be going, otherwise the belt could not be thrown off. Shaw then sent word to the engineer to slow down, and plaintiff got a ladder and proceeded to do the job. He threw the belt off, and the machinery stopped entirely. Thereupon, in further compliance with Shaw's directions, he undertook to tie the belt up out of the way of other moving parts. While engaged in this operation, Shaw started or allowed the machinery to be started suddenly, in consequence of which plaintiff was caught and injured.

The theory of the complaint is fourfold: (1) That Shaw was negligent, careless, unskillful, and intemperate, of which defendant well knew, or ought to have known; (2) that defendant had failed in his duty to provide proper and safe rules and regulations; (3) that defendant had neglected to provide certain clutch pulleys; (4) that a place in which he was put to work, and which was safe when he went into it, became unsafe by the sudden starting of the machinery. Of the first of these charges of negligence there was produced on the trial no testimony whatsoever. There is no suggestion anywhere in the record of any rule or regulation whatsoever which would have been likely to prevent the accident. Some little testimony was given on the subject of clutch pulleys, but it fell far short of showing that they were such usual appliances that their absence would imply negligence. Plaintiff argues at great length, citing many authorities, that the case comes within the rule that the master must supply a reasonably safe place to work in, but we are unable to assent to the proposition. The place was entirely safe, provided the fellow servants of plaintiff moved the machinery slowly. It became unsafe because one or more of them started the machinery suddenly and without warning plaintiff. The statement (or implication of statement, as in this case) of a fellow servant that he intended to move the machinery slowly is not within the rule of "promise" or "assurance" by the master that defects will be corrected and dangerous places made safe. The judgment is affirmed.

MODERN WOODMEN OF AMERICA v. UNION NAT. BANK OF OMAHA.

(Circuit Court of Appeals, Eighth Circuit. April 11, 1901.)

No. 1,458.

1. APPEAL—REVIEW—INSTRUCTIONS.

When a peremptory instruction is given in favor of either party, the only question with respect to the charge which is open for consideration by an appellate court is whether such direction to find for one party or the other, when considered in the light of the pleadings and all the evidence, was right. Assignments of error as to other matters contained in the charge are in such case immaterial.

2. BANKS—CERTIFICATES OF DEPOSIT—ESSENTIALS OF INSTRUMENT TO CREATE ACTIONABLE OBLIGATION.

An instrument executed by the cashier of a bank, which merely certifies that on a prior date named a party had a stated sum on deposit to its credit in the bank, but which contains no words of negotiability or promise to pay, is not a certificate of deposit, or an obligation of the bank upon which an action can be maintained, but is merely evidentiary in character.

3. SAME—ISSUANCE OF CERTIFICATE SHOWING FICTITIOUS DEPOSIT—ESTOPPEL.

Z. was head banker of plaintiff, which was an incorporated insurance order, and as such had the custody of its funds. After the expiration of his term of office, he retained certain of such funds, although they had been demanded by plaintiff, and kept the same on deposit in a bank in Grand Island, Neb., of which he was a stockholder and director. The cashier of such bank wrote to the cashier of defendant bank, which was its Omaha correspondent, explaining that his bank had certain money of plaintiff on deposit; that on a certain date plaintiff would issue a statement, and, for reasons concerning his own bank, he did not wish such deposit to appear therein. He requested defendant to give plaintiff a fictitious credit for the amount on said date, inclosing his note for the amount to be credited, and also a check for the same amount, to be used in paying the note a day or two later. He further stated that the arrangement had been fully explained to, and was understood by, Z. and plaintiff's directors. The arrangement was carried out, and defendant's cashier, a few days later, on request, issued a certificate stating that on the date named plaintiff had such sum on deposit in his bank. This certificate was sent to the Grand Island bank, and by it given to Z., who forwarded it to plaintiff. Three weeks later the Grand Island bank failed, and Z. and his sureties were also insolvent. Plaintiff, having made demand, brought action against defendant to recover the amount, suing both on the certificate and for money had and received. *Held*, that the certificate executed by defendant's cashier was not an obligation which would support an action, nor would the action lie on an implied promise, since defendant did not in fact receive any money on deposit; that it was not estopped to show such facts by the certificate, which was issued only as an accommodation to its correspondent, and without any intention to deceive plaintiff, or knowledge that it would be so used, but, on the contrary, with the understanding that plaintiff's officers had full knowledge of the transaction; that, when there is nothing in the circumstances of a case indicating that one making a false statement intended that the complaining party should act on it, the party making such statement is not estopped from showing the truth.

4. SAME—REMEDY OF PARTY INJURED.

Where a bank issued a certificate falsely stating that on a certain date it had on deposit a sum to the credit of a party, and it was claimed that the certificate misled the party and occasioned damage, but it appeared that such damage was much less than the amount of the certificate, *held*, that the proper remedy was an action *ex delicto* for deceit, rather than in assumpsit to recover the amount of the certificate.

Sanborn, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the District of Nebraska.

The Modern Woodmen of America, an Illinois corporation, and the plaintiff in error, sued the Union National Bank of Omaha, Neb., the defendant in error, for the sum of \$27,269.33, the complaint containing two counts or causes of action. The first count alleged, in substance, that on December 31, 1895, the plaintiff had on deposit with the defendant bank the sum of money last stated, which sum it had ever since refused to pay. The second count alleged, in substance: That on January 6, 1896, the defendant bank issued and delivered to the plaintiff its certificate of deposit in the following form:

"January 6, 1896.

"I, Charles E. Ford, cashier of the Union National Bank of Omaha, Nebraska, do hereby certify that at the close of business on the 31st day of December, A. D. 1895, the Modern Woodmen of America had on deposit in this bank the sum of \$27,269.33, designated 'General Fund.'

"Chas. E. Ford, Cashier."

—That the plaintiff had presented this certificate to the defendant bank on two occasions, to wit, on February 12, 1896, and March 10, 1896, and had demanded payment of the same, and that the defendant had declined to pay it, to the plaintiff's damage in the sum of \$27,269.33. By its answer to the foregoing complaint the defendant denied that it then had on deposit, or that it had on deposit at the times mentioned in the complaint, any sum of money belonging to the plaintiff; and, as respects the cause of action founded on the alleged certificate of deposit, it alleged the following facts, in substance: That on or about the date of the alleged certificate of deposit one O. J. Smith had requested the cashier of the defendant bank to make a statement, for the accommodation of said Smith, that the plaintiff had the amount of money stated in the certificate on deposit with said defendant bank on December 31, 1895; that said cashier, relying upon the good faith and honesty of said Smith, executed the instrument set forth above, and delivered it to said Smith, without any consideration whatever, but solely for the accommodation of said Smith, and not in the usual course of business, and that said instrument was so executed without any right or authority on the part of said cashier, and without any consideration, and in pursuance of a specific agreement that said instrument should not be valid; and that at the same time, and as a part of the same transaction, Smith delivered to said cashier a check for the purpose of canceling said instrument; and that said Smith then and there stated to said cashier that the directors of the Modern Woodmen of America, the plaintiff herein, were aware of the transaction, and that it had no money on deposit with the defendant bank. To this answer the plaintiff company filed the following reply, in substance: That the certificate of deposit set forth in its petition was issued by the defendant bank with the intention that it should be delivered to the plaintiff, and for the purpose of being delivered to the plaintiff, and with the intention that the plaintiff should rely upon the facts stated in the certificate as being true; that said certificate, when issued, was forwarded to D. C. Zink, at Grand Island, Neb., to be forwarded by him to the plaintiff company; that said Zink did forward the same to A. R. Talbot, then chairman of the plaintiff's board of directors, who in turn forwarded it to the plaintiff's head clerk; that said Zink had been "head banker" of the plaintiff company, but his term of office had expired in June, 1895, and his successor duly appointed; that on December 30, 1895, said Zink had on deposit with the Bank of Commerce, of Grand Island, Neb., the sum of \$27,269.33 of the plaintiff's funds; that for some time prior to December 30, 1895, the plaintiff had been endeavoring to obtain said money from said Zink, and had been threatening to sue said Zink and the sureties upon his official bond for the money so in his hands; that on the receipt of said certificate from said Zink it suspended further efforts in that behalf, relying upon the statement contained in the certificate, and believing the same to be true; that at the time it received said certificate, on or about January 6, 1896, Zink and the sureties on his bond were solvent, but that when the defendant bank refused to pay the certificate, and on or about February 22, 1896, they had become insolvent;

that on December 31, 1895, the Bank of Commerce, of Grand Island, Neb., had a large amount of money on hand subject to check, more than sufficient to pay the amount of money belonging to it which Zink then had on deposit in said bank; that, if the aforesaid certificate had not been issued by the defendant bank, Zink would have checked out said money, and paid it to the plaintiff company, prior to January 20, 1896, when said Bank of Commerce became insolvent; that while the plaintiff was pressing said Zink to pay over the money in his hands belonging to it, he, the said Zink, had finally agreed with the plaintiff that by December 31, 1895, the amount of money in his hands would be placed on deposit with the defendant, the Union National Bank of Omaha, and that a certificate of deposit would be furnished therefor; and that on receipt of the aforesaid certificate from said Zink it supposed that the funds in his hands had been deposited with the defendant bank on December 31, 1895, pursuant to said promise. In view of these facts, the plaintiff company alleged that the defendant was estopped from proving the facts which were averred in its answer. A trial was had on these issues, and at the conclusion of the plaintiff's testimony the trial court instructed the jury to return a verdict in favor of the defendant. The case is before this court for review on a writ of error which was sued out by the plaintiff.

John L. Kennedy (J. M. White and Myron L. Learned, on the brief), for plaintiff in error.

James H. Macomber, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Inasmuch as the trial court directed a verdict in favor of the defendant bank, the principal question to be considered by this court is whether that direction was right in view of admitted facts, and in view of facts concerning which there was no substantial controversy. Without attempting, therefore, to notice in detail the various exceptions which were taken to the admission and exclusion of evidence and to some portions of the court's charge to the jury, we shall direct our attention to the question above stated, namely, whether, in the light of the undisputed facts which were developed by the evidence, the trial court properly directed a verdict in favor of the defendant bank. With respect to those assignments of error that are addressed to the charge, and concerning which something has been said in the briefs, it may be well to observe that the rule is well settled that when, as in the present instance, a peremptory instruction is given in favor of either party, the only question with respect to the charge which is open for consideration by an appellate tribunal is whether such direction to find for one party or the other, when considered in the light of the pleadings and all the evidence, was right. *Rollins & Sons v. Board of Com'rs of Gunnison Co.*, 49 U. S. App. 399, 26 C. C. A. 91, 80 Fed. 692, 695. This rule obviates the necessity of considering whether there was error in any part of the charge other than the final direction to the jury to return a verdict in favor of the defendant, as it is immaterial whether the learned judge of the trial court did or did not give expression to certain views that were erroneous in reaching that result.

Before considering the principal question in the case, we deem it expedient to notice a subordinate question, which arises upon the pleadings; and that is whether the instrument declared upon in the

second count of the complaint is an express contract, like a note or bill, upon which an action can be maintained, or whether it is in such form that it can only be used as an item of evidence to establish an indebtedness on account of which the law will imply a promise to pay. If the latter is the correct view concerning the alleged certificate of deposit, then the two counts of the complaint are not substantially different, because, proceeding under either, the plaintiff must establish the existence of a debt, and rely for a recovery upon a promise which the law will imply. It is obvious that the instrument in question is not in the form of an ordinary certificate of deposit, such as banks and other financial institutions are in the habit of issuing, because it does not speak as of the day it bears date, and acknowledge the existence of an indebtedness at that time, but refers to a prior date, and certifies that at that time the plaintiff company had on deposit a specified sum. Neither does the instrument in question contain the usual clause that the sum on deposit is payable on the return of the certificate, or on its presentation, or at any time. In view of the form of the certificate, it would seem to have been designed, not as an ordinary certificate of deposit to show the existence of a present indebtedness on the part of the defendant bank, but rather for the purpose of showing the state of the plaintiff's account with the bank at a prior date and an indebtedness at such prior date, which, for aught that the certificate discloses, may have been fully discharged before it was executed. No one, we apprehend, would purchase such an instrument on the faith of its own recitals, because it contained no representation that any funds were on deposit when it was issued, and for the further reason that it contained no words indicating that it was intended for negotiation or circulation as an obligation of the bank. For these reasons we are of opinion that an action could not be maintained on this certificate, as might have been done if it possessed the distinguishing features of an ordinary certificate of deposit, and contained words of negotiability or a promise to pay; that it is merely evidentiary in its character, and that the second count of the complaint, like the first, is founded, not upon the certificate, but upon an implied promise. *Hotchkiss v. Mosher*, 48 N. Y. 478, 482; *Daniel*, Neg. Inst. (3d Ed.) § 1704.

Passing to the main question in the case, it may be said that the testimony at the trial disclosed the following undisputed facts: D. C. Zink, who had been head banker of the Modern Woodmen of America, had in his possession \$27,269.33 of the funds of the order, which he failed to turn over to his successor in office when the latter qualified as his successor, on or about August 18, 1895. This money he had on deposit with the Bank of Commerce, of Grand Island, Neb., of which institution he was a stockholder, and also an active director. After his successor was appointed, he endeavored for some time to induce said order to make said bank one of the depositories of its funds, but such effort failed. The money remained in Zink's custody, and on deposit with the Bank of Commerce, during the fall of 1895, and until the bank failed, on or about January 20, 1896. During that period a demand appears to have been made on

him by the plaintiff company to turn over the money to his successor, and he seems to have promised to pay the same to his successor on or before December 31, 1895. On December 26, 1895, the following letter was written by O. J. Smith, cashier of the Bank of Commerce, to Charles E. Ford, cashier of the Union National Bank of Omaha:

"Grand Island, Neb., 12—26—'95.

"Chas. E. Ford, Esq., Cash., Omaha—Dear Sir: As you know, we still have about 25 M. of Zink money, and we have the privilege of keeping it for a time yet.—just how long I don't know, but I guess until we are ready to pay it out. Now, on Dec. 31 they make an annual statement, & for our good here I don't want it shown up as in our bank, as it is supposed that we haven't any Woodmen money. Can I arrange with you to give us a credit of this amt. for a day or two by sending you a note for the amt. & a check on the same account so you are fully protected. & you give credit to the Woodmen acct. for the amount for a day or two, & can then issue a certificate showing this amount in your bank at that time instead of here. Mr. Zink & the Woodmen board of directors all understand this, as it has been fully explained to them. An early reply will oblige, yours,

O. J. Smith, Cash."

The defendant bank, through its cashier, responded to the aforesaid letter as follows:

"Omaha, Neb., Dec. 27, 1895.

"O. J. Smith, Cashier, Grand Island, Neb.—Dear Sir: * * * With reference to our assisting you in the matter of the Zink money of \$25,000, would say that we will comply with your request, provided everything is made safe to us; and you can send on the papers, as suggested by you.

"Respectfully yours,

Chas. E. Ford, Cashier."

On December 30, 1895, Smith wrote the following letter to the defendant bank, which contained the specified inclosures, to wit, a note and check:

"Grand Island, Neb., 12—30—'95.

"Chas. E. Ford, Esq., Cash.—Dear Sir: Inclosed find our note for \$27,269.33; also check for like amount. Please make the credit on your books so you can make certificate that there was to the credit of the Modern Woodmen of America on Dec. 31—'95, the above amount. Don't want Zink's name to appear in the certificate. You can arrange it on your books to suit yourself so you are perfectly safe. We have this matter arranged with the directors of the Woodmen all O. K., so we can pay it out as we like, but don't want to show it here, for our own good, as it is supposed we haven't any of this money. Use check to pay note, & return note on Jan. 2 or 3.

"Truly yours,

O. J. Smith, Cashier.

"Kindly make certificate 31st December, and forward to Zink."

On December 31st, Ford, as cashier, replied to the aforesaid letter as follows:

"Omaha, Neb., Dec. 31, 1895.

"O. J. Smith, Cashier, Grand Island, Neb.—Dear Sir: I have yours of the 30th. I credit your account with \$27,269.33. We will sign a certificate if Mr. Zink will send the form that he would like for us to use. * * *

"Respectfully yours,

Chas. E. Ford, Cashier."

On January 2, 1896, the following letter was written, which contained the inclosure therein stated, to wit, the note for \$27,269.33:

"Omaha, Neb., Jan. 2, 1896.

"O. J. Smith, Cashier, Grand Island, Neb.—Dear Sir: I herewith inclose your note for \$27,269.33, the same having been paid by check drawn on this bank by the Modern Woodmen of America.

"Respectfully yours,

Chas. E. Ford, Cashier."

On January 4, 1896, Zink himself wrote the following letter to the defendant bank, in obedience to the request contained in Ford's letter of December 31, 1895:

"Grand Island, Neb., Jan. 4, 1896.

"Chas. E. Ford, Esq., Cashier, Omaha, Nebraska—Dear Sir: Kindly make upon your letter head a certificate showing balance in your bank on the 31st day of December, 1895, as follows: 'I, Chas. E. Ford, Cashier of the Union National Bank of Omaha, Nebraska, do hereby certify that at the close of business on the 31st day of December, A. D. 1895, the Modern Woodmen of America had on deposit in this bank the sum of \$——, designated "General Fund."' Please forward same to me, and oblige,

"Yours, respectfully,

D. C. Zink, Cashier."

On the receipt of the letter from Zink inclosing the form of a certificate which was desired, such a certificate was executed by Ford, as cashier, the same being the alleged certificate of deposit which is set forth above in the statement. This certificate, on its receipt by Zink, was by him transmitted, as it seems, to the plaintiff company. There was no evidence introduced, so far as we can discover, which tended to show that the defendant bank, or any of its officers, had any knowledge of the object which Zink or the Grand Island bank may have had in view in requesting the issuance of the alleged certificate of deposit, except such as was communicated by the aforesaid letters. No oral communication took place between any of the parties to the transaction, but the same was consummated by correspondence in the manner above shown. And, inasmuch as it was stated in Smith's letter of date December 26, 1895, and in his letter of date December 30, 1895, that the proposed transaction whereby the plaintiff company was to receive a fictitious credit had been "fully explained" to the plaintiff's board of directors, and that the Bank of Commerce had "this matter arranged with the directors of the Woodmen all O. K.," it is evident that the defendant bank did not issue the alleged certificate with any intent to deceive, mislead, or defraud the plaintiff company. The proof shows without contradiction that in issuing the certificate the defendant acted, as it supposed, with the full consent of the plaintiff company for the purpose of benefiting the Grand Island bank in some manner. There is no evidence, therefore, to sustain the allegation contained in the reply that the certificate in question was issued with the intention that it should be delivered to the plaintiff company, and that it should rely upon the facts stated in the certificate as true. That averment of the reply is wholly gratuitous, and unsupported by the evidence.

In view of the facts to which we have adverted, we are of opinion that the trial court properly directed a verdict in favor of the defendant bank. The action, as heretofore shown, was in assumpsit upon an implied promise, and to sustain such an action it is necessary to show the existence of an indebtedness on the part of the person sued, since the law never implies a promise on the part of any one to pay a sum of money, unless the proof shows the existence of a debt growing out of some transaction, which he is legally obligated to pay. In the present instance it appears that the defendant bank did not have in its hands on December 31, 1895, any funds belonging to the plaintiff company; that the credit given to it on that day was purely

fictitious; that it was given in reliance upon representations made by Smith that the plaintiff understood it to be fictitious, and upon the further assurance that the defendant should incur no liability by giving the credit. It goes without saying that under such circumstances the law will not imply a promise to pay a sum of money which was never received. This is the view of this very transaction which was entertained and expressed by the supreme court of Nebraska in *State v. Bank of Commerce of Grand Island*, 84 N. W. 406, 407.

Nor do we perceive that the defendant bank, on the facts above detailed, should be held estopped from showing the circumstances under which the certificate in question was issued, or from showing that in point of fact the Modern Woodmen of America had no funds whatsoever on deposit with it on December 31, 1895. To create an estoppel such as is here relied upon by the plaintiff company, it is generally held that the false statement must have been made with intent that the complaining party should act upon it, or it must at least appear that it was foreseen that he would in all probability act upon it to his prejudice. When there is nothing in the circumstances of the case which reasonably indicates that the one who made the false statement intended that the complaining party would act in reliance upon its being true, the party making it is not estopped from proving the truth. *Kuhl v. Mayor, etc.*, 23 N. J. Eq. 84, and cases there cited; *Mayenborg v. Haynes*, 50 N. Y. 675; *Wilcox v. Howell*, 44 N. Y. 398, 402; *Bigelow, Estop.* (5th Ed.) pp. 570, 629; *Bisp. Eq.* § 290, and cases there cited. Now, in the present instance the false certificate was obtained from the defendant, as already stated, on the representation that the plaintiff's board of directors all understood the transaction, and assented to it; and, however culpable the defendant bank may have been in uttering a false certificate for the purpose of bolstering up the credit of the Grand Island bank, yet it is clear that it did not intend to deceive the plaintiff company, or to give utterance to a falsehood on which it would act to its prejudice, or in consequence of which it would take any action whatsoever. It supposed, and with good reason, that the fictitious credit which it was asked to make and certify to was made with the full knowledge of the plaintiff's board of directors, if not at their solicitation, and incidentally for the benefit of the plaintiff company. Under these circumstances we are persuaded that it would be carrying the doctrine of estoppel to an unreasonable limit to hold that the defendant is precluded from telling the truth, and is bound to pay its certificate in full. A very different result would probably be reached if the certificate had been a negotiable instrument, and had passed into the hands of an innocent purchaser for value; but we are not called upon to consider such a case.

Aside from the foregoing view, it is obvious that, upon the theory on which the present action is brought, there could have been no recovery against the defendant bank short of the full amount of the certificate; and it is apparent from such examination as we have made of the testimony bearing upon that issue that, if the plaintiff company sustained any damage whatever in consequence of the issu-

ance of the certificate, either by postponing action against Zink and his sureties for the space of about six weeks, or by the failure of Zink to withdraw the fund from the Bank of Commerce, or to make an attempt to withdraw it, the amount of such damage, if any, was small, and far less than the face of the certificate. It is not at all probable, we think, that the fund could have been collected from Zink and his sureties or the Bank of Commerce at any time after December 26, 1895. The fund was probably lost to the plaintiff prior to the latter date. Such actual damages as were in fact sustained could, doubtless, have been recovered in an action *ex delicto* for deceit, on the assumption, of course, that the directors of the plaintiff company were ignorant of the circumstances under which the certificate was obtained, and on the further assumption that the certificate was issued by the defendant, as alleged in the reply, with the intention that the plaintiff should rely and act on the facts therein stated, and that it was in fact used by Zink to deceive the plaintiff company, and occasioned it some damage. We are of opinion, therefore, that, if a right of action existed, it should have been brought in form *ex delicto*, instead of being brought in a form which would necessitate the recovery of a specified sum, although it might be far in excess of the damages actually sustained in consequence of the alleged deceit. The judgment below is affirmed.

SANBORN, Circuit Judge (dissenting). I agree with the proposition of the majority that an action for damages for deceit could have been maintained by the plaintiff against the bank on its certificate of January 6, 1896, and the facts surrounding its presentation to the plaintiff. But that position leads inevitably to the conclusion that an action for the money which that certificate declares that the bank held on deposit for the plaintiff on December 31, 1895, could also be maintained. An estoppel is a prohibition from denying the existence of the facts and the legal consequences of the existence of the facts which one has falsely represented to exist to the damage of another. In this case it forbade the bank to deny that on December 31, 1895, it had \$27,269.33 of the money of the plaintiff in its possession, and it as conclusively prohibited it from denying the legal effect of that fact, namely, its implied promise and its legal liability to pay the plaintiff that amount. This action is not based on the theory that this money was ever actually deposited in this bank. It rests on the fact that the bank falsely represented to the plaintiff, to its damage, that it owed it this amount of money on December 31, 1895, and upon the legal conclusion that it was thereby forbidden to deny the truth of its statement. Hence it is that the plaintiff was not required to prove that any money was actually on deposit with the bank to the credit of the Modern Woodmen of America, in order to raise the implied promise and the legal liability of the bank to pay this debt. When the Modern Woodmen of America had proved that it relied upon the truth of the statement in that certificate, and that it was thereby induced to change its position, to its damage, that certificate became as incontestable proof against the bank that the facts therein stated were true, and that the necessary legal conse-

quences of these facts, the implied promise and the legal liability to pay, had arisen, as a judgment or a decree to that effect would have been. When a false representation raises an estoppel, the injured party has a choice of remedies. He may aver the falsity of the statement, and recover damages for the deceit, or he may insist upon the truth of the representation, and enforce the rights he would have had if it had been true. One purchases bank stock for another, but takes the certificate in his own name. The bank may maintain an action against him for damages for the deceit, but it may also refuse to avail itself of this remedy, may insist that the false appearance he has caused represented the truth, and may collect assessments from him who made the representation just as if it had been true. *Horton v. Mercer*, 71 Fed. 153, 18 C. C. A. 18, 36 U. S. App. 234. One who has a first lien upon property represents to another about to take a second lien thereon that the latter's mortgage will constitute a first lien. The holder of the second lien may recover damages for this deceit, but that is not his only remedy. He may insist that his mortgage is a first lien, may foreclose it upon that theory, and the holder of the first lien will not be permitted to deny either the fact or its legal consequences. *Guthrie v. Quinn*, 43 Ala. 561; *Kuhn v. Morrison*, 78 Fed. 16, 23 C. C. A. 619, 41 U. S. App. 700. A bank states that a check is good when it is not, and one accepts it in payment of some obligation of the debtor worth much less than the face of the check. He may sue the bank for the deceit, and recover the damages he actually sustained. But he is not confined to that remedy. He has a right to recover of the bank the exact amount he would have received if its statement had been true. He can recover the face of the check. *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. 604, 645, 19 L. Ed. 1008; *Riverside Bank v. First Nat. Bank of Shenandoah*, 74 Fed. 276, 20 C. C. A. 181, 38 U. S. App. 674; *Farmers' & Mechanics' Bank of Kent Co. v. Butchers' & Drovers' Bank*, 16 N. Y. 125, 69 Am. Dec. 678.

Now here, while the plaintiff had the right to sue the bank, and to recover damages for the deceit, that was not its only remedy. It had an equal right to maintain an action, and to recover a judgment against the bank for the money which it would have been entitled to receive if the statement in the certificate had been true,—the \$27,269.33, and interest from date of demand or presentation. Indeed, under the facts of this case, this certificate had exactly the same meaning and the same legal effect that Zink's check payable to the plaintiff and certified by the bank would have had. It was a certificate of the bank that it held \$27,269.33 on deposit for its benefit on December 31, 1895. When this certificate was presented by Zink to the plaintiff, it and its officers knew that, if that money was there to its credit on December 31, 1895, it still remained there, for they had not withdrawn it, and no other party had authority to do so. Hence the presentation of the certificate to the plaintiff was a plain statement of the bank that it was indebted to the Modern Woodmen of America at the time the certificate was presented in the amount stated upon its face. Moreover, this certificate does not differ in any respect that is material to the liability of the bank to pay the

debt it evidences from the usual certificate of deposit, upon which all will concede that an action may be maintained. Such a certificate reads:

"St. Louis, April 9, 1901.

"John Smith has deposited with this bank one thousand dollars in current funds, payable to his order on the return of this certificate properly indorsed."

Of course, such a certificate is a negotiable instrument, while the certificate before us is not. But, if the words "payable to his order on the return of this certificate properly indorsed" are stricken from the instrument, the legal liability of the bank to pay its face to the payee—a liability which may be enforced by an action on the instrument—will still remain. Now, the only difference between such a certificate and that in evidence in this case is that the former certifies that the money was deposited at some indefinite time in the past, without stating when it was there, while the latter certifies that it was deposited at some time in the past, and that it was still on deposit with the bank seven days before the certificate was dated. This variance cannot make any material difference in the legal effect of the two certificates, and that issued by the defendant is, in my opinion, an evidence of indebtedness upon which an action is maintainable to the same extent and in the same way that it is upon a certified check, upon a certificate of deposit, or a duebill. A little reflection will show that the cashier of a bank, when he certifies a check or issues a certificate of deposit, is always stating a past transaction,—that money has been deposited, that the bank has become indebted. He usually writes his certificates of deposit in that form, and his certificate in this case stated only what he was accustomed to state whenever he issued a certificate of deposit. If the plaintiff had been a party to, or had been aware of, the mischievous acts which led to the issue of this certificate, those acts would have constituted a defense to it. But it was not. It stands in the same relation to the bank that the purchaser of a certified check or of a certificate of deposit is placed. The latter purchases the certificate in good faith, in reliance upon the truth of the statement it contains. The plaintiff took this certificate in good faith, in reliance upon the truth of the statement it contained that the bank was indebted to it in the amount of its face, and for this reason it forbore to collect its debt of Zink and the Grand Island bank, the parties that really owed it. It received the certificate in good faith in payment of Zink's debt, and permitted him, his sureties, and the Grand Island bank to escape payment on account of its reliance upon the indebtedness of the Omaha bank. These facts estopped the latter bank from proving the falsity of its certificate.

Ford and the bank cannot escape from this estoppel because they did not intend to induce the plaintiff to act upon the certificate. An actual intent to deceive, or to induce another to act on a false representation, is not essential to the creation of an estoppel. It is sufficient that the natural and probable effect of the misrepresentation was to deceive others, and to induce them to change their position in reliance upon it. Such a misstatement begets a conclusive presumption that he who makes it intends thereby to deceive, and to induce

others to act upon it, under the familiar rule that every one is presumed to intend the natural consequences of his acts. The true rule is that, if a man so conducts himself, whether intentionally or not, that a reasonable person would infer that a certain state of things existed, and the latter acts upon that inference, the former will afterwards be estopped from denying it. *Bigelow, Estop.* (5th Ed.) 634; *Cornish v. Abingdon*, 4 Hurl. & N. 549; *Barnes v. Railroad Co.*, 54 Fed. 87, 89, 4 C. C. A. 199, 201; *Paxson v. Brown*, 10 C. C. A. 135, 61 Fed. 874, 882; *Cairncross v. Lorimer*, 3 Macq. H. L. Cas. 828; *Dickerson v. Colgrove*, 100 U. S. 578, 582, 25 L. Ed. 618; *Kirk v. Hamilton*, 102 U. S. 68, 75, 26 L. Ed. 79; *Evans v. Snyder*, 64 Mo. 516; *Pence v. Arbuckle*, 22 Minn. 417; *Crook v. Corporation of Seaford*, L. R. 10 Eq. 678; *Faxton v. Faxon*, 28 Mich. 159; *Cooper v. Schlesinger*, 111 U. S. 148, 155, 4 Sup. Ct. 360, 28 L. Ed. 382; *Kiefer v. Rogers*, 19 Minn. 32, 36 (Gil. 14); *Slim v. Croucher*, 1 De Gex, F. & J. 518; *Litchfield v. Hutchinson*, 117 Mass. 195, 198; and cases cited in *Barnes v. Railway Co.*, 4 C. C. A., at page 202, 54 Fed., at page 90.

Now, the Omaha bank, when it issued this certificate, did so conduct itself that any one who saw it would naturally and inevitably conclude that that bank was indebted to the plaintiff, and would confidently act on that belief. These facts were sufficient evidence of intention to sustain the estoppel. But this was not all. This certificate was not issued to inform those who knew the state of these accounts. It was not issued to educate the cashier of the Grand Island bank or Zink. It was issued for the sole purpose and with the sole intent of misleading and deceiving those who did not know the condition of these accounts, and with the intent to induce them to act or to refrain from acting in reliance upon this certificate. Ford intended—and in this transaction Ford was the bank, because he was the officer to whom the duty of examining and certifying the state of its accounts was intrusted, and what Ford intended the bank intended—Ford intended that this certificate should deceive the members of the Modern Woodmen of America and the customers of the Grand Island bank, and that it should induce them to act, or, rather, to refrain from acting, to refrain from collecting from the Grand Island bank this \$27,269.33, and other amounts which that bank owed until it was too late. The two banks and Zink entered into a conspiracy to misrepresent to the members of the plaintiff and the customers of the Grand Island bank the state of the accounts of these two banks with the plaintiff. In pursuance of that conspiracy, for that purpose, and with the intent to deceive these parties, and to induce them to refrain from enforcing their rights, and with no other intent, the Omaha bank issued this certificate. Does it lie in its mouth now to say that its falsehood was more deceitful and more effectual to accomplish its purpose than it intended it should be; that it not only deceived and defrauded the lay members of the plaintiff, but also its officers, whom it supposed, from the false statement of one of its co-conspirators, to be participes criminis in its nefarious scheme? I think not. One who fires his gun into a crowd, and kills a man, is not guiltless because he did not intend to harm that man, but meant to kill another. One who falsely certifies a check, which

C. takes in reliance upon the certificate, cannot escape the estoppel because he did not intend to deceive C., but thought to cheat D.; and the Omaha bank ought not to escape this estoppel because its purpose and intent were to deceive the lay members of the plaintiff's organization, while its false certificate not only accomplished that purpose, but went further, deceived the officers of the corporation, and induced the plaintiff to do the very thing which the bank intended that its certificate should induce others to do,—induced it to refrain from collecting the obligations of the Grand Island bank until it was too late. In my opinion, the facts in this case present every element of an equitable estoppel; the certificate itself is an evidence of a debt upon which an action can be maintained, and the judgment below ought to be reversed.

NASHUA SAVINGS BANK v. ANGLO-AMERICAN LAND-MORTGAGE & AGENCY CO., Limited.

(Circuit Court of Appeals, First Circuit. April 24, 1901.)

No. 303.

1. EVIDENCE—AUTHENTICATION OF FOREIGN STATUTES.

In an action by a corporation of Great Britain against a stockholder to enforce liability for unpaid assessments on the stock, the statutes governing such liability are sufficiently authenticated and proved by the testimony of an English solicitor, familiar with company law, and who was also a director in the company, stating under what acts it was organized, and that copies which he produced were copies of such acts, and also that they were published by governmental authority.

2. APPEAL—REVIEW—QUESTIONS PRESENTED BY RECORD.

Where the record on a writ of error from the circuit court does not purport to contain all the evidence, or all the material evidence, the questions whether the court erred in refusing a request to direct a verdict for defendant, or in directing a verdict for plaintiff, cannot be considered.

3. SAME—PRESUMPTIONS—FAILURE OF RECORD TO SHOW THAT IT CONTAINS ALL THE EVIDENCE.

In an action by a foreign corporation against a stockholder to recover an assessment made on his stock, the fact that no evidence was offered by plaintiff to show that it was insolvent when the assessment was made, or that such call or assessment was made for the benefit of creditors or in payment of debts, does not preclude a recovery, where, under the statutes governing the corporation, calls might legally be made for other purposes; and where, on appeal from a judgment for plaintiff, the record does not purport to contain all the evidence, it must be presumed that due proof was made of the regularity of the corporate meetings and of the calls.

4. FOREIGN CORPORATION—ACTION AGAINST STOCKHOLDER TO RECOVER ASSESSMENT—LAW GOVERNING LIABILITY.

In an action by a foreign corporation in a court of the United States against a stockholder to recover a call made upon his stock, which by the statutes under which the corporation was organized is made a debt from the stockholder to the corporation, for which the corporation is also given a lien on the stock, the plaintiff is not restricted to the forfeiture and sale of defendant's stock, because that is the only remedy provided by the laws of the state in which the action is brought, but may enforce defendant's personal liability. Strictly speaking, such action is not based upon the foreign statute, but on the contract voluntarily made by the defend-

ant when he became a stockholder, of which such statute defining the liability of stockholders became a part.

5. ACTION—FORM—ASSUMPSIT.

The English companies act (25 & 26 Vict. c. 89, § 16) provides that "all moneys payable by any member to the company in pursuance of the conditions and regulations shall be deemed to be a debt due from such member to the company; and in England and Ireland to be in the nature of a specialty debt." *Held*, that assumpsit was the proper form of action in a court of the United States to enforce the liability of a stockholder to a company organized under such acts for a call made upon his stock pursuant to the provisions thereof.

Aldrich, District Judge, dissenting.

In Error to the Circuit Court of the United States for the District of New Hampshire.

John S. H. Frink, for plaintiff in error.

Omar Powell (Gilbert A. Davis and Daniel L. Cady, on the brief), for defendant in error.

Before COLT, Circuit Judge, and ALDRICH and BROWN, District Judges.

BROWN, District Judge. This writ of error is to review the rulings of the circuit court in an action of assumpsit by the Anglo-American Land-Mortgage & Agency Company, Limited, a corporation of Great Britain, to recover from the Nashua Savings Bank, a New Hampshire corporation, a stockholder in the Anglo-American Company, unpaid assessments upon stock. A verdict was directed for the plaintiff below, now defendant in error.

The first exception requiring consideration relates to the sufficiency of proof of the statutes of Great Britain that govern the Anglo-American Company, and also provide that "all moneys payable by any member to the company in pursuance of the conditions and regulations shall be deemed to be a debt due from such member to the company; and in England and Ireland to be in the nature of a specialty debt." 25 & 26 Vict. c. 89, § 16. We are of the opinion that the statutes were sufficiently authenticated by the deposition of an English solicitor familiar with company law, and a managing director of the Anglo-American Company. He states under what laws the company was organized, referring to them by their titles, and testifies that he produces copies of the acts, and also that "these copies are issued by authority, being printed by her majesty's printer, and are as such by law receivable in evidence without further proof." We have, therefore, evidence from a competent witness not only that the documents are copies of the laws under which the company was organized, but also evidence authenticating printed copies of these laws. The witness does not, as counsel contend, simply produce certain transcripts which he says prove themselves, but states upon his own authority that they are copies of the laws, and also by his oath authenticates the documents as official copies. This proof is ample. *Church v. Hubbard*, 2 Cranch, 238, 2 L. Ed. 249; *Ennis v. Smith*, 14 How. 426, 14 L. Ed. 472; *Hall v. Costello*, 48 N. H. 176; *Kennard v. Kennard*, 63 N. H. 303; *State v. Davis*, 69 N. H. 350, 41 Atl. 267; *Barrows v. Downs*, 9 R. I. 446; *The Pawashick*, 2 Low.

142, Fed. Cas. No. 10,851. The plaintiff therefore clearly proved that the defendant, as a stockholder, voluntarily assumed such liability as is set forth in the portion of the statute we have quoted.

The majority of the court are of the opinion that, as the record does not purport to contain all the evidence, or all the material evidence, the questions whether the circuit court erred in declining the defendant's request to direct a verdict for the defendant, and whether that court erred in directing a verdict for the plaintiff, cannot be considered. *City of Providence v. Babcock*, 3 Wall. 240, 244, 18 L. Ed. 31; *Railroad Co. v. Cox*, 145 U. S. 593, 606, 12 Sup. Ct. 905, 36 L. Ed. 829; *Hansen v. Boyd*, 161 U. S. 397, 16 Sup. Ct. 571, 40 L. Ed. 746; *Yates v. U. S.*, 32 C. C. A. 507, 90 Fed. 57, 62.

It appears from the record that the plaintiff introduced no evidence that the plaintiff corporation was insolvent at the time of making the calls or assessments sued upon, or that the call or assessment was made for the benefit of creditors or in payment of its debts; but this statement does not cover all the purposes for which calls might be made legally, and the statement that this proof was absent does not make it appear affirmatively that other and sufficient proof was not presented. It does not appear that the call was not regularly made, and for proper purposes. The objection made upon the motion to direct a verdict that the declaration contained no averment or allegation upon what conditions the plaintiff was authorized to make such calls or assessments does not raise the question of the sufficiency of proof that the call was duly made. We are bound to assume, upon this incomplete record, that the proofs of the regularity of this call were sufficient. The necessity for applying in this case the rule of law that regularity of proceedings in the trial court shall be assumed until the contrary appears is shown by the fact that the learned judge, in his remarks preliminary to the direction of a verdict, referred to evidence not presented here, and stated that there was no doubt that the call for the assessment was properly proven, and also that no question was made as to the regularity of the meetings of the directors. As the majority of the court are of the opinion that we are bound to assume upon this record that due proof was made of the regularity of the corporate meetings and of the calls, we are of the opinion that the question whether we are to accord to the corporate proceedings of a foreign and alien corporation the same presumption of regularity that exists in respect to domestic corporations does not arise upon this record.

The remarks of the learned judge in directing a verdict for the plaintiff were simply explanatory of the views of fact and law that led him to take that course, and were not subject to exception. The court itself determined the issues; and the question whether it erred in so doing can be determined only upon a complete record of the evidence, or upon a record containing all material evidence. This record is not shown to be such.

We think that only two substantial questions are presented,—the first, as to the sufficiency of the proofs of the English statutes, which we have considered; and the second, the question whether the company, in seeking to enforce the payment of calls, is restricted

to the sale and forfeiture of the defendant's shares, in accordance with the law of New Hampshire. We are clearly of the opinion that it is not. The present action is not, strictly speaking, founded upon an English statute, but upon an obligation voluntarily assumed by the defendant as a stockholder. The English statute that became a part of the charter of the company defines the liability of the stockholder, but it is the act of the defendant in voluntarily assuming this liability by the purchase of its stock that is the basis of the present action. *Railway Co. v. Gebhard*, 109 U. S. 537, 3 Sup. Ct. 363, 27 L. Ed. 1020; *Hawkins v. Glenn*, 131 U. S. 329, 9 Sup. Ct. 739, 33 L. Ed. 184; *Webster v. Upton*, 91 U. S. 69, 23 L. Ed. 384; *Relfe v. Rundle*, 103 U. S. 222, 226, 26 L. Ed. 337. Though it appears by the articles of association that the company has a lien upon the shares of a stockholder, and may enforce such lien by sale or forfeiture, yet this is not the exclusive remedy; for, by the statute, which has become a part of the articles of association, and to which it has consented, the bank became liable, also, as for a debt. The company therefore has two concurrent remedies, and was strictly within its right in electing to proceed by an action at common law instead of by sale and forfeiture. If we assume that the question of the form of action properly arises upon this record, the exceptions which relate to the form of action must be overruled, since we are of the opinion that *indebitatus assumpsit* was the proper form of action. 2 Chit. Pl. p. *53; Gould, Pl. c. 3, § 19; *Pullman v. Upton*, 96 U. S. 328, 24 L. Ed. 818; *Mandel v. Cattle Co.*, 154 Ill. 177, 40 N. E. 462, 27 L. R. A. 313. The judgment of the circuit court is affirmed.

ALDRICH, District Judge (dissenting). The plaintiff is an alien business company organized under what are known as the "English Companies' Acts," and I disagree with my associates upon the questions as to the sufficiency of the evidence to warrant a verdict, and as to what is shown by the record, and as to presumptions of evidence below not stated in the record. In this case, at the close of all the evidence, contrary to the situation in *Hansen v. Boyd*, 161 U. S. 397, 16 Sup. Ct. 571, 40 L. Ed. 746, cited in the majority opinion, the defendant moved the court to direct a verdict in its favor upon the pleadings and evidence in the case; and, if under such circumstances the appellate court must assume that the court below had before it sufficient evidence to justify its ruling, it can never review the question whether the evidence there was sufficient to justify a verdict for the plaintiff. Moreover it is expressly shown by the record that "the statutes, memorandum, and articles of association, certificate of stock, and Frederick H. Ramsden's testimony constitute all the evidence bearing upon the question of the plaintiff's incorporation and organization"; and the record expressly negatives the presence of certain other proofs which I maintain were necessary and essential to plaintiff's case. So, as I view the record, it is one which purports to present all the proofs material to the question of sufficiency of evidence. The essential question here is whether there was evidence sufficient to warrant the verdict, and upon that question we must look to the record, and cannot look beyond. The mo-

tion below and the exceptions raised that question distinctly, and the case, coming here upon such exceptions based upon such a motion, called for all the evidence; and we are bound to assume that it is all here, and inquire whether, upon the evidence disclosed by the record, the verdict was warranted. I dissent upon the ground that upon the evidence below, as shown by the record, unaided by presumptions of regularity of corporate proceedings, and presumption or intendment in favor of business necessity, there is no sufficient evidence to warrant the verdict. Aside from presumption the plaintiff's case is a mere shadow, with no evidence to show that it is anything more than a paper organization,—a mere fiction. There is no evidence to show that the corporation ever did business; that it has any debts behind it or business before it; and coming here and bringing its suit where it is not maintained as a matter of right, but upon grounds of international comity only, presumptions of corporate regularity and business necessity should not be accorded to it in order to establish or aid a recovery, but, on the contrary, for abundant reasons the corporation should be required to prove its case by affirmative evidence, not alone of a regular call, but of a regular organization, regular corporate proceedings, and compliance with all the requirements of the home statute; and evidence that the company has either done business and needs money to pay debts, or is a going concern and needs money for legitimate business purposes within the scope of the line expressed in the articles of association. A careful examination of the record and observations of the court below in directing a verdict show that the learned judge disposed of this case there upon the idea that it was only necessary, to make out its case, for the plaintiff to show a formal organization, that the defendant was a shareholder, and that the particular call upon the defendant below was regular on its face; and the majority opinion of my associates proceeds upon the idea that, as it does not appear that the call was not regular and for proper purposes, the verdict should stand, and so, in effect, accords to the plaintiff a presumption that the corporate proceedings were regular, and that the call was for proper purposes. It is from this view, and the effect of it, that I dissent.

I am fully persuaded that a plaintiff ought not to recover, under the circumstances of this case, on the meager proofs presented. Though the share subscriptions are nearly 10 years old, there is no evidence that this company ever did a dollar's worth of business, or intends to do a dollar's worth of business, or that shareholders other than the foreign shareholders who failed to register their address at the home office have ever been called upon, or that it is ever proposed to call upon other shareholders. Proofs as to other shareholders were treated below as entirely unnecessary to the plaintiff's case, and immaterial to the defendant's case, as will be seen by reference to assignment of error 17, where it was said, subject to exception: "It is of no sort of consequence, so far as this case is concerned, what happened about other calls or assessments;" and the view of the court below in this respect is further illustrated by reference to the record, where, subject to exception, it was said,

upon a question as to the introduction of an extract from the company records for the purpose of showing that the Nashua Savings Bank was a shareholder: "I will rule that, if the entire record were here, I should not allow anything read except this. This appears to be the entire record relating to this defendant." And by reference to assignment of errors 6, 7, and 15, including, of course, assignment 17, already referred to, it will be seen that the case was treated as one in which it was only necessary for the plaintiff to show a corporation *de facto*.

Quite aside from the alien character of the situation presented, which I shall consider later on, and notwithstanding that, under the English and American authorities, it is necessary, to an enforcement of a contract of this character, that all the shareholders should be treated alike, and that the call should be regularly authorized and made, and impartial and uniform among all subscribers,—see *Cook, Stock & S.* §§ 113, 114, and notes; 23 *Am. & Eng. Enc. Law* 808 (5), and notes; *Mor. Priv. Corp.* § 154; *Telegraph Co. v. Burnham*, 79 *Wis.* 47, 47 *N. W.* 373,—the question as to other calls was treated as unessential and altogether immaterial and unnecessary to the plaintiff's case. Again, aside from the alien phase of the situation, where, as in this case, the subscription contract by fair implication contemplates a strict performance of the statutory requirements and a strict compliance with the association regulations, or where, as in this case, the statute (*Vict.* 25 & 26, c. 89, § 16) makes the proceedings and records binding under certain formalities and conditions, compliance with the statutory and association regulations becomes an implied condition precedent to liability, and performance and compliance must be shown,—as, to illustrate, where the capital is fixed at a certain amount, the law implies that the capital shall all be taken before the corporation can enforce a call against a single shareholder (*Mor. Priv. Corp.* [2d Ed.] § 137, and authorities, note 1, p. 140); or, as, where the charter provides that a certain amount shall be subscribed before the call, a subscription is a mere offer until the amount is subscribed, and the entire amount must be subscribed in good faith, and must not be fictitious (*Id.* § 141); or, as, where shareholders are to pay when required by a vote of the board of directors, there is an implied condition precedent to liability that a regular call shall be made upon all the shareholders, and this is so even where there is no express provision in the charter or contract of subscription (*Id.* § 143), and this is upon the idea that the shareholders mutually agree to contribute capital when certain persons shall have made a call in a certain manner, and not before (*Id.* § 155); or, as, in an action against a shareholder to recover the amount of a call, the plaintiff must allege and prove both that the defendant is a shareholder, and that all conditions precedent to his liability have been performed (*Id.* §§ 141, 158; *Turnpike Corp. v. Valentine*, 10 *Pick.* 142; *Fry's Ex'r v. Railroad Co.*, 2 *Metc. [Ky.]* 314, 323, 324). And this is because the agreement of the shareholder is to contribute after an authorized call has been made by properly elected agents, and, until such a call has been made, a condition precedent to his liability remains unperformed.

Mor. Priv. Corp. § 150. So, upon the same principle, where the share subscription is payable in pursuance of conditions and regulations, and where the certificate is expressly made subject, as in this case, to the articles of association and the rules and regulations of the company, performance and compliance should be required to be shown by proper, affirmative proofs, rather than allowed to stand upon presumption and intendment.

That part of section 16, c. 89, Acts 25 & 26 Vict., to which the majority opinion refers as establishing the voluntarily assumed liability of the defendant, was doubtless only intended to declare and prescribe the nature of the remedy; that is to say, that the subscription should be deemed a debt due from him, and in the nature of a specialty debt in England and Ireland, to be recovered by an appropriate action. But, however that may be, it is sufficient for my purpose to say, whether it was intended to fix liability or to declare the nature of the remedy, it in express terms makes moneys payable by members "in pursuance of the conditions and regulations," thereby recognizing and expressing what is always read into such contracts, whether expressed or not,—that liability is incident to and conditioned upon fulfillment by the other party, by compliance with statutory and associate regulations; and compliance and performance therefore become a substantive element of the plaintiff's case, to be established by evidence. Even if the record discloses sufficient evidence of the face regularity of the calls, which I deny, there is no pretension in the record or in the majority opinion that there was any evidence that the calls were authorized by the resolution which the statute and the articles of association contemplate, or that the calls were uniform or necessary to pay debts or to do corporate business, or that there was any evidence showing whether the corporation was going or winding up, whether this attempt to recover is for corporate purposes, or whether the detached and incomplete extracts from the record are remnants of an exploded and defunct experimental association in the hands of speculators who found them in an attic. I am not contending against shareholder contract liability, as a general proposition, but that a plaintiff should be required to show that it has done the things which the statute and the contract contemplate should be done in order to mature the liability; that the recovery should be upon substance, rather than upon shadow. The corporate field of the last 10 years is strewn with wrecks of speculative associations, wrecks of corporations organized to do all sorts of things,—all the way from making cork from wood pulp to extracting gold from the seas. Records of such corporations can be had by the finding. The back rooms of vacated offices are filled with records and débris of experimental and defunct corporations,—some with records complete upon their face, and ornamented certificates of stock fair to look upon, which never started business, and others with incomplete records and partially filled subscription lists, ranging from one subscriber to 99 per cent. of the whole, which have attempted business and failed; and the length of struggle for life and the time of ultimate death are variously and mysteriously marked. If a case can be made out by

simply showing organization, and presenting a fragmentary extract showing a single subscription, and a scrap from the records showing a single call by a corporation which never did business, and never proposes to do business, and which carries, perhaps, two or three subscriptions for shares, only, the door is open to abuse, and recovery is easy and convenient for those who may hunt up and get possession of the records of wrecked and defunct corporations; but, to my mind, the corporate right of recovery upon a naked subscription contract should not be, and is not, so arbitrary, absolute, and conclusive as to justify a verdict founded upon such a meager and unsubstantial showing. In my view, the defendant's motion for a verdict for want of evidence, and its contention against the verdict on the ground of insufficient proofs and evidence, and its exceptions to the ruling denying the first and to granting the second, sufficiently raise the question, and therefore demand consideration at the hands of this court; and the particular manner in which the question is raised is pointed out further on.

This organization is a mere business arrangement, having none of the formalities of judicial proceedings, and not all of the formalities of corporate proceedings incident to our own statutory corporations; but, before entering upon a discussion of the particular question as to the alien character of the plaintiff, and the measure of proof to be required in a case like this, and as bearing thereon by analogy, I desire to point out the caution with which courts receive and enforce even the solemn judgments in personam of courts of alien countries. The particular question is one of substance and one of vast practical importance. It relates to the measure of proof to be required in respect to corporation or company necessities, and in respect to the regularity of corporate or company proceedings, including that of assessment calls upon stockholders in an alien country, where enforcement of alien rights is sought on grounds of international comity. And, as bearing upon this question, by reason of the force of analogy, we must keep in mind the caution exercised by courts of all countries in respect to accepting without proper proof the solemn statute laws of another and an alien country, as well as the reluctance with which the courts of the various countries have accepted as conclusive even judgments in personam of courts of foreign and alien countries. The opinion of the supreme court by Mr. Justice Gray in *Hilton v. Guyot*, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. Ed. 95, presents an exceedingly interesting and valuable historical and judicial review of the principles of international law involved in the question as to the credit and effect to be given to judgments of foreign countries, and of the rules of comity and justice which should control their enforcement. That case involved a judgment of a court of the French republic having general jurisdiction, which was sought to be enforced in the courts of the United States against a citizen of this country, and, as a result, it was treated as not entitled to the full credit which is accorded to judgments of the courts of our sister states; but, upon reasoning in respect to international conditions, it was said, in effect, if it appears from the judgment that it was rendered by a competent court, having juris-

diction of the cause and of the parties, and upon due allegations and proofs, and an opportunity to defend, and the proceedings are according to the course of a civilized jurisprudence, and are stated in a clear and formal record, that the judgment is *prima facie* evidence, at least, of the truth of the matter adjudged, and conclusive of the merits, unless special ground is shown for impeaching it, or by the principles of international law, and by the comity of our own country, it is not entitled to full credit and faith. Thus it will be seen that, before the foreign judgment is accepted as *prima facie* evidence, it must appear as a substantive part of the plaintiff's case—not irregularities shown by the defendant, not want of jurisdiction and due allegations and proofs and lack of opportunity to defend shown by the defendant, or that the proceedings were not according to the course of civilized jurisprudence shown by the defendant; but it must appear in the plaintiff's case—that the judgment was rendered by a competent court, and one having jurisdiction of the cause and the parties, and one founded upon due allegations and proofs and opportunity to defend, and that the proceedings are according to the course of a civilized jurisprudence, and that they are stated in a clear and formal record; and when this is made to appear by the plaintiff a judgment will be accepted as conclusive, unless the defendant shows ground for impeaching it, like fraud or prejudice, or that by the principles of international law, or by the comity of our own country, it is not entitled to credit and effect. To illustrate by taking an extreme view in respect to international comity, in France a judgment of a foreign country sought to be enforced there is subject to an examination on its merits,—*au fond*,—on the view that judgments in favor of a foreigner against a Frenchman by a foreign court are subject, when execution of them is demanded in France, to the revision of the French tribunals, which have the right and the duty to examine them both as to the form and as to the merits. Of course, such a rule does not obtain between this country and Great Britain, and is only referred to as showing the measure of judicial caution exercised in respect to assumptions of conclusiveness and regularity when foreign and alien situations are presented. So it is seen that foreign judgments are received and enforced with caution. And it is a vast step from a judgment of a court of general jurisdiction, founded upon notice to the adverse party and actual trial, which is to be received with caution and upon certain proofs, to the binding force of proceedings of private foreign corporations or corporate companies. The contractual liability of stockholders under an English corporation or company like that in question is not like the contractual liability existing under the constitutions and statutes of our sister states, like that of Kansas or Ohio or Minnesota, which we are so frequently called upon to consider, for the reason that under these constitutions and statutes the liability of the stockholder resides in the express provision of the constitution or of the statute of the state, while the English statutes simply provide for the organization of the corporation or company, and authorize liability to be created by corporate or company action. In the first instance the liability results from the provisions of the constitution and the stat-

utes, while in the second instance the liability, if it exists, is created by the acts of the parties, and under such circumstances enforceable liability can only be created by lawful and regular corporate and statutory proceedings, which must be shown, and ought not, and cannot with any measure of safety, be presumed. When called upon to enforce against stockholders the Kansas constitutional and statutory contract the right of enforcement depends upon the judgment against the corporation, and enforcement proceeds upon the idea that all of the stockholders have been concluded by the judgment based upon service upon the corporation. Under statutes like that of Ohio, we hold that enforcement by a federal court of the constitutional liability created by a sister state is conditioned upon a joinder of all the stockholders and the corporation, and proof that the contemplated statutory ascertainment has been made; and, under statutes like that of Minnesota, enforcement is upon condition that the statutory and equitable requirements have all been complied with. And there is, as it seems to me, and as has been observed, a wide difference between an express constitutional or statutory provision which creates a liability from the stockholder to the creditor, and a permissive business arrangement under the statutes of Great Britain, where the liability is to be created by corporate vote or regulation.

The acts referred to in the record are various acts of Victoria, and among them is an act for the incorporation, regulation, and winding up of trading companies and other associations, with amendments; another, an act to amend the companies' acts; others, in respect to banking associations. But the plaintiff company was organized under the companies' acts. These acts provide that certain persons may associate themselves together for a lawful purpose; that the liability of the members may be limited to the amount unpaid on the shares, or to such amount as the members may respectively undertake, by the memorandum of association, to contribute to the assets of the company in the event of its being wound up; and, in case the company is formed on the principle of having the liability of its members limited to the amount unpaid on the shares, that various things shall be done and registered, and among other things to be stated and registered is the object for which the proposed company is established. It also provides that certain modifications of the conditions may subsequently be made. It provides that the articles of association shall be printed, and, when certain other things shall be done, that the articles shall be registered, and that when these statutorily required things are done the articles shall be binding upon each member of the company, and that all moneys payable by members shall be deemed a debt due from such member to the company, and in England and Ireland to be in the nature of a specialty debt. It provides for passing special resolutions by a majority of not less than three-fourths of the members, under certain and various conditions. The memorandum of association in question describes the purposes of the enterprise and various other things, and in an amended article it is provided that the directors may from time to time make such call as they may think fit upon the members in respect of all moneys unpaid on their shares.

But it is understood from paragraph 10 of the amended articles that the calls are to be authorized by resolutions of the directors or of the association. The articles also provide that the number of directors shall not be less than 3 nor more than 10; that each director shall own 50 shares, at least, in the company; and that the office shall be vacant if he ceases to own in his own right at least 50 shares, or if he hold any other office or place of profit under the company, or if he be absent from the meeting as provided under the articles, or if he be adjudged bankrupt, or if he suffers his estate to be vested in any person for the benefit of his creditors or compounds with his creditors or suspends payment, or if he is individually concerned in or participates in the profits of the company, or if he participates in the profits of any work done by the company. It is also provided by the articles of association that the directors shall cause minutes of various things to be made in books provided for the purpose, and, among other things, of all orders made by the directors and committees of directors, and of all resolutions and proceedings of meetings of the company. And, by the express terms of the defendant's certificate of stock, the holder's rights are made subject to the articles of association and the rules and regulations of the company.

The pleadings in this case, among other things, put in issue the question whether the corporation was ever duly organized,—whether all the shares necessary to enable the corporation to be duly and regularly organized have been subscribed to; and, among other things, the defendant in its pleadings set out that “the assessments attempted to be collected in this suit are invalid, unlawful, and unauthorized.” It appears from the record that the plaintiff introduced no evidence whatever that the plaintiff corporation was insolvent at the time of making the calls or assessments sued for, or at the time of the bringing of this suit, or that the call or assessment was made for the benefit of its creditors or in payment of its debts. The fifth assignment of error, under paragraph 4, is upon the ground that the declaration contains no averment or allegation that the call or assessment was necessary to pay the debts of the company, or was made for the benefit of its creditors, and that it contains no averment or allegation upon what condition the plaintiff was authorized to make such calls or assessments, and to collect the same. So it appears that there was no allegation as to the financial condition or financial necessities of the corporation, and no evidence of its insolvency, or of the necessity for a call for actual business purposes, and that there was no evidence that the various conditions and restrictions contained in the various statutes and in the various articles of association had been complied with, and that there was no allegation or proof whether the company was engaged in business or had ceased to do business, or that the call was made upon all the members of the company alike.

The fifth general assignment of error is that the court erred in denying the motion of the defendant to direct a verdict for the defendant on the pleadings and evidence in the case. The nineteenth assignment goes to error in directing a verdict for the plaintiff. Va-

rious grounds are stated, and, among others, that in assignment 28, which goes upon the ground that there was no evidence in the case that this suit was instituted and carried on for the benefit of the creditors of the plaintiff, or that this call or assessment was made for the payment of debts or other obligations of the plaintiff; and, under assignment 29, that, in the absence of express promise to pay on the part of the defendant, the action cannot be maintained, unless to enforce the collection of the sum due for the benefit of the creditors of the plaintiff corporation, or in payment of its debts. It is true, the particular question as to the difference in the rule as to measure of proof applied to domestic corporations and that to be applied to foreign or alien corporations was not expressly called to the attention of the court below. But it seems to me, although the question of distinction between foreign and domestic corporations was not expressly urged in extenso to that court, that it was sufficiently covered by the brief statement, the motion for a verdict for the defendant, and the grounds stated in support thereof, and the exceptions to the order directing a verdict for the plaintiff, and the grounds there stated, and that the assignments of error entitle counsel to urge it here for our consideration, and that we ought, therefore, to deal with it.

Assignment twenty-nine is upon the distinct ground that there was no evidence that this suit was instituted and carried on for the benefit of creditors, or that the call or assessment was made for the payment of debts or other obligations of the plaintiff. The exception on which this assignment is based, under a familiar rule, called for all the evidence on that point, yet the record does not disclose any evidence whatever on the subject. While this assignment expressly raises a particular question, by fair and reasonable inference it also raises the question whether the corporation is a going corporation or is winding up, and, if winding up, whether the money was needed to pay legitimate debts of the corporation, whether there were any debts, or whether the money was going into the pockets of whoever succeeded in recovering upon the naked assessment. Aside from intendment and assumption, there is nothing tending to establish which way it is. There was no evidence that the corporation was out of business, or that it was doing business.

Under our own system of territorial and state divisions, there is no imperative and absolute rule of right among the states, aside from that involved in the provision of the constitution of the United States as to judgments of sister states, by which actions at law are maintained extraterritorially to enforce rights involved in corporate or other conditions existing in jurisdictions foreign to the forum where aid is sought. Such aid is, however, usually rendered on grounds of public policy, comity, and justice, and so, in respect to international conditions involving alien corporations, enforcement does not exist as a matter of right, but on the ground of wholesome international comity.

It is claimed by this company that the right of recovery does not stand here like that of a right involved in a judgment; that is to say, a judgment concludes because the defendant has been notified

and his rights adjudicated, while in this case it is insisted that the right rests in contract, and that the stockholder is concluded by corporate or directorship action, upon the ground of representation,—upon the ground that his rights were represented by the corporation, and that the directors and other members with whom he was associated were his agents for such purpose. I recognize this distinction between contracts and judgments, but, upon rules of analogy, I say, if the plaintiff, in order to secure an enforcement of his judgment under alien conditions, must prove the solemn laws of an alien country, and show due allegations and proofs, and due proceedings in the usual course of civilized jurisprudence, and formal records of courts of foreign countries of general jurisdiction, and that the merits of the judgment controversy were not extrajudicial, that there are far weightier reasons for requiring the same measure of proof and security in respect to the corporate management of the affairs of alien corporations and their proceedings; in other words, as a condition of enforcement, an alien corporation may be required to make full proof of the regularity of its proceedings according to the domiciliary law; that its calls were in the regular course of its business, and that the money called for was for the purpose of carrying on the business contemplated by the articles of association, or necessary to pay the debts of the association, if the corporation was insolvent and not going; that the calls were duly made upon all the stockholders alike, with no discrimination in favor of domiciliary stockholders or against foreign stockholders; and that the necessity existed in respect to business done within the scope of the contemplated purposes of the association. It is true the limitations upon the doctrine of corporate representation of stockholder interests as applied to distant alien countries have never been defined or much discussed, so far as can be learned; but I think, under alien conditions, even if the relations are that of principal and agent, or if the parties were associated together for a general purpose, and if the doctrine of representation applies, that it is not unreasonable, in a case of this kind, where relief is sought in a country foreign to the corporation, to require the plaintiff suitor to show that the corporate agent acted altogether within the scope of the authority. I do not view this case as one presenting the purchase of a certain number of shares of a certain par value, but as one presenting a subscription to shares upon which calls or assessments may be made as necessities occur; and as the shares are expressly subject to the articles of association and to the rules and regulations of the company, and by implication to the law of the domicile, it is not unreasonable to require the corporation to show that its assessments, its necessities and proceedings, are altogether within such scope. On the contrary, it is quite reasonable, and justice and safety require, that the party seeking enforcement shall show that all the conditions contemplated by the domiciliary law and the articles of association have been complied with.

I do not think comity or justice require that we should accord to corporate proceedings of a foreign and alien corporation the presumption of regularity which exists in respect to domestic corporations, or that the doctrine as to the representative character of the

corporation should, without limit, be extended to distant alien corporate action of business companies formed under general statutory laws of foreign countries, and that foreign corporate action should be accepted as conclusive of the rights of the parties. The power of the corporation to represent the stockholder depends upon the scope of the agency, and the scope of the agency depends upon the statute, the articles of association, and the character of the business; and the fact that proper corporate and statutory conditions exist should be shown by the plaintiff. While certain assumptions may be safely made with respect to domestic corporations, and while certain conclusions may be safely drawn from domestic representative situations, and certain presumptions safely accorded in respect to domestic corporate regularity and necessity, under circumstances such as involved in this case no principle of international comity is violated by requiring the contractual corporate and statutory facts to be shown by the foreign suitor seeking aid in a country alien to the domicile of the corporation.

It is the policy of the law in some cases to place the burden of proof upon a party when the facts are peculiarly within his knowledge, and not within the knowledge of the other party. 1 Greenl. Ev. § 79; *Id.* §§ 32, 34, 79. Rules as to burden of proof and as to presumptions are rules of convenience based on expediency, and adopted from motives of public policy. Questions as to such rules do not involve matter of substantive right, but relate rather and only to conduct of trials, rules of evidence, and the measure of proof to be required.

Under alien corporate and statutory conditions such as here presented, considerations of convenience, expediency, and public policy require that the foreign suitor's case shall not be made out by presumption or intendment, or by operation of technical domiciliary rules as to burden of proof, yet, doubtless, where representative capacity is created and is shown to continue, right of enforcement would not be affected by alien conditions, and doubtless the subscription creates the representative relation; but under alien conditions, as already said, assumption and intendment should not be invoked to establish the fact that the relation continues,—in other words, that the proceedings, business, and conditions of the corporation continue to be such as to entitle it to bind the stockholder upon grounds of representation,—and a foreign corporation relying upon the alleged or supposed representative capacity may and should be required to show that it has proceeded within the scope of the authority, and within the contemplated agency. Moreover, as has been said, the English statute does not create the right; it simply permits an association to organize for a purpose; and a corporation which undertakes to enforce the supposed right in a foreign country should be required to make full proof that the right is founded upon the contemplated authorized conditions,—upon regularity of nondiscriminating proceedings, and the necessities of the business. It does not follow, because upon proper pleadings between resident suitors the burden of showing the absence of these things may be placed upon the defendant, that a foreign plaintiff, who asks that a supposed foreign

right shall be enforced in a country alien to the right, should not be required to make full proof in respect to regularity of proceedings and the necessities for a corporate call. It has been recently held here, as has been said, that a stockholder liability created by an express constitutional provision of a sister state will not be enforced against the stockholder unless it affirmatively appears that all things which the statute contemplated should be done have been done. Equitable and legal considerations require that a foreign corporation shall make the same full showing. This is no special hardship upon the alien plaintiff, and it affords only a reasonable measure of security to a defendant stockholder foreign to the domicile of the corporation. If the attorney of an English corporation may make out his case by producing the statutes and the articles of association, and a piece of paper with six lines showing an assessment call, without being required to show regularity of proceedings, or that the assessment call was uniform and in respect to transactions not ultra vires, or that the money was needed to carry on the going business, or to pay the debts of a business that is being closed out, such assessment calls must become the foundation for enforcement, if they come from corporations operating under English statutes in the remote colonies of the British empire, or from France or Italy, the late republic of South Africa, or from Kamchatka or Japan.

Of course, this view is quite aside from intendment made in favor of domestic corporations like that suggested in *Webster v. Upton*, 91 U. S. 65, 23 L. Ed. 384; *Chubb v. Upton*, 95 U. S. 665, 24 L. Ed. 523; *Telegraph Co. v. Purdy*, 162 U. S. 329, 336, 16 Sup. Ct. 810, 40 L. Ed. 986. Such cases go upon the idea that the contract is to pay the full par value of the authorized stock when required and when called, and certain intendments as to corporate conditions are made on the ground that the call concludes certain questions. Such intendments or presumptions are based upon matters of domestic concern, and result from domestic conditions and peculiar interstate relations and necessities; but it must be said that these cases contain no hint or suggestion that presumption or intendment of due regularity or that the idea of conclusiveness should be extended to foreign private corporate or company action. Under our peculiar conditions of territorial divisions, and our peculiar quasi interstate judicial system, certain intendments and presumptions as to corporate existence and corporate regularity may not stop at state lines; but should such presumptions and intendments as to corporate conditions extend beyond national lines or the lines of realms, and to private corporations organized under foreign statutory laws, and doing business in distant and alien countries? I do not think international comity, public policy, or justice requires us to make such intendments or presumptions in favor of an alien corporation. And my contention in this respect is rested upon the ground that the same intendments and presumptions should not be accorded to corporations of distant alien countries that are accorded to corporate institutions of our own creation, which are directly responsible to the local domestic legislatures creating them, and subject to the restraints of the domiciliary courts.

The record in this case does not even show the statutorily con-

templated and intended resolution of the company or of the directors as the foundation for the call, or any special resolution conforming to the provisions of the statute. So far as this record shows, there are many provisions of the statutes and of the regulations of the company which may not have been complied with; and, indeed, while a call must be for the bona fide purpose of raising money for corporate purposes, and while it must be impartial and uniform among all the subscribers or shareholders, and made on all alike (Cook, Stock & S. §§ 113, 114), aside from presumption and intendment, for aught that appears in the record this company may be out of business, the money may be intended for ultra vires purposes, and this assessment call may be upon this defendant only, or, at most, upon the nonresident stockholders only, of all the shareholders. Thus the plaintiff presents a naked assessment call of a private corporation of a foreign and alien country, without proof of necessity or of intra vires purposes, or that all of the shareholders have either paid, or been called upon to pay. While the shareholder liability in this company is not upon express condition that the shareholders shall bear the company burdens equally, or that these things shall be made to appear, it is expressly subject to the regulations of the company, and, by force of operative construction, to the law of the foreign land. And a court called upon to enforce the supposed right against its own citizens may well require, as a condition upon which the supposed alien right founded in foreign statutory and corporate conditions will be enforced, that conditions shall be shown to exist which justify and make the call necessary; that there is no discrimination in favor of the shareholders of the domicile of the corporation, or against those foreign to the domicile; that the intended use of the money called for is within the general scope of the business originally contemplated or subsequently legally authorized, or to pay debts accruing in respect to the authorized business of the association; and that the corporate proceedings are regular and in accordance with all the regulations and by-laws of the corporation, and all the provisions of the foreign statutes, and all the requirements of the foreign common law. It is not unreasonable to require a foreign suitor who seeks enforcement of a foreign right to show that his right is fully and fairly within the purview of the foreign law, and within the scope and the necessities of the foreign enterprise. Such a rule would not impose so great a hardship upon the foreign corporate suitor who seeks the relief, and who has all the records and all the necessary evidence at hand, as we should impose upon our own citizens by subjecting them to recovery upon the naked proof of an assessment call by a private foreign corporation, or, as the only alternative, compel them to go to a foreign country and show that the corporation was not within the law, that the proceedings were not regular, and that the business and the assessment purposes were ultra vires.

At the arguments we called the attention of counsel directly to the question whether, under the jurisprudence of England, conclusiveness is accorded to corporate action involving internal management of corporations created by and doing business in countries foreign to England. No satisfactory answer was given in the subsequent brief

on this point, and I should doubt whether English courts would enforce stockholder liability upon the naked evidence of a single assessment call certified by the secretary of a private business corporation organized under our statutes, and operating either in our new and distant possessions or in our important business centers. Some English authorities were cited, based upon cases arising from the colonies of Great Britain, but none as to judicial treatment of American private corporation assessment calls in the courts of England.

I do not feel called upon to enter upon a discussion of the English cases, or to inquire whether this action, with the measure of proofs here presented, is sufficiently within the English authorities to be maintained there, for the reason that the rule of evidence and the measure of proof required in the domestic forum may not be a just rule of evidence or a sufficient measure of proof in the courts of an alien country where enforcement of such right is sought. But, without venturing upon a critical analysis of the English cases, it may be observed that it is at least extremely doubtful whether the English courts would consider the proofs here presented sufficient to establish the right of recovery in the domiciliary courts in a case like this. In some of the English cases based upon some of the statutes of Great Britain, it is held that organization and subscription of the full stock must be shown; in others, that the assessment was upon all the shareholders alike; in others, that under certain circumstances the liability on the shares does not constitute a debt; in another, under the Swansea dock act, where the place of business was Swansea, and 14 days' notice of all public meetings was required by the statute to be given by advertisement in a paper circulating in the district of the company's principal place of business, notice was published in a Sunday London paper, and, at a meeting held in pursuance of the notice, change was made in the number of directors, it was held to be invalid and illegal, because it did not appear that the paper reached Swansea; in others, that there must be properly appointed directors to make a call; in others, that the form of remedy must be strictly followed (and English authorities would seem to indicate, where no particular form was prescribed, that the remedy, as well as the question whether such courts would require evidence as to the internal management of the corporation, might depend upon the question whether the concern was a going concern, or in process of winding up); in other cases, that it must be made to appear that the requisite number of directors acted; in others, under certain circumstances, that it must be made to appear that there are debts of the company unpaid. I do not refer to these cases as having any decisive bearing upon any particular point before us, but merely as illustrating that in England, under certain circumstances, something more than organization, holding, and assessment is required to be shown.

It is now a matter of common notoriety that the evils resulting from loose and unauthorized conduct and management under these English companies' acts are a matter of severe popular, parliamentary, and judicial criticism in England, and that in 1894 a committee was created by a London board of trade which was presided over by Lord Davey. This committee, in its report, pointed out many of the

evils incident to the system; and some of the principal evils were said to result from directors acting without qualification, or taking gifts of paid-up shares; from companies proceeding to allotment upon insufficient capital; from loading of the purchase money in case of a company formed to purchase an existing business, or of the contract price in case of a company formed to construct and work an undertaking; from the nondisclosure in the prospectus of facts material for the guidance of intending investors, and want of facilities on the part of the public for ascertaining the existence of mortgages and charges affecting the company's property. This committee reported an act intended to remedy notable and notorious evils, which became a law in 1900 (Wkly. Notes, Aug. 1900, pp. 188, 189; 38 L. R. p. 96; St. 63 & 64 Vict.); and in it, among other things, the idea of conclusiveness is dealt with, and conclusiveness is only expressly carried to the certificate of incorporation, and to registration and matters precedent and incidental thereto; thus, by implication at least, presupposing a limitation upon the uncertain and unsafe doctrine of presumption and conclusiveness, if the doctrine may be said to exist, in respect to regularity of corporate and company proceedings subsequent to incorporation and registration. I do not refer to recent English parliamentary criticism as having a decisive or even a direct bearing upon the question at issue, but to illustrate the point taken, that we cannot with safety blindly accept as conclusive detached extracts from such business associations. It was held by Mr. Justice Kekewich, in *Re National Debenture & Assets Corp.* [1891] 2 Ch. Div. 505, that the certificate of incorporation could not be treated as conclusive of the fact that the statutory seven persons had signed the memorandum of association; and the court of appeal expressly agreed with Mr. Justice Kekewich's view of the law; Lord Justice Lindley stating that it was a condition precedent to registration under the act that the company should consist of seven members. Reasoning from such English requirements, it may at least be required here, as a condition of enforcement in this forum, that the plaintiff shall not only show a legal statutory organization, but that the proceedings have been regularly within the English statutes and the by-laws of the company, and, in short, that the status of the corporation and its proceedings are in all respects within the law of England. *Bailey v. Birkenhead*, 12 Beav. 433, 440, which the plaintiff cites in support of his position as to the reluctance of the English courts to inquire into the internal affairs of corporations, was the case of a going corporation, and was a bill in equity without a proper joinder of the different classes of shareholders. Still, because the English courts do not inquire into the internal affairs of going domestic corporations in a suit in favor of a stockholder, it does not follow that courts of a country alien to the corporation should be estopped from requiring proof upon the question whether the corporation is going or not, and, if not going, require evidence as to the corporate necessities. However it may have been before, since the decision of the supreme court in *Bank v. Hawkins*, 174 U. S. 364, 19 Sup. Ct. 739, 43 L. Ed. 1007, a banking corporation is not estopped from setting up in avoidance of an assessment that its holdings are

ultra vires. If this may be done by a corporation in its own behalf, I see no reason why the stockholder may not set it up as against the corporation, especially in respect to matters of which he had no notice. If this may become a defense between domestic shareholders or corporate suitors; and if a foreign plaintiff may be required to make it appear that his foreign judgment of a court of general jurisdiction is founded upon due allegations and proofs, that its recovery was in accordance with the usual course of jurisprudence of a civilized country, and that the merits of the case were not extrajudicial, I see no reason why enforcement of a private foreign corporate assessment call against a citizen shareholder of this country by the courts of this country may not, without offending the principles of international comity, be made subject to the qualification that corporate regularity and full intra vires conditions shall be shown by the foreign suitor invoking the aid.

This is, as claimed, a contract, but it is not a simple contract like that of a contract of sale, or like that involved in a negotiable promissory note. On the contrary, it is a contract involving foreign corporate conditions and foreign statutory requirements; and, enforcement being sought extra regnum, on the grounds of comity, regularity of corporate proceedings and performance of statutory requirements by the party who sets up the contract should not be presumed, but should be shown by the party seeking its enforcement. The general rule of comity as to enforcement of the personal liability of a resident stockholder of a foreign corporation is that, if it rests in contract merely, it will be enforced according to the law of the place of the contract, and, if it grows out of a statute to which the corporation belongs, that it will generally be conceded and enforced, if the liability is in its nature contractual; but this is wholly upon grounds of comity, and may be altogether excluded, or enforced in a foreign country upon such terms and conditions as that country may think proper to impose. And this qualification is true even in respect to our sisterhood of states. *Paul v. Virginia*, 8 Wall. 168, 181, 19 L. Ed. 357; *Pembina Con. Silver Mining & Milling Co. v. Pennsylvania*, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650; *Boston Inv. Co. v. City of Boston*, 158 Mass. 461, 33 N. E. 580; *Fawcett v. Iron Hall*, 64 Conn. 170, 29 Atl. 614; *Pennsylvania Co. v. Bauerle*, 143 Ill. 459, 33 N. E. 166; *People v. Pavey*, 151 Ill. 101, 37 N. E. 691; *Insurance Co. v. Davis*, 29 Mich. 238; *Telegraph Co. v. Mayer*, 28 Ohio St. 521; *State v. Ackerman* (Ohio) 37 N. E. 828. Therefore it is no answer to my position as to the measure of proof to be required to say that holding the stock creates a contract. I concede that it is in the nature of a contract. But saying that this is a contract is no greater answer than saying, in case of a foreign judgment, that the plaintiff's right of recovery is founded on a judgment of a court of general jurisdiction, and the enforcement of such a foreign and alien right is safeguarded by requiring a judgment plaintiff to show something more than the naked judgment. And so the enforcement of a supposed foreign corporate contract right may and should be safeguarded by requiring something more than the naked holding and assessment. While, under the federal constitution, judgments of our

sister states are entitled to full credit, and, duly authenticated, prove themselves by their own weight, and create an enforceable liability, judgments of alien countries, duly authenticated, do not prove themselves by their own weight and establish an absolute and enforceable liability, but require extrinsic explanation and support to that end. And, by parity of reasoning, and by force of close and almost controlling analogy, while assessments by domestic corporations under certain exceptional circumstances, and upon somewhat exceptional grounds, create an enforceable liability, assessments by foreign and alien corporations do not necessarily, by force of an absolute and arbitrary rule, create enforceable liability, without extrinsic explanation and support. The proceedings of a private foreign corporation, without the semblance of a seal, or even with a seal, must stand upon less favorable ground, *extra regnum*, both as to measure and burden of proof and as to conclusiveness, than the solemn and formal judgments of courts of general jurisdiction of foreign and alien countries. And questions as to the regularity and necessity of corporate assessments, and other material questions as to corporate proceedings, must stand less favorably as to presumption and intendment than the question of the authenticity of the solemn published statutes of Great Britain. So, in this sense, private foreign corporate assessment proceedings and the transactions involved in the anterior corporate proceedings do not possess any peculiar measure of merit, sanctity, or solemnity, as evidence, above that possessed by the judgments of foreign courts of general jurisdiction; and there is no peculiar rule of conclusiveness applicable to private foreign corporate assessment rights not applicable to foreign judgment rights. Indeed, judgment rights are recognized as in the class of the highest and most solemn of rights, and, if proofs may be required as to the regularity of foreign judgments, we see no reason why this plaintiff, a foreign corporation, should not be put to full proof of corporate necessity, corporate regularity as to its proceedings, and to full proof as to the transactions being within the scope of the business originally contemplated by the association, or subsequently legally authorized. And my conclusion is that the ordinary rules applying to domestic corporations as to burden and measure of proof do not apply to an alien corporation of the character of the one in question, and that the rule to be applied to alien corporate contracts should require the plaintiff to show that all material statutory and corporate requirements have been complied with, and that the conditions contemplated by the statutes and the common law of the country of the corporation actually exist. It is also my conclusion that, under the rule as to the measure of proof which should be required in the courts of a country alien to the corporate domicile, the pleadings in this case, together with the motion for a verdict, and the statement of the grounds thereof appearing in the record, operated to put the plaintiff to a larger measure of proof than was produced in its behalf at the trial, and that the objections and the exceptions sufficiently present to us the question as to the measure of proof to be required in a case like this. This is not a denial of right; it is not a denial of remedy; it is only a denial of the right of relief until the foreign suitor asking relief

proves by evidence readily accessible to him, and not accessible to his adversary, that the right exists, and is founded in conditions which fairly and reasonably require its enforcement. When, however, a foreign plaintiff like the one in question presents a case with a measure of proof showing that justice and comity require its enforcement (and in this connection "comity" is used in a sense as broad as that of "justice"), the right should be established and enforced in accordance with the law of England, and the remedy, subject to certain limitations, should be that employed for such purpose in that country; and this is for the reason, as said in *Railway Co. v. Gebhard*, 109 U. S. 537, 3 Sup. Ct. 369, 27 L. Ed. 1024, that "a corporation must dwell in the place of its creation, and cannot migrate to another sovereignty, * * * and whatever control it is subject to at home must be recognized and submitted to by those who deal with it elsewhere." Such being the law, it follows that "every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government affecting the affairs and obligations of the corporation * * * as the known and established policy of that government authorizes."

Considerable was said upon argument against the remedy, but upon the question of the remedy, were the right established by proper proofs, I agree with my Brethren. The decisions are numerous and controlling that, if the statute creating the liability specifies a remedy, that remedy must be followed; but, if not specified, I think the right must be enforced according to the usual course of jurisprudence in the jurisdiction of the corporation. This has been repeatedly held in respect to assessment cases in our own country, and I see no reason why the same rule should not apply to English corporations, especially in view of the fact that the system of common-law and equity jurisprudence of England prevails in this country so far as the same is not repugnant to our institutions. In this view, the law of New Hampshire in respect to the sole remedy of forfeiture of shares should not apply. Of course, the right is measured by the English law, subject to the qualification in respect to the rule of evidence, the necessity and reasonableness of which I have undertaken to point out; and the rule for which I contend involves the idea that no intendment or presumption as to regularity of corporate proceedings should be accepted in favor of a foreign and alien corporation which sues here, and that we may and should adopt a different rule as to the burden of proof in respect to material questions involved in an alleged right of recovery than that adopted by the domiciliary courts; and when the right is established the remedy is according to the remedy usually employed for the enforcement of such a right in England, the home of the corporation.

TURNER v. TURNER.

(District Court, D. Indiana. May 20, 1901.)

No. 850.

1. BANKRUPTCY—PROVABLE DEBTS—JUDGMENTS.

Not all judgments or decrees against a bankrupt for the payment of money evidence debts provable against his estate, under Bankr. Act 1898, § 63a, cl. 1, and in determining their character the court will look beyond the form of the judgment, and consider the nature of the liability upon the original cause of action.

2. SAME—ENJOINING ENFORCEMENT OF JUDGMENT—DECREE FOR ALIMONY.

A decree awarding alimony to a wife on granting her a divorce, although creating a fixed liability payable at once, does not evidence a "debt" provable against the husband's estate in bankruptcy, under Bankr. Act 1898, § 63a, cl. 1, and from which he is released by a discharge, and proceedings to enforce its collection will not be enjoined by a court of bankruptcy on his petition. Alimony is a sum awarded for the wife's support in the enforcement of a marital duty imposed for the benefit of the wife, and also from public policy, and not a debt in a legal sense, and congress cannot be presumed, from the language used in the bankruptcy act, to have intended to permit a bankrupt to avail himself of its provisions to evade such duty, because a court, on granting a divorce to the wife, has definitely fixed the measure of the obligation.

In Bankruptcy. On petition of bankrupt for an injunction restraining proceedings to enforce a decree for alimony.

James L. Harman, for petitioner.

Dodge & Waltz, for respondent.

BAKER, District Judge. This is a petition for an injunction restraining the prosecution of proceedings supplementary to execution in a court of the state. On March 1, 1899, the defendant, then the wife of the complainant, filed her complaint in the circuit court of Elkhart county, Ind., against the complainant for divorce and alimony, on the ground of his cruel and inhuman treatment. Summons was personally served on the complainant herein, and such proceedings were had in the state court as that a decree of divorce was granted to the above-named defendant against the above-named complainant, and the court further adjudged and decreed that the defendant herein "do have and recover of and from the complainant herein the sum of \$500 as alimony, together with the costs of suit." An execution was issued on the judgment for alimony, and was returned nulla bona. On February 15, 1901, said Turner filed his voluntary petition in bankruptcy in this court, and on the same day he was adjudged a bankrupt. The schedule filed with his petition discloses indebtedness to the amount of \$653, \$600 of which consists of the alimony decreed to his wife, with interest thereon. On March 28, 1901, the above-named defendant instituted proceedings supplementary to execution in the state court to enforce the payment of said decree for alimony. These supplementary proceedings are still pending. On May 13, 1901, the above-named complainant filed his petition for injunction in this court, asking the court to re-

strain the above-named defendant from the further prosecution of the proceedings supplementary to execution.⁷

The right to the restraining order depends on the question whether the alimony decreed to the defendant is a debt provable against the bankrupt's estate. The assets of the bankrupt, as shown by his schedule, amount to the sum of five dollars. It is apparent that, if the decree for alimony is a provable debt, the wife will be wholly deprived of the provision made for her support by the statute of this state and by the decree of the court. Alimony is an allowance for support and maintenance, having no other purpose and provided for no other object. It is solely intended to furnish a provision for food, clothing, and habitation for the wife, who has been driven to seek a divorce on account of the husband's wrongful breach of the marriage contract. The amount necessary for this purpose depends more or less on the condition, habits of life, and social position of the parties, and, while the judgment of the court will be somewhat influenced by these considerations, the primary and distinctive purpose of support will never be lost sight of. It is not awarded as a debt, but for the enforcement of a duty growing out of the marital relation, which is not severed by the husband's misconduct. He owes this duty while the marital relation subsists, and the decree of alimony but continues this duty in force after the dissolution of the marriage contract. As has been well said, the allowance only becomes a debt in the sense that the general duty over which the husband had a discretionary control has been changed into a specific duty over which he has no control. The authorities hold that alimony is not strictly a debt due to the wife, but rather a general duty of support made specific by the decree of the court. 2 Am. & Eng. Enc. Law (2d Ed.) 117, and cases cited in notes. It is not a debt or liability which the wife can assign, nor can it be appropriated for a debt existing prior to the divorce. These special attributes of property are denied to the wife. It is evident that it is not an ordinary debt due to the wife, which she may deal with at her pleasure. It is a special fund, devoted to the support and maintenance of the wife, provided by the policy of the state to protect her from becoming a public charge, and to secure her against the temptations to a life of vice. The bankrupt in this state is entitled to an exemption to the amount of \$600 from debts founded on a contract, express or implied. He is entitled to no exemption on a judgment for alimony. The bankrupt on debts founded on contract, express or implied, is entitled to claim his exemption, and thus, if the decree of alimony is a provable debt, the wife is left wholly dependent while her husband retains the \$600, which by the policy of the state ought to be applied to her support.

It is claimed that this fund, provided in a wise public policy,—a policy essential to good morals and having its foundation in the family relations,—is an ordinary debt, which is extinguished by proceedings in bankruptcy. If this be so, it will at once be seen how effectually the bankrupt law overturns and defeats one of the wisest and most humane provisions of state policy for the protection of the injured wife. The policy of the state is to give bread to the

divorced wife, but the bankrupt act on complainant's contention would give her husks instead. It would rob the wife of her support, and reward the guilty husband by granting him a full and free discharge. It may be that congress has the power indirectly through a bankrupt law to defeat the policy of the state regulating the dissolution of the contract of marriage. It could not do it directly, because the regulation of the domestic relations is a matter purely of state concern. The court ought not to impute to congress a design to defeat the policy of the state unless the language claimed to accomplish it is so clear and unmistakable that no other construction can be given to it. The statute, so far as applicable to the present question, provides as follows: "Debts of the bankrupt may be proved and allowed against his estate, * * * which are (1) a fixed liability as evidenced by a judgment * * * absolutely owing at the time of the filing of the petition, * * * whether due or not." This does not include every judgment or decree for the payment of money. The authorities agree that it does not apply to installments of alimony made payable after the adjudication. The mere fact that money is decreed to be paid does not necessarily make it a "debt," within the meaning of that word as used in this statute. The statute specifies different classes of claims which are made provable. The one in question includes debts which are a fixed liability evidenced by a judgment. We have seen that alimony is not a debt reduced into judgment. It is a sum of money awarded for the wife's support in the enforcing of a marital duty, and it does not constitute a "debt," in the true sense of that word. The court will look beyond the form of the judgment. It will look at the nature of the liability, the original cause of action. The duty of marital support springs out of the contract of marriage, and continues until dissolved by death or the judgment of a competent court. A discharge in bankruptcy will not release a bankrupt from his obligation of support. The wife, during the marital relation, cannot prove her claim for support against the estate of her bankrupt husband. If a discharge will not release the bankrupt husband from his liability to furnish his wife support, why should such discharge absolve him from the performance of this duty, when, on account of the violation of his marriage contract, a court has decreed the amount of money that he should pay in satisfaction of this duty? In my opinion, the present bankrupt law ought not to receive a construction which would absolve the guilty husband from the duty of support, although the measure of that duty is fixed by a decree of court. The bankruptcy act of 1800 authorized the bankrupt to be discharged from "all debts." The act of 1841 authorized a discharge "of all persons whatsoever owing debts." And in *Re Cotton*, Fed. Cas. No. 3,269, it was held that a money judgment in a bastardy case was not a debt, within the meaning of the last-named act. It was also held in the same case that a money judgment in favor of the father for his daughter's seduction was not a debt. This case rests on the principle that it is the duty of the court to look behind the judgment, and to ascertain the nature of the cause of action; and, if the judgment is one which fixes the amount which should be paid by

the bankrupt in the performance of the duty of support, it is not a dischargeable debt. The principle ruled in this case, and in *Re Garrett*, Fed. Cas. No. 5,252, and in *Re Lachemeyer*, Fed. Cas. No. 7,966, is persuasive that neither of the acts of 1800, 1841, nor 1867 is to be so construed as to discharge a bankrupt from a decree of alimony.

It has been thought by some courts that the first clause of section 63a must be so construed as to include alimony where the amount is fixed by the decree and is made presently payable. The primary object in the interpretation of a statute is to ascertain the intention of the lawmakers. Whenever their intention is ascertained, it ought to be followed with reason and discretion in the construction of the statute, although such construction seems contrary to its letter. A thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers of the law. In the construction of the statute, the court, in order to ascertain the intention of the legislature, will look to the whole statute, and all its parts, to the situation and circumstances under which it was enacted, to other statutes on the same subject, whether passed before or after the statute under consideration, and whether in force or not, and will carefully consider the purpose sought to be accomplished. A Massachusetts statute of wills provided that all persons of full age and of sound mind might dispose of their real estate as well by last will and testament in writing as otherwise, by any act executed in his or her lifetime. But this language was held not to include married women, on the ground that it was not the intention of the legislature to alter the relation between husband and wife or the legal effect of that relation. *Osgood v. Breed*, 12 Mass. 530; *Wilbur v. Crane*, 13 Pick. 284.

The object of the bankrupt act was to relieve the honest and unfortunate debtor from the burden of his debts. It is incredible that it was the intention of congress to relieve the guilty husband and father from his duty to support his wife and children. The change in the language of the present statute from that employed in the former statutes does not necessarily require a change of construction. The difference of language ought to be so clear and distinct as to evince a manifest intention to change the law so that the interpretation given to former statutes relating to the same subject-matter should be clearly inapplicable in the construction of the later statute. It seems to be thought by some that the statute includes every fixed liability evidenced by a judgment absolutely owing at the time of the filing of the petition, whether then payable or not; but the language of the statute does not justify such an interpretation. The clause in question only includes "debts * * * which are (1) a fixed liability as evidenced by a judgment * * * absolutely owing at the time of the filing of the petition, * * * whether payable or not." The ruling word is the word "debts" as in the former statutes. It is not a forced or unnatural construction to hold that the judgments intended do not include those for a fixed sum of money absolutely owing to the wife or child, decreed to be paid by the guilty husband and father for their support. If

money decrees for the enforcement of the marital or parental duty of support were intended to be included, it is difficult to understand why the law did not mention duties as well as debts. If congress intended to include money decreed for the support of the wife or child, it would have been easy to have used the words, "debts and duties * * * which are (1) a fixed liability as evidenced by judgment * * * absolutely owing, * * * whether due or not." Reducing a debt or duty into judgment works no change in its character. Notwithstanding the change in form from that of a simple debt or duty by merger into a judgment of a court of record, it still remains the same debt or duty on which the action was first brought. *Boynton v. Ball*, 121 U. S. 457-466, 7 Sup. Ct. 981, 30 L. Ed. 985.

The petition is addressed to a court of equity, and invokes its active assistance in the enforcement of an alleged legal right secured to the bankrupt by the bankrupt act. He who seeks equity ought to offer to do equity. "Equity will not feed the husband and starve the wife." Anything more disgraceful in a moral point of view than the complainant's attempt, by becoming a voluntary bankrupt, and manifestly for the sole purpose of cutting off the alimony decreed to his wife, cannot be imagined. When the active assistance of a court of equity is invoked in the enforcement of a naked legal right it will refuse its aid where granting it would work injustice, or, if it grants its assistance, it will only do it upon conditions which will mitigate or relieve the injustice. The complainant has made no offer to mitigate or relieve the injustice of depriving his wife of support. The prayer for injunction will be denied.

In re CARMICHAEL.

(District Court, D. Kentucky. February 15, 1901.)

1. BANKRUPTCY—RIGHT TO HOMESTEAD.

An owner of a homestead in Kentucky sold it, and with the money made payments to the extent of \$1,250 on other property bought, in which, on subsequently becoming a bankrupt, he claimed a homestead. At the time of the purchase he moved to such last-mentioned property, where he and his family have ever since resided. The property was conveyed to the bankrupt and his wife jointly. Ky. St. § 1702, provides that there shall be exempt to an actual bona fide housekeeper with a family a homestead not to exceed \$1,000. *Held*, that the bankrupt was entitled to have a homestead of \$1,000 set apart to him in the property.

2. SAME—CONTRACT OF SALE.

The fact that the bankrupt may have entered into a contract to sell such homestead to his wife and sister-in-law, they not at the time being in any way indebted to him, did not in any way affect his right to the exemption.

E. E. McKay, for bankrupt.

J. K. Chambers, for trustee.

EVANS, District Judge. The trustee in this case having declined to set apart to the bankrupt a homestead to the value of \$1,000 in a house and lot on Broadway, in this city, the bankrupt excepted, and

brought the question before the referee. He, having heard it, sustained the action of the trustee, and the bankrupt has filed a petition for a review of the ruling of the referee. Although there are some contradictory statements by the bankrupt in the testimony, the material facts seem to be that he owned a homestead in Jefferson county, outside of Louisville, which he sold, and with the money, in April, 1899, made payments to the extent of \$1,250 on the purchase money for the property in which the homestead is now claimed. With his family he then moved to the property last mentioned, and has ever since, with them and with the family of his wife's mother, resided upon it, the two ladies keeping there a boarding house. The property was conveyed to the bankrupt and his wife jointly, though it is attempted to be shown that there was some arrangement between him and his wife and sister-in-law to the effect that, after the balance of the purchase money should be paid to the vendor, and after the \$1,250 was repaid to the bankrupt, he would convey his interest in the real estate to them; and this arrangement, though the proof of it was somewhat shadowy, was construed by the referee to constitute in some way a mortgage to them, and upon that ground mainly the right to the homestead was denied. The original transaction was between the Fidelity Trust & Safety-Vault Company as the vendor and the bankrupt and his wife as joint vendees. He made the purchase of at least one-half interest in it. He alone made the payment of \$1,250. He made it largely, and probably altogether, out of the money derived from the sale of his homestead in the country. He and his wife executed the 23 notes for the balance of the purchase money, and some of them have since been paid by her and her sister. The deed from the trust company was made to the bankrupt and his wife jointly, and he, with his family, has in fact resided upon the property as a home ever since. No agreement in writing between the bankrupt and his wife and sister-in-law seems to have been made, but the understanding proved by the evidence is one which, it seems to me, upon the facts just stated, constituted, if anything, an executory contract for the sale to them of his interest, and in no sense a mortgage; and particularly as they, in no reasonable sense, owed any debt to the bankrupt when the deed was made, which, as to him, is sought to be construed as a mortgage. The bankrupt, at most, as it seems to me, even if there had been a writing to satisfy the statute of frauds, only agreed upon certain conditions to sell his interest in the property to his wife and sister-in-law, and, as before observed, they did not then owe or create any debt to him as a basis upon which any mortgage or other security could be said to operate. He owned a half interest in the property, and agreed verbally to sell it to them upon certain conditions. If this interest was his homestead, he had the right to dispose of it regardless of his creditors, who had no interest in it, but his bankruptcy probably nullified or made impossible of execution the agreement of sale. Bankruptcy defeats most contracts of the bankrupt, but, at all events, the creditors have no interest in it, whether the wife and sister-in-law can ever enforce it or not. Section 1702 of the Kentucky Statutes is in this language:

"In addition to the personal property exempted by this article there shall, on all debts or liabilities created or incurred after the first day of June, one thousand eight hundred and sixty-six, be exempt from sale under execution, attachment or judgment, except to foreclose a mortgage given by the owner of a homestead, or for purchase money due therefor, so much land, including the dwelling house and appurtenances owned by debtors, who are actual bona fide housekeepers with a family, resident in this commonwealth, as shall not exceed in value one thousand dollars; but this exemption shall not apply to sales under execution, attachment or judgment, if the debt or liability existed prior to the purchase of the land, or of the erection of the improvements thereon."

The facts of the case seem to meet the statutory conditions upon which the homestead right of the bankrupt depends. His intent to use the city property as a homestead is demonstrated by the fact that he has always so used it since he purchased it, and the Kentucky decisions seem to require nothing more. They also seem to give him much advantage, from the fact that the purchase money was in part paid out of what he had realized from the sale of another homestead, the proceeds of which were promptly reinvested in the one now claimed. Homestead laws are liberally construed in favor of the debtor, and I see nothing in this case to lead to the conclusion that the money obtained as this was, and which was invested in another homestead, as this was, should, under the benevolent spirit of the homestead laws, be forfeited to the bankrupt's creditors, upon grounds so entirely technical as would be demanded in this case. It was expressly decided in *Johnson v. Kessler*, 87 Ky. 458, 9 S. W. 394, that, where a husband and wife held real estate jointly, the former was entitled to have the entire \$1,000 set apart to him out of his interest. An agreement to sell the homestead cannot in any wise be held to forfeit the right to the exemption. On the contrary, many cases hold that creditors cannot attack even a voluntary or fraudulent sale of it, because, it being exempt from the payment of their debts, they have no interest in it. *Tong v. Eifort*, 80 Ky. 152; *Dowd v. Hurley*, 78 Ky. 260. And it is also clear that the proceeds of the sale of the bankrupt's country homestead were exempt when he reinvested them in the city property. *Cooper v. Arnett*, 95 Ky. 603, 26 S. W. 811. Subject to the conditions and exceptions set forth in the section of the statute just quoted, it seems to me that the bankrupt is entitled to the exemption he claims. The petition for the reviewing of the referee's ruling in this matter is therefore sustained, the referee's ruling is reversed and set aside, and proper orders will be entered to give effect to these views of the court.

IN RE MORTON BOARDING STABLES.

(District Court, S. D. New York. May 17, 1901.)

BANKRUPTCY—CORPORATION—CONDUCTING BOARDING STABLES.

A corporation, the principal business of which is conducting boarding stables wherein it boards horses for its customers, including the complete care of them and also the care of wagons and carriages, harness, etc., is engaged principally in "trading or mercantile pursuits" within

the meaning of Bankr. Act 1898, § 4b, and may be adjudged an involuntary bankrupt.

In Bankruptcy.

On motion to set aside an adjudication in bankruptcy. An order of reference was made to ascertain the facts, with the referee's opinion thereon: The following is the report of the referee, with his opinion:

I, Ernest Hall, the referee in said order named, do respectfully report: That I have been attended upon said reference by the officers of said alleged bankrupt corporation and its counsel, and by counsel for the petitioning creditors, and other parties in interest, and that I have taken the proof offered by the respective parties and have heard argument of counsel thereon, and after due deliberation, I do find and report, that at the time of filing the petition herein the alleged bankrupt, the Morton Boarding Stables, was a corporation engaged principally in trading and mercantile pursuits, within the meaning of section 4b of the bankrupt act, and could lawfully be adjudged an involuntary bankrupt thereunder.

The facts in the case are practically undisputed, and are substantially as follows: The corporation hired and rented a large building in the city of New York, and had it suitably arranged for the accommodation of horses and trucks or wagons and for the storage of necessary food and bedding for horses, and they also had a blacksmith's establishment and repair shop for trucks and wagons, which were operated in connection with the stable. They took horses to board for a certain specified sum per month, which sum included the storage of the trucks or wagons, and the cleaning and greasing of the same. They also shod the horses and, to a small extent, did outside shoeing and also a small business in repairs to trucks, but all of the matters outside of the board of the horses may be considered as mere adjuncts or accessories of the main business of boarding horses for hire; and the income from all other sources formed but a small and unimportant part of the entire income from the business. It may also be remarked, in passing, that they occasionally bought, sold, or exchanged horses and also let their own horses to their customers, when those of the latter were out of condition for work.

They had many incidental branches to their business and it became necessary for them to buy and sell different articles, and, perhaps, manufacture to a small extent; and it might be possible to find that in these different branches they were traders or were following mercantile pursuits within the meaning of the act, but it can scarcely be said that in this regard they were engaged principally in trading or mercantile pursuits, and I prefer to rest my decision squarely upon the fact that in boarding horses for hire and carrying on a livery stable, they were principally engaged in trading and mercantile pursuits.

I consider the case *In re Odell*, 17 N. B. R. 73, Fed. Cas. No. 10,426, decided by Judge Blatchford, under the old bankruptcy law, as a direct authority in this case, and that it is well reasoned and ought to control.

Subdivision 7, § 5110, Rev. St., provided that no discharge should be granted to a bankrupt, if being a merchant or tradesman he had not kept proper books of account.

The bankrupts in that case kept a livery stable and took horses for board at a certain specified price per month, and they also let their own horses and bought horses for their own use in the business and for hiring out.

"They fed the horses with hay, oats, feed and grain, buying such food and receiving pay for that which the horses consumed; this was as much a sale of the food as if it had been sold to be taken away from the premises and consumed by the horses of other persons elsewhere. The only difference is that it was sold to be consumed on the premises by the horses of other persons."

This language is more directly in point in the case at bar than it was in the *Odell* Case, because in that case the bankrupts kept a regular livery

stable and their principal business seems to have been the hiring out of their own horses and carriages for pay, and incidentally boarding the horses of other persons; while in the case at bar the chief business was the boarding of horses belonging to other persons.

Much stress has been laid by the counsel for the moving party upon the fact that the rent of the stable and the attendance upon the horses by the employés of the bankrupts furnished a large part of the service for which they received the monthly pay. If such an argument were controlling there could be no trading or mercantile business within the meaning of the act; every merchant or trader must have a place of business and own it or pay rent for it, and he must have employés and salesmen to handle and sell his goods, and horses, and trucks, perhaps, to deliver them, and in many mercantile businesses the handling and delivery of the goods constitutes the chief expense, as in buying ice or coal by the cargo and retailing it; the same may be said of almost any business of buying and selling.

The bankrupt bought grain and feed of all kinds in large quantities, and sold it again at retail to its customers, and instead of delivering it to them in bulk to be used at their own stables, they divided it up into the necessary quantities and sold it to their customers to be consumed on the premises. Suppose they had furnished eight quarts of oats to a customer for so much a quart, and the customer had put it in the manger and fed it to his horse, and had continued the same performance for a month, and then paid the agreed price, can there be any doubt but that it would constitute a sale? But the moving party claims that because an employé put it in the manger it became something else than a sale, but he fails to disclose what the transaction would then have been, nor does the fact that the wages of the employé formed an indivisible part of the monthly sum charged, alter the case or make it any less a sale; the employé delivers the goods purchased to be consumed upon the premises instead of somewhere else. I fail to discover any distinction.

Counsel for the moving party cites in support of his argument the case of *In re New York & W. Water Co.* (recently decided by this court) 98 Fed. 711, in which it was held that a company which owned a source of water supply and a reservoir and pipe lines and allowed householders for a certain sum to connect their houses with its pipes and thus obtain a water supply, was not principally engaged in trading or mercantile pursuits under the act.

The reasoning of that case seems perfect, but it has no application here. That company did not buy and sell water in specific quantities, but merely conveyed the water through their own pipes or conduits from a natural supply, and for a certain annual payment licensed householders to connect with their pipes and thus obtain necessary quantities of water.

But, suppose that company had been formed for the purpose of purchasing spring water in bulk and then bottling it and selling it at retail; can there be any doubt but that they would have been traders and engaged in mercantile pursuits, even though the original cost of the water might have been but trifling and the labor of transporting and bottling and delivering it have been the chief item of cost?

Or, go further and suppose they opened a store (as many of them have) and in order to introduce their goods had agreed that any one might go in and be served with as much of the water as they could drink every day for a certain price per month, would not that also have been trading?

The cases referred to by the learned counsel for the moving party, relating to mining companies, have no application to the case at bar; they stand upon the same footing as the *Water Co.* Case.

The case of *In re San Gabriel Sanatorium* (D. C.) 95 Fed. 271, decided under the present law, goes much further in support of the petitioning creditors' contention than the *Odell Case*, and is certainly not an authority in favor of the moving party.

My conclusion is that the adjudication in this case was clearly within the provisions of the bankruptcy act.

I submit herewith the order of reference and all the testimony taken before me.

Jacob A. Cantor, for petitioning creditors.
Henry G. Sanford, opposed.

BROWN, District Judge. The principal business of this corporation being evidently that of boarding horses for their customers, including the complete care of them, and also the care of wagons, harness, coaches, etc., I should have hesitated, if this were an original question, to consider this corporation as principally engaged in "trading or commercial pursuits" within section 4b of the bankruptcy act, as the business does not involve, except to a very minor degree, any direct sale of the hay, feed, grain, etc. In re New York & W. Water Co. (D. C.) 98 Fed. 711, 713, 714, 3 Am. Bankr. R. 508; In re Elk Park Min. & Mill. Co. (D. C.) 101 Fed. 422; In re Rollins Gold & Silver Min. Co. (D. C.) 102 Fed. 982, 4 Am. Bankr. R. 327. But in construing the phrases of the act of 1898, reference is constantly made to the preceding bankruptcy acts and to the construction given to similar phrases therein used. In the Case of Odell, 17 N. B. R. 73, Fed. Cas. No. 10,426, in this district, Mr. Justice Blatchford construed the words "merchant or tradesman" in the act of 1867, as including livery stable keepers, considering that the purchase and supply of hay, oats, feed and grain (which are the principal items in this business), and receiving pay therefor in the compensation paid for the board of horses, was equivalent to a sale of the food and constituted "trading." This is no doubt a somewhat liberal construction of the word trading; but as this was the established construction under the former act and has, so far as I know, never been dissented from, and as the business is in general so closely allied and analogous to trading or commercial pursuits, I think I should follow the former construction as the learned referee has done, and confirm his report, leaving to the contestants the burden of any review by appeal, should that be desired.

The report is confirmed.

In re FELDSTEIN.

(District Court S. D. New York. May 11, 1901.)

BANKRUPTCY—DISCHARGE—IMPROPER BOOKS.

A bankrupt was engaged in business, and kept books, and employed a bookkeeper. For more than two years prior to his bankruptcy he was largely and increasingly insolvent, his liabilities exceeding his assets at the time of his bankruptcy by half a million dollars. During such two years he lost in gambling and stock speculations over \$200,000, which was taken out of his business, but during all such time his books showed him to be solvent. This arose largely from the fact that he took notes from customers who were indebted to him on account as shown by the books, and, instead of crediting them to the makers, sold or discounted such notes, and credited the proceeds to himself as money put into the business by him, and against such credits he drew the money to pay his gambling losses, which did not appear on the books. He kept two small memorandum books in his desk, in which the note transactions were entered, but they were not a part of his regular system of books. *Held*, that such books were calculated to conceal his true financial condition, and, since he must have known of his insolvency, it was a reasonable inference that they were fraudulently so kept with that intent, and in

contemplation of bankruptcy, so as to bar his right to a discharge, notwithstanding his denial of such knowledge or intent.

In Bankruptcy. On application for discharge, and objections thereto.

The following is the report of Ernest Hall, referee, to whom the application and objections were referred:

The specifications filed by the objecting creditors are as follows: First, they charge that the bankrupt, with fraudulent intent concealed his true financial condition and in contemplation of bankruptcy, failed to keep books of account or records from which his true condition might be ascertained; and the facts in regard to this specification are fully set out in the subdivisions following the specifications. The second specification is, that the bankrupt did knowingly and fraudulently omit from his schedule of assets his interest and ownership in the house occupied by him, known as "No. 34 West 71st Street," in the city of New York, represented by certain amounts paid out by checks of the bankrupt in reducing liens and incumbrances on the property, and which amounts are set forth in full in the specifications. The third specification charges that the bankrupt did knowingly and fraudulently make a false oath and account in and in relation to his proceedings in bankruptcy, and the fourth specification charges, that the bankrupt concealed, while a bankrupt, from his trustee in bankruptcy, certain property belonging to his estate, consisting of a sum of money, being a portion of the moneys drawn by him from his deposit in the Pacific Bank, and not included in or accounted for by the checks drawn for gambling and stock speculations.

The only specifications which were seriously pressed before me were those relating to the failure to keep proper books of account, and the concealment of assets by the bankrupt from his trustee, consisting of his interest in or ownership of the house No. 34 West 71st street, New York City.

In regard to the latter specification, I find from the evidence before me that said specification is not sustained; that said house was owned by the wife of the bankrupt, was purchased with her separate and individual funds not derived from or through the bankrupt, and that all payments for, or on account of the purchase of said house, or for taxes or principal or interest of incumbrances thereon which were paid by the bankrupt were paid out of funds in his hands belonging to his wife, and not obtained by her from or through him.

The other specification as to the failure to keep proper books of account and the failure to enter therein the various matters mentioned in the subdivision of the first specification, present a much more serious and difficult question.

Before going into a discussion of the testimony regarding this alleged failure to keep proper books, it may be well to record a general statement of the condition of the bankrupt during the last two years before his bankruptcy. I find from the evidence that the bankrupt was insolvent to the amount of \$75,000 and more on January 1, 1898, and more than \$175,000 on December 31, 1898, and more than \$360,000 on December 31, 1899, and more than \$500,000 on May 1, 1900, without regard to debts owing to his wife and her family, amounting to more than \$90,000.

Between September 19, 1898, and April 12, 1900, and during all or a part of which time the bankrupt was hopelessly insolvent, he lost in gambling at roulette, etc., the enormous sum of more than \$160,000 in gambling houses in New York, and paid the same out of moneys drawn from his business, in addition to about the sum of \$75,000 lost in speculations in stocks.

Under the provisions of the present bankruptcy act, these losses furnish no ground for refusing a discharge nor have the same been noted here for any such purpose; the law must be administered as it stands, and it is not for the courts to criticise its provisions, and I want to be understood as giving no weight or consideration whatsoever to those matters in forming my conclusions, but refer to those facts only in connection with the very peculiar method of bookkeeping adopted by the bankrupt, and of possibly aiding in the elucidation of the reasons for adopting such methods.

I have carefully examined the cases cited in the very clever brief submitted by counsel for the bankrupt, who has certainly been at great pains to present every fact and every argument which could be presented on that side of the case, and I agree fully with his statement of the law; that no special form of bookkeeping is required so long as the bankrupt keeps books or records of his business in such a way as that an ordinary person, having a general knowledge of accounts, could discover his true financial condition; nor is it of any particular consequence what kind of books or records are kept, so long as that end can be reached by reasonable examination. I also agree that in order to bar the discharge, the books must have been kept incorrectly with a fraudulent intent, and in contemplation of bankruptcy, but I am of opinion that no direct evidence of an avowed fraudulent intent is necessary, but that it is sufficient if such intent can reasonably be inferred from the circumstances surrounding the matter, and that if a man, who is hopelessly insolvent and must know it, keeps no books of account or keeps them in such a manner as to conceal his true financial condition, and a distinct purpose or reason is apparent for such action, the fraudulent intent may properly be inferred.

Counsel for the bankrupt lays great stress upon the fact that ever since the bankrupt commenced business in 1894 and when he was entirely solvent, he kept his books in the same manner as during his insolvency. While he was solvent, and could promptly meet all his obligations and before the passage of the bankrupt act, he was at liberty to keep his books in any manner he pleased or to keep no books at all, but when he asks the benefits of the bankrupt act he is bound to show a compliance with its provisions regarding his books as well as any other requirements, but if he kept improper or incorrect books before the passage of the bankrupt act and to such an extent as to make them improper or insufficient under the act, he should, upon the passage of the act, have altered his system of bookkeeping so as to comply with its requirements, if he ever expected to seek the benefit of its provisions.

I am convinced from the evidence that some time during the year 1898 and certainly at the end of that year, the bankrupt knew that he was insolvent, and could not meet his obligations and he turned to gambling and stock speculations in hopes of retrieving his losses, but he went from bad to worse and rapidly used up his assets and the money of his creditors. But counsel argues that his books, if improperly kept, were not so kept in contemplation of bankruptcy and the bankrupt testifies that he did not know he was insolvent and did not contemplate bankruptcy until April, 1900. If that were all that was necessary, it would never be possible to find that a man did anything in contemplation of bankruptcy; he could fail to keep any books or keep them in the most false and fraudulent manner possible and still say that he did not contemplate bankruptcy. The proper interpretation of the law does not in my opinion require that the bankrupt should go forth and make a declaration that he contemplated filing a petition in bankruptcy, but that from the condition of his affairs and the knowledge with which he must properly be charged regarding them, he could plainly see that there was nothing for him but bankruptcy; to hold anything else would be tantamount to a complete nullification of the act in this respect.

I have therefore no hesitation in finding from the evidence that the bankrupt knowing that he was insolvent and in contemplation of bankruptcy within the meaning of the law, and with intent to conceal the true condition of his business and affairs, kept his books in the manner he did, and it only remains to determine whether his books were kept in such a manner as to conceal his true condition.

In arriving at my conclusions in this matter I have not given great weight to the question of the relations existing between Zellweger & Co. and the bankrupt, or to the discussion of the question whether the agreement between them constituted a general or special co-partnership; I regard that question as largely academic so far as its bearing upon the result in this case is concerned.

It stands admitted by the record in this case before me, that the bankrupt was indebted to the firm of Zellweger & Co. in nearly \$300,000, and, whether

the partnership between them was general or special, the transactions out of which that indebtedness arose consisted in forwarding goods by them to the bankrupt to be sold for their account and the proceeds accounted for and returned to them in Switzerland, and they as much as any other creditors were entitled to have their accounts correctly kept by the bankrupt; and even were this not true, the other creditors were certainly entitled to have those accounts correctly kept, because it was only by correct entries in that account as well as all others that the true condition of the bankrupt could be ascertained.

The bankrupt had a set of books, kept by a bookkeeper during his entire business career, and under his direction and instructions. The facts regarding the method of keeping the books are not disputed. The accounts of all debtors were entered in the day book and ledger in the regular way so far as charges were concerned, and when the accounts were partially or wholly paid by notes, as seems to have been the course of business, the bankrupt either had them discounted with his indorsement or else sold them absolutely, and without recourse; but in the former case no credit was given to the customer for the notes, although the proceeds thereof had been received by the bankrupt, but the debit balance was shown as if no note had been given, and no entry of the notes were made in the ledger. The result of this would be that any one examining the books for the purpose of ascertaining the true financial condition of the bankrupt would have found all the debit balances in favor of the bankrupt, just the same as if no notes had been given, and this sometimes amounted to hundreds of thousands of dollars. When in fact those accounts were not owing at all, but had been closed by notes, which should have appeared in the several accounts, and should also have appeared in a bills receivable account which was not kept in the ledger. But this was not the only misleading result of such a course of bookkeeping. When a note was discounted and the proceeds received by the bankrupt, such proceeds were credited to his account as so much cash paid in by him, and the books showed very large amounts so credited, which without explanation would make it appear that he had put into the business very large sums of money, and would thus enable him to make the enormous withdrawals of money used by him in his gambling and stock transactions without comment.

It is true that the bankrupt kept in his desk two small memorandum books in which he entered these note transactions and the various discounts, but I do not consider them a part of the regular books of account kept in his business for the information of those interested, but merely private memoranda made for his own information and purposes.

In regard to the enormous amounts of money withdrawn to pay gambling debts, it is true that most of the checks given for that purpose were entered either in his firm check book or his individual check book, some of them being regularly entered on the stubs of the checks and some of them only on the opposite pages and not on the stubs, but the purpose of the payment was never stated nor was any account kept in the books showing the purposes. But the bankrupt claims that they were made to such well-known gamblers as to give notice of their purpose to any one examining the books. I hardly think the court can take judicial cognizance of such a state of facts, and I beg to remark that the names of all such persons to whom the checks were made were entirely unknown to me, and probably would have been unknown to any interested person examining the books, although it might have been discovered on a thorough overhauling of the books that they were not business creditors. I think that the books were clearly false in not showing the reasons for these immense payments, and that they were purposely so kept in order to conceal the reason of these withdrawals, and in connection with the credit of the proceeds of discounted notes to the bankrupt, were intended to lead any one to believe that the bankrupt had paid in large sums as capital, and paid the same out as he lawfully might, if the facts regarding such credits were true. I am also of opinion that the failure to enter the notes received in payment of the goods consigned by Zellweger & Co. and to whom the bankrupt was indebted nearly \$300,000 was a fraudulent concealment of the facts, and an examination of the books by Zellweger & Co. by

ordinary methods would have shown that the purchasers of their goods were still indebted to Feldstein for the entire amount.

The same remarks will apply to the failure to enter in the regular books the stock transactions and the losses resulting therefrom, and also the failure to enter in such books the amount of indebtedness to the Siercks and Mrs. Feldstein, amounting to over \$90,000.

It is true that the bankrupt says that he kept in his private desk one or more little memorandum books in which entries of these matters were made, but the trustee who took possession of all the assets and books has failed to discover any such books, nor does the bankrupt produce them; but, assuming that there were such books, they were no part of the regular system of bookkeeping and the bookkeeper had no access to them, so that any ordinary creditor examining the books of account would necessarily have passed over this large amount of indebtedness.

So far from considering these memorandum books as well as those in which the note transactions were entered as a part of the regular books of account, I consider that they were kept in the manner described for the express purpose of concealing the true condition of the bankrupt from his creditors and compelling them to resort to the regular books, which would show at all times, down nearly to the bankruptcy, a solvent condition.

In regard to the very large amounts paid for gambling debts in April, 1900, and one upon the very day on which the bankrupt consulted his lawyers regarding the making of an assignment, I find that three of them were not entered at all even in the check book; and while I should not regard that omission standing alone as fatal to the bankrupt's discharge, I am not at all impressed by the attempted explanation of the bankrupt of the failure to make such entries. I think that for the last two years the bankrupt simply plunged headlong into all manner of gambling without thought for his creditors, and did his best to conceal the real facts from them, and only ceased when there was nothing left to gamble with.

The argument of the learned counsel for the bankrupt that the expert Klaw, who was employed by the trustee to examine the books, was enabled to make an accurate statement of the bankrupt's condition is not at all conclusive to show that the books were properly kept. Neither he nor any other expert could have made a correct statement from the books regularly kept in the business, but being an expert of many years' standing and having possession of the memorandum books containing the entries of the note transactions, and by examining the checks drawn for gambling, and finding no corresponding entries in the books, he was enabled by questioning and investigation to make a substantially true statement, as he says, "when he had the key."

So might one solve any enigma if he had the key, but the ordinary creditor examining the books would not have had the key and could not have even approximated the true financial condition of the bankrupt.

Much more might be said upon the subject, and much more has been said by the counsel for the creditors, but it seems to me that it has been clearly demonstrated that the bankrupt, with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy, has failed to keep books of account or records from which his true financial condition could be ascertained, and that the first specification is sustained by the evidence and the discharge should be refused.

The second specification is not sustained by evidence and should be dismissed.

The third and fourth specifications were not pressed by counsel for creditors, and were withdrawn.

Putney, Twombly & Putney, for bankrupt.

Blumenstiel & Hirsch, Black, Olcott, Gruber & Bonyng, Lord, Day & Lord, Stern & Rushmore, and Julius Goldman, for creditors.

BROWN, District Judge. Upon examination of the evidence and books in this case, I am entirely satisfied that the discharge of the

bankrupt should be denied on the grounds stated by the referee in his admirable opinion. I will only add that no system of bookkeeping, as it seems to me, could be devised that would be more calculated to mislead and deceive persons referred to the books for information as to the capital of the bankrupt invested in his business, which under this system of bookkeeping appeared at all times to be much larger than it was in fact.

KLUMP et al. v. THOMAS.

(Circuit Court, E. D. Pennsylvania. May 14, 1901.)

CUSTOMS DUTIES—CLASSIFICATION—FLAX THREAD.

A manufacture of flax, consisting of hanks of two strands of flax twisted together, is not dutiable under paragraph 347 of the tariff act of 1897, covering manufactures of flax not specially provided for, but is "thread * * * made from yarn * * * composed of flax," and as such specifically provided for in paragraph 330.

Appeal from Decision of Board of General Appraisers.

H. T. Kingston and W. Wickham Smith, for importers (appellants).

W. M. Stewart, Jr., and James B. Holland, for the United States.

DALLAS, Circuit Judge. This is a proceeding for review of a decision of the board of general appraisers, which affirmed the action of the collector of the port of Philadelphia as to the classification of certain merchandise imported by the plaintiffs. This merchandise was assessed for duty under paragraph 330 of the act of 1897, and the contention of the plaintiffs is that it was not dutiable under that paragraph, but under paragraph 347. These paragraphs are as follows:

"330. Threads, twines, or cords, made from yarn not finer than five lea or number, composed of flax, hemp or ramie, or of which these substances or either of them is the component material of chief value, thirteen cents per pound; if made from yarn finer than five lea or number, three-fourths of one cent per pound additional for each lea or number, or part of a lea or number, in excess of five."

"347. All manufactures of flax, hemp, ramie or other vegetable fiber, or of which these substances, or either of them, is the component material of chief value, not specially provided for in this act, forty-five per centum ad valorem."

The material involved in this case consists of hanks of two strands of flax twisted together, and is therefore a "manufacture of flax"; but, though this is plain, still the crucial question remains, is it an article which congress has designated by the specific name of "thread"? If it is, it was rightly classified under that designation. *Twine Co. v. Worthington*, 141 U. S. 474, 12 Sup. Ct. 55, 35 L. Ed. 821.

If it were necessary, as the plaintiffs seem to suppose, to distinguish thread from yarn, it would, I think, be difficult to point out any difference upon which, for the purposes of this case, such distinction could be rested. The dictionary definition of either of these words would be inclusive of this merchandise, and the evidence

shows that each of them is commercially applied to it. Therefore, while it cannot be said that it is not yarn, it is equally certain that it is thread. It is "thread * * * made from yarn," and congress, having so designated it, did all that was necessary for its identification. It was not requisite that it should be called by every name which might properly have been given to it. I quite agree that, though to a limited extent and for restricted purposes it may be used for sewing, it could not have been classified as a sewing thread; but the obvious answer to the argument which has been based upon this fact is that it has not been so classified, and that the act makes no provision for any such classification. Indeed, I think it is clear that in paragraph 330, by thread made from yarn, there was intended (as some of the witnesses have testified is their understanding of the meaning of the word "thread") two or more strands of yarn twisted together, as distinguished from "single yarns," which are dealt with in the following paragraph; in other words, that, for certainty of description, the term "single yarns" was employed when but one strand was referred to, but that, where articles composed of more than one strand were in mind, the word "threads" alone was used, as being precisely apt, and, of itself, sufficiently defining. The decision of the board of appraisers is affirmed.

In re SMITH.

(Circuit Court, E. D. Pennsylvania. May 13, 1901.)

CUSTOMS DUTIES—CLASSIFICATION—LACE WINDOW CURTAINS.

Lace window curtains only partially made on a Nottingham machine, and in part manufactured on another and different machine, which greatly enhances their value, are dutiable under paragraph 339 of the tariff act of 1897, and not under paragraph 340.

Appeal from Decision of Board of General Appraisers.

Howard T. Walden, for importer.

W. M. Stewart, Jr., and James B. Holland, for the United States.

DALLAS, Circuit Judge. The appellant imported merchandise which he claims should have been classified under paragraph 340 of the tariff act of June 24, 1897, as "lace window curtains, * * * finished or unfinished, made upon the Nottingham lace-curtain machine, or on the Nottingham warp machine." The fact, however, is that these curtains, as imported, were only partially made on a Nottingham machine. They were in part manufactured—not merely "finished"—upon another and entirely distinct machine, which greatly enhanced their value. Upon this ground the board of general appraisers overruled the protest which was made against their classification and assessment under paragraph 339 of the same act; and as, in my opinion, this decision was clearly correct, it is affirmed.

TOWNSEND et al. v. UNITED STATES.

(Circuit Court, S. D. New York. May 9, 1901.)

No. 2,996.

CUSTOMS DUTIES—CLASSIFICATION—STATUARY.

Statues cut, carved, and wrought by hand from a solid block of marble, by a person who is a graduate of a recognized school of art, are "statuary, the work of a professional sculptor," within the terms of paragraph 454 of the tariff act of 1897, and entitled to entry as such, without regard to the purpose for which they are to be used, the degree of artistic merit they possess, or the fact that they are copied from the work of other sculptors.

Appeal by the importers from a decision of the board of United States general appraisers, which sustained the assessment of duty by the collector of customs upon the importations in question.

Howard T. Walden, for appellants.

Henry C. Platt, Asst. U. S. Atty.

COXE, District Judge (orally). The collector assessed duties upon the importations under paragraph 115 of the tariff act of 1897 as "manufactures of marble." The importers protested insisting that they should have been assessed under paragraph 454 of the same act, as "statuary, the work of a professional sculptor."

As the case appeared before the board of general appraisers there was no evidence to show the professional character of the persons who made the imported statuary other than the declaration of the sculptors themselves and the consular certificates attached to the invoices. On the other hand, the United States produced the testimony of a number of sculptors of this country, who gave it as their opinion after examining the importations that they were not works of art and were not the work of a professional sculptor, but were, as characterized by them, ordinary commercial or "cemetery" statues. Upon that state of facts there could be no reason for disturbing the conclusion reached by the board. But since their decision evidence has been taken in this court which, it seems to me, very materially changes the situation.

The paragraph in question provides that the term "statuary," as used in the act, "shall be understood to include only such statuary as is cut, carved, or otherwise wrought by hand from a solid block or mass of marble." These importations are cut, carved and wrought by hand from a solid block of marble. The paragraph further provides that the statuary must be the production of a professional sculptor. I do not understand that the court is precluded in determining what a professional sculptor is by the opinions of gentlemen who are professional sculptors, whether they reside in this country or in the country where the statuary is made. I suppose if we were to define what a professional sculptor is we would say among other things that he is a graduate of an art school, a man educated in his profession, and who is capable of making statuary which gives a pleasing and artistic impression to the eye. It is not a question of degree; it is not wholly a question of the opinion which others

may entertain of his work. There are good sculptors and there are poor sculptors, just as there are good painters and poor painters. But I think that there can be no question that a picture painted by a graduate of an art school is a painting, although it is far inferior to the work of a Meissonier or a Raphael. So in this case these productions may not have all the artistic features that the American sculptors who have testified are capable of putting into marble; but that cannot be the test. If that were the test works of art might be narrowed down to the productions of a few men who are at the head of their profession.

The fact that these importations are used in cemeteries would also seem to be wholly immaterial. It is not a question where they are used; the question is what they are. And every one who has any knowledge at all upon the subject will recognize that some of the most beautiful statuary in the world is found in the cemeteries. Witness the Pere la Chaise, the cemetery at Genoa, or even Greenwood.

Nor do I think the question can be determined by the fact, if it be a fact, that these are copies from models made by other sculptors. I suppose that if Mr. Karl Bitter or any sculptor of recognized ability should copy the Venus of Milo, or the Dying Gladiator, and send it here it would be regarded as a work of art notwithstanding that the model was made centuries ago.

In this case we have the fact undisputed that each one of the sculptors whose work is in question was graduated from the Carrara School of Art; and so far as appears that is a well-recognized school. It also appears from the uncontradicted testimony that each one of the statues in question was actually made by the sculptor himself. The model made by him was placed in front of the workman who cut out the rough stone, and afterwards the sculptor put on the finishing touches. It must be that these statues are the work of a professional sculptor within any rule that the court can formulate. If the photographs that are presented here properly represent the importations, as I suppose they do, no one can say that the statues do not have some artistic merit. In other words, I think the new evidence taken in this case differentiates it very materially from the case before the board, and the court must find as a matter of fact that these particular statues are the work of a professional sculptor and therefore entitled to come under paragraph 454 of the tariff act. This leads to a reversal of the decision of the board of general appraisers.

UNITED STATES v. AMERICAN FERMENT CO.

(Circuit Court, S. D. New York. May 11, 1901.)

No. 2,967.

CUSTOMS DUTIES—CLASSIFICATION—POWDERED JUICE FROM PAPAW MELON.

Powder from the juice of the papaw melon, which in use is made into various forms of medicinal vegetable pepsin, is not dutiable, under section 6 of the tariff act of 1897, as a manufactured article not otherwise provided for, nor is it entitled to free entry under paragraph 548 of the

free list as a crude drug not edible, "and not advanced in value or condition by refining or grinding or other process," but is dutiable under paragraph 20 as a drug not edible, which has been advanced in value or condition by grinding; it appearing from the evidence that the juice of the melon, when dried in the sun, is in the form of crumbles or lumps, and is subjected to a grinding process between boards to reduce it to the powdered form.

Appeal by the United States from a decision of the board of United States general appraisers, which sustained the protest of the importers as to the merchandise in question.

D. Frank Lloyd, Asst. U. S. Atty.

Albert Comstock, for appellee.

COXE, District Judge (orally). The article in controversy is a powder from the juice of the papaw melon. It was classified by the collector under section 6 of the act of 1897, as a manufactured article, not otherwise provided for. The importer protested insisting that it should have been admitted free of duty as a crude drug not edible "and not advanced in value or condition by refining or grinding, or by other process," as provided in paragraph 548 of the same act. He also protested in the alternative that if not permitted to enter free it should be classified under paragraph 20 of the same act as a drug, not edible, but which has been "advanced in value or condition by refining, grinding, or other process, not specially provided for in this act." The board of general appraisers, following the decision of this court in the case of *U. S. v. Godwin* (C. C.) 91 Fed. 753, decided that it was entitled to free entry under paragraph 548.

In the case to which reference has just been made the court found that the article imported "is a powder from the juice of the papaw melon, caught in pans, dried in the sun, sifted to take out foreign substances, packed in tins, and exported. It is not used nor fit for medicine, but is made into various forms of medicinal vegetable pepsin." There was no evidence in that case to show that the papaw juice was ever in a more crude merchantable condition than in the powdered form in which it was imported. It now appears that after the juice has exuded from the melon and coagulated it is scraped off from the melon or the receptacle in which it is permitted to drop and then appears in the condition found in Exhibit 2, in the form of crumbles or small lumps approximately the size of a pea and is of a dark brown color. It also appears from the testimony of the importer himself, who was called as a witness by the government, that he is familiar with the manner in which the article is prepared for the market, and that after the papaw juice is found in the condition just described it is spread upon a board with another board over it, and subjected to a process of grinding, by which it is reduced to the powdered condition in which it is imported as illustrated by Exhibit J4, which represents the importation in the present case. It seems to me that there is no escape from the conclusion that this additional process is a refining or grinding by which the juice is advanced from the condition in which it appears when first taken

from the melon, and therefore, clearly, it is not within paragraph 548 of the free list.

The alternative paragraph mentioned in the protest, paragraph 20, provides for a specific duty of one-fourth of one cent per pound and in addition thereto an ad valorem duty of ten per cent. upon "drugs * * * which are not edible, but which are advanced in value or condition by refining, grinding, or other process." What has been said with reference to paragraph 548 leads, I think, logically to the conclusion that the importation in question is a drug which has been advanced by the process of grinding; and therefore it is assessable under paragraph 20 of the act.

There was some suggestion in the argument that the importation in question is not affected by the testimony of Mr. Johnson for the reason that it was imported from Yucatan and his evidence relates to what he saw in the West Indies. The difficulty with this contention is twofold—First, there is no evidence that the importation came from Yucatan, it is merely an inference drawn from certain loose expressions in the evidence; and, second, even if it be conceded that it came from Yucatan, there is nothing whatever to show there is any distinction between the papaw melon of Yucatan and the papaw melon of the West Indies.

The decision of the board of general appraisers is reversed and the collector is advised to take duty under paragraph 20 of the act of 1897.

BREESE v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. May 18, 1901.)

No. 338.

CRIMINAL LAW—INSTRUCTIONS—NEW TRIAL.

An instruction on a trial for violating the banking law that, "in his opinion, it was the duty of the jury to convict the defendant," was ground for new trial, as calculated to mislead the jury, who would, perhaps, construe the language as a direction on the part of the court.

Brawley, District Judge, dissenting.

On Rehearing.

For former opinion, see 106 Fed. 680.

J. C. Pritchard and Charles A. Moore (Pritchard & Rollins, Tucker & Murphy, and Joseph S. Adams, on the briefs), for plaintiff in error.

William P. Bynum, Jr., Sp. U. S. Atty. (A. E. Holton, U. S. Atty., and A. H. Price, Asst. U. S. Atty., on the brief), for defendant in error.

Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

PER CURLAM. We have considered the arguments upon the rehearing of this cause. The opinion of the court is unchanged as to the conclusions reached that there was no error in the court below in overruling the demurrer and in not granting the motion to quash,

and upon the various points decided in the progress of the cause. But, inasmuch as the strong opinion expressed by the judge below in his charge to the jury, in which he used the words "that, in his opinion, it was the duty of the jury to convict the defendant," was calculated to mislead the jury, who perhaps construed this language as a direction on the part of the court, we think that it would be proper to grant a new trial. For these reasons the case is remanded to the court below, with instructions to grant a new trial.

BRAWLEY, District Judge, dissents.

WRIGHT et al. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. April 30, 1901.)

No. 978.

1. CONSPIRACY — INDICTMENT UNDER FEDERAL STATUTE — DESCRIPTION OF OFFENSE.

An indictment under Rev. St. § 5440, making it an offense "if two or more persons conspire * * * to defraud the United States," is sufficient where it charges that the defendants named "unlawfully did conspire to defraud the United States," etc., followed by a statement of the nature and purpose of the conspiracy and the acts done to effect its object. The use, in connection with the verb "conspire," of other words or phrases of similar import, such as "combine," "confederate," "agree together," or "agree between and among themselves," while usual and proper in indictments for conspiracy, is not essential, since such words add nothing to the meaning expressed by the word "conspire," as defined by lexicographers and as used in the statute, and their omission, if a defect, is one of form only, which does not tend to the prejudice of the defendants, and must therefore be disregarded, under Rev. St. § 1025.

2. CRIMINAL LAW — TRIAL — COMMENTS OF COUNSEL ON FAILURE OF DEFENDANTS TO TESTIFY.

Counsel for the government in a prosecution for conspiracy in his argument to the jury analyzed and criticised the testimony of one of the defendants, and then stated that neither of the other defendants had taken the stand. At this point he was interrupted by an objection, and the court immediately held that he had no right to comment on such fact; and both the court and the district attorney expressed themselves to the effect that such comment was improper, and the district attorney disclaimed any intention of making it. The court also, at request of defendant's attorneys, fully stated the law in that regard in the charge to the jury. *Held*, that the mere reference to such fact, at once disclaimed by counsel, and in view of the further statements of the court, did not constitute such prejudicial error as would warrant a reversal, especially as the fact that one defendant had testified had presumably called the attention of the jury to the omission of the others to take the stand.

Pardee, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

The first count in the first indictment is as follows: "The grand jurors of the United States of America, Eastern District of Louisiana, New Orleans division, duly impaneled, sworn, and charged at the November term, A. D. 1898, of the court aforesaid, on their oath present: That William H.

Wright, A. S. Cornet, whose Christian name is to the grand jurors unknown, and Robert H. Cox, all and each late of the district and division thereof aforesaid, on the 1st day of May, A. D. 1897, in the Eastern district of Louisiana, New Orleans division, and within the jurisdiction of this court, unlawfully did conspire to defraud the United States of the title and possession of large tracts of land in the parish of Ascension, Eastern district of Louisiana, of great value, by means of false, feigned, illegal, and fictitious entries of the said lands under homestead laws of the United States, the said lands being then and there public lands of the United States open to entry under said homestead laws at the local land office of the United States in the city of New Orleans, in the state of Louisiana; and thereafter, to effect the object of said conspiracy to defraud the United States of the lands aforesaid, the said William H. Wright, said A. S. Cornet, and said Robert H. Cox, and each of them, did persuade and induce one Ernest E. Martin and one Karl Fach and one John Siegenthaler to make filings and entries in the said local land office of the United States at New Orleans, Louisiana, in the district and division thereof aforesaid, under said homestead laws of the said public lands of the United States, hereinafter described; and the said William H. Wright, said A. S. Cornet, and said Robert H. Cox, and each of them, to further effect the object of said conspiracy to defraud the United States as aforesaid, thereafter did there exact and obtain from the said Ernest E. Martin and the said Karl Fach and the said John Siegenthaler, prior to the filings and entries made by them, respectively, and hereinafter set forth, a promise and agreement from each of them to transfer and deed to them, the said William H. Wright, said A. S. Cornet, and said Robert H. Cox, one-half of the lands embraced in the filings and entries hereinafter stated, or to pay to them, the said William H. Wright, said A. S. Cornet, and said Robert H. Cox, the sum of \$200; and the said Ernest E. Martin, being so persuaded and induced as aforesaid, did make in said local land office of the United States at New Orleans, Louisiana, application No. 18,434, on the 20th day of August, A. D. 1897, under said homestead laws, for the lands known and designated on the maps of public survey of the lands of the United States as the southeast quarter of the southeast quarter, section twenty-two, and west half of southwest quarter, and southeast quarter of southwest quarter, of section twenty-three, township ten south, range three east, Southeastern land district of Louisiana, east of the Mississippi river, in the parish of Ascension, state of Louisiana, and Eastern district thereof, being 160.07 acres, of the value of \$200.09; and the said Karl Fach, being so persuaded and induced as aforesaid, did thereafter make in the said local land office of the United States at New Orleans, Louisiana, application No. 18,448, on August 27, A. D. 1897, under said homestead laws, for the lands known and designated on the maps of public survey of the lands of the United States as the east half of the east half of section twenty-three, township ten south, range three east, Southeastern district of Louisiana, east of the Mississippi river, in the parish of Ascension, state of Louisiana, and Eastern district thereof, being 159.88 acres, of the value of \$199.85; and the said John Siegenthaler, being so persuaded and induced as aforesaid, did thereafter make in the said local land office of the United States at New Orleans, Louisiana, application No. 18,476, on September 7, A. D. 1897, under said homestead laws, for the lands known and designated on the maps of public survey of the lands of the United States as the northwest quarter of section twenty-five, township ten south, range three east, Southeastern district of Louisiana, east of the Mississippi river, in the parish of Ascension, being 174.21 acres, of the value of \$217.76; and the said applications, entries, and filings so made as aforesaid by the said Ernest E. Martin, Karl Fach, and John Siegenthaler, respectively, for said homestead lands, declared, as required by law, and each of them so declared, that the said applications, entries, and filings, respectively, were made for the purpose of actual settlement and cultivation, and that the said applications, entries, and filings were made for the said respective applicants' exclusive benefit, and not directly or indirectly for the benefit or use of any other person or persons whomsoever, wherens, in truth and in fact, the said applications, entries, and filings, and each of them, were made as aforesaid for the benefit of the said William

H. Wright, A. S. Cornet, and Robert H. Cox, as well as for the benefit of the said applicants or entrymen; and the said statements so made as aforesaid in said filings, applications, entries, and affidavits, and in each of them, by the said applicants or entrymen, respectively, were false, as aforesaid, as the said William H. Wright, said A. S. Cornet, and said Robert H. Cox, and each of them, then and there well knew; and they procured the making and filing of said false statements, applications, entries, and affidavits in the said local land office of the United States at New Orleans, Louisiana, for the purpose of further effecting the object of the said conspiracy to defraud the United States of the lands as aforesaid, and so and by such means fraudulently and illegally to obtain from the United States a relinquishment of all the United States' title to said lands, and to obtain a patent for the same, and to acquire for themselves the ownership and deed for one-half portion thereof, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States." The second count charges conspiracy by the defendants on the 1st of May, 1897, to procure the making and filing in the land office at New Orleans of false and fraudulent declarations and affidavits for and concerning the same homestead entries. The first count in the second indictment charges conspiracy by the defendants to defraud the United States of the title and possession of large tracts of land in the parish of Ascension, and charges that, to effect the object of the conspiracy, the defendants called upon Charles Fridge to make a homestead entry in the land office at New Orleans, and offered to pay all fees and expenses; and the defendant Cox, to effect the object of the conspiracy, requested and solicited Fridge to agree and contract to deed and transfer to the defendants one-half of the land embraced in the entry; and the defendant Wright on the 1st day of July, 1897, called upon William Wallace, and requested and solicited him to contest the entry of one Lawrence E. Watkins, who Wright represented had failed to comply with the homestead laws; and Wright solicited Wallace to contest the entry, and offered to pay all fees and expenses, and solicited Wallace to enter into an agreement and contract to deed and transfer to Wright, for the benefit of the defendants, one-half of the lands. The second count in the second indictment charges conspiracy by the defendants on the 1st day of May, 1897, to defraud the United States of the title and possession of large quantities of public lands in the parish of Ascension by means of false and illegal entries, and that the defendants induced and persuaded Lewis R. Marble to make entry No. 18,548 on the 4th day of October, 1897, and Wright and Cox on the 1st day of October, 1897, obtained from Marble an agreement and contract to deed and transfer to the defendants one-half of the land, and Wright and Cox paid the fees and expenses of Marble, and the defendants deposited and filed in the land office at New Orleans, on the 4th day of October, 1897, the application and entry, which declared that Marble made the entry for his own benefit, and that no one else was interested, and they knew the statement to be false. The third count in the second indictment charges conspiracy by the defendants on the 1st day of May, 1897, to procure the making and filing in the land office at New Orleans of false and fraudulent declarations and affidavits concerning homestead entries for lands in Ascension parish, and, to effect the conspiracy, Wright and Cox induced Marble to make entry No. 18,548 on the 4th day of October, 1897, and induced and persuaded Marble to make false declaration and affidavit in connection with the homestead entry, and on the 4th day of October, 1897, procured and caused to be deposited and filed in the local land office at New Orleans the false and fraudulent affidavit of Marble, well knowing it to be false. Each defendant demurred to both indictments. The demurrers were general, averring that the indictments "are not sufficient in law," and that the defendant "is not bound by the law of the land to answer the same," and the defendant therefore "prays judgment that the same may be dismissed and discharged." No demurrer was filed to any separate count. The demurrers were overruled. The two indictments were, on order of the court, consolidated and tried as one case. No question is raised in this court as to the consolidation. The defendants, their demurrers being overruled, pleaded not guilty. During the trial, which lasted several days, bills of exceptions

were reserved. The jury found the defendants guilty. The court sentenced each of the defendants to pay a fine of \$100; and Wright, to imprisonment for 12 months; Cox, 6 months; and Cornet, 3 months. The case is brought here on error to reverse this judgment.

Girault Farrar and John D. Rouse (Wm. Grant and Rufus E. Foster, on the brief), for plaintiffs in error.

W. W. Howe, U. S. Atty. (Charles P. Cocke, Asst. U. S. Atty., on the brief).

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Did the circuit court err in overruling the demurrers to the indictment? At common law a conspiracy was the combination of two or more persons to do something, the act to be done, or the means of doing it, being unlawful, or, as more elaborately expressed, a combination of two or more persons for the purpose of accomplishing a criminal or unlawful object, or an object neither criminal nor unlawful, by criminal or unlawful means. There are no common-law offenses against the United States. We therefore look for a statute to sustain every indictment in a federal court, though we often look to the common law for aid in construing the statutes. The indictment in this case is for conspiracy. In some of the counts a conspiracy to defraud the United States is charged, and in others a conspiracy to commit an offense against the United States. The indictment is framed on the following statute:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than one thousand dollars and not more than ten thousand dollars, and to imprisonment not more than two years." Rev. St. U. S. (2d Ed.) § 5440.

The indictment charges a conspiracy by the defendants to defraud the United States of the title and possession of large tracts of land by means of false, feigned, and fictitious entries of lands under the homestead laws. It is settled by the supreme court that such a conspiracy is within the statute. *Dealy v. U. S.*, 152 U. S. 539, 14 Sup. Ct. 680, 38 L. Ed. 545. Several of the counts in the case at bar follow substantially the indictment set out in the *Dealy Case*, where a conviction was sustained. The indictment here differs from the *Dealy* indictment in the words used to charge the conspiracy. There it is charged that the defendants "did falsely, unlawfully, and wickedly conspire, combine, confederate, and agree together and among themselves to defraud the United States," etc. Here the charge is that the defendants (naming them) "unlawfully did conspire to defraud the United States," etc. The learned counsel for the defendants point out the alleged defects in the indictment in this case, so that their contention is made clear. They assert:

"The indictment is without precedent. Wharton furnishes the most approved form of an indictment for conspiracy. The charging part is that the defendants 'fraudulently, maliciously, and unlawfully did conspire, com-

bine, confederate, and agree together, between and amongst themselves,' etc. 2 Precedents of Indictments and Pleas, No. 607. The English form, as furnished by Archb. Cr. Prac. & Pl. p. 1048, is, 'did amongst themselves unlawfully conspire, combine, confederate, and agree together,' etc. 'Did unlawfully conspire, combine, confederate, and agree together,' is the language of Crown Circuit Companion, 267. The form furnished by every writer on criminal law is substantially the same, and so is that found in every reported case, where the form appears, that has been examined by us. In all of them the charge is that the defendants did 'confederate and agree together,' or 'between and amongst themselves.' Here it is not averred that the defendants 'confederated or agreed together,' or 'between and amongst themselves'; neither is there any allegation of concerted action alleged, nor any agreement for concerted action of any kind whatever."

In another argument other counsel for the defendants say:

"We challenge the citation of a single specimen indictment in any reported case or book of forms or treatise on criminal pleading, in which a conspiracy is sought to be charged without some one or other of the connective or conjunctive prepositions, 'with,' 'among,' 'between,' 'amongst,' or 'betwixt,' or the adverb 'together,' or the phrase 'each other' preceded by a conjunctive preposition."

An examination of the form books will sustain the contention of counsel that it is usual in charging a conspiracy to use other verbs with the word "conspire," such as "combine" and "confederate" and "agree," and also that it is usual to follow such words, especially the word "agree," by the words "between and among themselves," or similar words. After stating that such words as the foregoing are appropriate to describe the offense, it is said in Wright, Cr. Consp. (Carson) 187, "But others of the same import are equally proper." The statute on which the indictment is framed uses only the word "conspire,"—"if two or more persons conspire." Rev. St. U. S. § 5440. In numerous acts of congress providing for the punishment of conspiracies the same, or substantially the same, language is used. Rev. St. U. S. §§ 5336, 5406, 5407, 5508, 5518, 5519, 5520. These acts show that the word "conspire" is used by the congress as being sufficient to show combination or confederacy, as equivalent to "agree among themselves." In so using the word congress is sustained by the dictionaries and by the best usage. Webster's Dictionary defines "conspire": "To make an agreement, especially secret agreement, to do some act; as to commit treason or a crime, or to do some unlawful deed; to plot together." And the following example is given: "'You have conspired against our royal person.' Shakespeare." Another definition is given as follows: "To concur to one end; to agree." And the following example is given:

"The press, the pulpit, and the stage

Conspire to censure and expose our age." Roscommon."

In the Century Dictionary we find the following definition of "conspire":

"(2) To agree, by oath, covenant, or otherwise, to commit a reprehensible or illegal act; engage in a conspiracy; plot; especially, hatch treason. 'The servants of Ammon conspired against him, and slew the king in his own house,' 2 Kings, xxi. 23. 'The very elements conspire * * * against him.' Cowper, The Task, ii. 139."

When congress enacted that if two or more persons "conspire to defraud the United States," etc., it used the word "conspire" as it is

used by English writers and speakers, and it would have added nothing to the meaning of the act to have added the word "together," or the words "between themselves." The same may be said of the indictment. To charge that the three defendants (naming them) "did conspire" means that they agreed together or among themselves. While other verbs may be used, the verb "conspire" is certainly the most appropriate to charge a conspiracy. It is not necessary to use other words that are synonyms. While it is true that, along with the phrase "with force and arms," we find in the common-law precedents the word "conspire" accompanied by "confederate, combine, and agree amongst themselves," yet we are cited to no case to show that the word "conspire" would not be sufficient of itself. Forms taken from text-books, or precedents copied from forms, are alone cited as showing the indictment insufficient. If it be conceded that the indictment does not follow the usual and established forms, would that make it subject to demurrer? There is a statute to be considered in this connection:

"No indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant." Rev. St. U. S. (2d Ed.) § 1025.

The omission of words that would add nothing to the meaning of an indictment seems so clearly a defect of form only that the application of this statute is apparent. The alleged defect, however, is insisted on with such earnestness that it may not be improper to cite some of the cases construing this curative statute:

In *U. S. v. Rhodes* (C. C.) 30 Fed. 431, 434, Mr. Justice Brewer, then circuit judge, construing this statute, said:

"While a defendant should be clearly informed in the indictment of the exact and full charge made against him, yet no defect or imperfection in matter of form only—and this includes the manner of stating a fact—which does not tend to his prejudice will vitiate the indictment."

In *U. S. v. Chase* (C. C.) 27 Fed. 807, Mr. Justice Gray said:

"The first two objections taken to it [the indictment] are that the letter alleged to have been deposited in the mail is imperfectly described, and that the allegation that the defendant knowingly deposited an obscene, lewd, and lascivious letter is defective, because, construed by the technical rules of criminal pleading, the averment is only that the defendant knowingly deposited the letter, and not that he knew its character. * * * But both these objections relate to defects or imperfections in matter of form only, not tending to the prejudice of the defendant, and therefore, under section 1025 of the Revised Statutes, affording no ground for a motion in arrest of judgment after a plea of guilty."

Judge Lowell, in *U. S. v. Jackson* (C. C.) 2 Fed. 502, 504, construing this statute, said:

"I have held that a particular intent, which made an act a crime by the words of a statute, is part of the substance. On the other hand, mere mistakes, however serious, in expressing the substance of a crime, if the meaning can be understood, I look upon as formal."

In *U. S. v. Jolly* (D. C.) 37 Fed. 108, 111, Judge Hammond said:

"The last objection is that the second count should be complete within itself, and should not refer to the other count in aid of its averments. That

is undoubtedly the best form of good pleading. Whether a count drawn as this is could be sustained at common law is very doubtful. Perhaps it could not, and there seems to be authority both ways. But our Revised Statutes (section 1025) forbid us to quash the indictment for that defect of form, as I think this clearly is; and we must therefore amend it by overlooking the defect, and reading the averments as if the words of the first count referred to as describing the warrant were inserted in this second count itself. It is not a technical amendment, but amounts to the same thing."

In *Connors v. U. S.*, 158 U. S. 408, 411, 15 Sup. Ct. 952, 39 L. Ed. 1034, Mr. Justice Harlan, referring to defects in an indictment, said:

"Nor, if made by demurrer or by motion and overruled, would it avail on error unless it appeared that the substantial rights of the accused were prejudiced by the refusal of the court to require a more restricted or specific statement of the particular mode in which the offense charged was committed. Rev. St. § 1025. There is no ground whatever to suppose that the accused was taken by surprise in the progress of the trial, or that he was in doubt as to what was the precise offense with which he was charged."

A defendant, of course, has the constitutional right to be informed of the nature and cause of accusation against him. No statute could make valid an indictment that deprived him of such right. But it seems to us that it cannot be doubted that this indictment fully informed the defendants of the nature and cause of accusation. When it was charged that they "conspired" to defraud the United States, the indictment setting out the nature and purpose of the conspiracy, they must have understood that the criminal agreement charged was among themselves. No other person was named. The language is that William H. Wright, A. S. Cornet, and Robert H. Cox "did conspire." No other word was needed to show the alleged members of the conspiracy. It meant that they had agreed together. To apply the language of Mr. Justice Peckham, no one reading the indictment could come to any other conclusion in regard to its meaning, "and when this is the case an indictment is good enough." *Price v. U. S.*, 165 U. S. 311, 315, 17 Sup. Ct. 368, 41 L. Ed. 729. We think that the circuit court did not err in overruling the demurrer to the indictment. So far as it is necessary to protect the real rights of defendants, we cannot adhere too closely to the technicalities of the old common-law practice; but in matters of form, not involving substantial rights, the rigor and technicality of such practice "must yield to the more enlightened jurisprudence of the present." *U. S. v. Clark* (C. C.) 37 Fed. 106.

We next consider the assignment of error based on the argument of the United States attorney. We cannot more briefly state the point than to quote the entire incident complained of, as it appears in the bill of exceptions:

"The United States attorney, prosecuting in its behalf, in making his closing argument before the jury recalled and analyzed from his notes the testimony of a large number of witnesses for the prosecution, and also analyzed and criticised the testimony of one of the defendants, William H. Wright, who at his own request had taken the stand and testified on his own behalf, and then, proceeding with his address, said: 'Neither Cox nor Cornet has taken the stand in this case—' Whereupon counsel for defendants Cox and Cornet interrupted him before his sentence was concluded, and objected to his making any comment upon the fact that the defendants named had not testified in their own behalf. The United States attorney then continued: 'I have not made a single comment yet. I have not a right to make a com-

ment, and I do not propose to make a comment, upon the fact that they did not testify. The counsel for the defendants cannot guess what I was going to say. I say that these defendants sat like graven images and made no explanation whatever,"—when counsel for defendants again interrupted him and made objection, when he added, "by calling other witnesses on their side." The court said: "The line is very clearly drawn in such cases, and it is this: As has been stated by the district attorney, he has no right to comment—he did not comment—upon the fact that the two defendants did not take the stand; but he has a perfect right to discuss at any length the fact that they did not call witnesses or produce evidence to discredit the government's case. Any reference made to their not taking the stand themselves is not proper, but a reference to their not calling witnesses to testify in their behalf is proper." The United States attorney continued: "I have not commented, and do not comment, upon the fact that these defendants did not get upon the stand. I have no right to do so. The law is perfectly plain that the fact does not create any presumption against them. But I do comment upon the fact that they called no witnesses. I do comment upon the fact that here is a case which, upon the face of the testimony, has excited the whole parish of Ascension for the past three years, and witnesses up there are as plentiful as blackberries, and they have not called a single witness to weaken or demolish the fabric that the government has built against them." Counsel for defendant Cox then said to the United States attorney: "You stated that Cox called no witnesses. As a matter of fact, he called five in connection with Mr. Wright, and they were put upon the stand for the special purpose of discrediting the statement made by Stevens as to matters that transpired at Mr. Cox's house." The United States attorney then continued: "Well, I will state this: That neither Cox nor Cornet called any witnesses as to any substantial fact set forth in these indictments. Of course, they called some witnesses, but they did not call such witnesses as they might have done." To all of which statements of the United States attorney and of the court the defendants Cox and Cornet then and there, when made in the presence of the jury, excepted, and still except."

The act of congress which permits a defendant at his own request to be a witness provides "that his failure to make such request shall not create any presumption against him." 20 Stat. 30, c. 37. To prevent such presumption being created, no hostile comment on the defendant's silence should be permitted in argument before the jury. Any allusion by counsel to the fact that the defendant on trial has failed to testify is improper. The trial court should promptly stop any comment or allusion to the failure of a defendant to testify as a witness. Where such comment is made, and, on objection by the defendant, the court fails or refuses to interfere, and evinces no disapprobation of the course of counsel, and gives no instruction to the jury to remove the probable impression of such comment, the defendant, on writ of error, would be entitled to a new trial. *Wilson v. U. S.*, 149 U. S. 60, 13 Sup. Ct. 765, 37 L. Ed. 650. In this case the district attorney did allude to the failure of two of the defendants to take the stand. He was immediately interrupted by opposing counsel, when he admitted that he had no right to make such comment. The important part of the incident is that the court immediately held that the district attorney had no right to comment on the failure of the defendants to testify. Both the district attorney and the court expressed themselves to the effect that such comment was improper. But it is said that the colloquy necessarily reminded the jury that two of the defendants had not testified. That is probably true. The fact, however, that one of the three did testify necessarily called to their attention the fact that two of the defendants did not take the

stand. If the incident had closed here, it would scarcely have appeared that the defendants were prejudiced substantially. But it did not close here. The court, after the case had been argued, instructed the jury as follows:

"The court is requested to instruct the jury that the fact that neither of the defendants Cox nor Cornet testified in his own behalf must not be considered by the jury. The law gives to a defendant in a criminal case the right to testify in his own behalf, but it does not compel him to do so, and, if he does not, that fact must not be construed in any way to his prejudice." And the court added: "This has already been stated once by the court, and twice by the United States attorney."

In *U. S. v. Snyder* (C. C.) 14 Fed. 554, the United States attorney made remarks conceded to be improper, but McCrary, circuit judge, held that the error was cured by the correcting charge of the court. In *Ruloff v. People*, 45 N. Y. 213, it appears that the trial judge repeatedly referred to and commented on the failure of the defendant to be sworn as a witness. But later, his attention being called to his error, he corrected it by telling the jury that there was no law requiring the defendant to be sworn, and no inference to be drawn against him from the fact of his not being sworn. The court held that this corrected the error. It seems to us that both at the time of the colloquy, and subsequently in the charge given, the position assumed by the court conformed to the law. A motion was made for a new trial, based in part on this matter, and the motion was overruled by the court. If it had appeared that the defendants had in any way been prejudiced by this incident, it was the duty of the trial court to grant a new trial. It may be well to note that the exception reserved is to "all of the statements of the United States attorney and of the court." The rulings of the court, at least, seem to have conformed to the wishes of the defendants. We do not think that, on principle or authority, the remarks of the United States attorney and the rulings of the court would justify a reversal of the case. *Willingham v. State*, 21 Fla. 761; *Cross v. State*, 68 Ala. 476; *Endleman v. U. S.*, 30 C. C. A. 186, 86 Fed. 456; *Nite v. State* (Tex. Cr. App.) 54 S. W. 763, 769; *State v. Parker*, 7 La. Ann. 83.

There are several exceptions raising questions as to the admissibility of evidence offered by the government on the trial. We have carefully considered the several assignments of error based on them. The evidence in each instance was, we think, properly admissible under some one of the counts of the indictment. We do not deem it necessary to discuss these assignments separately. We think that the record contains no reversible error, and that the judgment of the circuit court must be affirmed.

PARDEE, Circuit Judge (dissenting). In my judgment, the trial court erred in overruling the demurrers to the indictments, and to each count thereof, and for this error the judgment of the circuit court should be reversed, and a new trial ordered.

In *U. S. v. Cruikshank*, 92 U. S. 557, 558, 23 L. Ed. 593, the court said:

"In criminal cases prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause

of the accusation.' Const. Amend. 6. In *U. S. v. Mills*, 7 Pet. 142, 8 L. Ed. 637, this was construed to mean that the indictment must set forth the offense 'with clearness and all necessary certainty to apprise the accused of the crime with which he stands charged'; and in *U. S. v. Cook*, 17 Wall. 174, 21 L. Ed. 539, that 'every ingredient of which the offense is composed must be accurately and clearly alleged.' It is an elementary principle of criminal pleading that where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition, but it must state the species. It must descend to particulars. 1 Archb. Cr. Prac. & Pl. 291. The object of the indictment is—First, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent, and these must be set forth in the indictment with reasonable particularity of time, place, and circumstances.'

Again, in *U. S. v. Carll*, 105 U. S. 612, 613, 26 L. Ed. 1135, the court said:

"In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words, of themselves, fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question, read in the light of the common law and of other statutes on the like matter, enables the court to infer the intent of the legislation, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent."

And in *Pettibone v. U. S.*, 148 U. S. 197, 203, 13 Sup. Ct. 545, 37 L. Ed. 422:

"A conspiracy is sufficiently described as a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means."

In *U. S. v. Britton*, 108 U. S. 193, 204, 2 Sup. Ct. 534, 27 L. Ed. 700, the supreme court said:

"The offense charged in the counts of this indictment is a conspiracy. This offense does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. The provision of the statute that there must be an act done to effect the object of the conspiracy merely affords a *locus penitentiae*, so that, before the act done, either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute. It follows as a rule of criminal pleading that, in an indictment for conspiracy under section 5440, the conspiracy must be sufficiently charged, and that it cannot be aided by the averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy. *Reg. v. King*, 7 Q. B. 782; *Com. v. Shedd*, 7 Cush. 514."

Taking the definition of "conspiracy" as given in *Pettibone v. U. S.*, *supra*, and applying the rules declared in *U. S. v. Cruikshank*, *U. S. v. Carll*, and *U. S. v. Britton*, *supra*, the indictments in this case, and every count in the same, should be held bad, because the charge made in each is only general, to wit, that the defendants "did conspire," etc., without charging the defendants with any combination or agreement or confederation with each other or with any other person or persons, and there is no equivalent to show concert-

ed action. To have committed the offense of conspiracy, they must have combined and agreed together or combined and agreed with some other person or persons; and such combination and agreement should be averred, so that the court and trial jury can determine whether the acts constituting the crime have been committed. To merely charge that the defendants "did conspire" is not to charge specific facts, but to charge a legal conclusion. An indictment, to be sufficient, must inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction if one should be had. For this, facts are to be stated, not conclusions of law alone. See *U. S. v. Cruikshank*, *supra*. In regard to defects or imperfections in matters of form under section 1025, Rev. St., so much relied on by my Brethren, I need only again quote from *U. S. v. Carll*, where an indictment was held bad because, while the defendant was charged that at a certain time and place, feloniously and with intent to defraud, he did pass, utter, and publish a falsely made, forged, counterfeited, and altered obligation and security of the United States, following the statute literally, the court held that the same was defective, because the indictment failed to expressly charge scienter with regard to the passing, uttering, etc.; and the court used this expressive language:

"This indictment, by omitting the allegation contained in the indictment in *U. S. v. Howell*, 11 Wall. 432, 20 L. Ed. 195, and in all approved precedents, that the defendant knew the instrument which he uttered to be false, forged, and counterfeit, fails to charge him with any crime. The omission is of matter of substance, and not a 'defect or imperfection in matter of form only,' within the meaning of section 1025 of the Revised Statutes."

And so I say that this indictment, by omitting the allegations contained in the indictment in *Dealy v. U. S.*, 152 U. S. 539, 14 Sup. Ct. 680, 38 L. Ed. 545, and in all approved precedents, that the defendants did conspire, combine, confederate, and agree together among themselves, or equivalent thereto, fails to charge any crime, and that the omission is a matter of substance, and not a defect or imperfection in form, within the meaning of section 1025, Rev. St. If we had before us an indictment under section 5339, Rev. St. U. S., which provides that "every person who commits murder" upon the high seas, etc., within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state, etc., shall suffer death, and which indictment charged that one Richard Roe, in the peace, etc., and on the high seas, etc., within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular state, did unlawfully murder John Doe, it would seem that nearly all the reasons given by my Brethren in favor of sustaining the indictment in the instant case would be as applicable, and I think as plausible, to maintain the supposed indictment charging Richard Roe with murder. We could say that the statute on which the indictment is framed uses only the word murder,—“every person who commits murder”; and in numerous acts of congress providing for the punishment of homicides the same or substantially the same language is used by the congress as being sufficient to show the killing of a human being with malice prepense or aforethought,

express or implied, and that in so using the word congress is sustained by the dictionaries and by the best usage; for, if we turn to Webster's Dictionary, we find "murder" defined as "the offense of killing a human being with malice prepense or aforethought, express or implied"; and the same, or its equivalent, can doubtless be found in all the dictionaries extant. If we turn to the Bible, we find that from Genesis to Revelations the malicious killing of a human being is recognized as murder; and the sixth commandment, as found in the standard Prayer Book, is, "Thou shalt do no murder." The ancient Chaucer, the father of English poetry, says "Mordre will out;" and in Shakespeare we find, "Macbeth does murder sleep," as he did murder his benefactor King Duncan; and we might say that, when congress enacted that "every person who commits murder," it used the word "murder" as it is used by English writers and speakers, and it would have added nothing to the meaning to have added the words "with malice prepense or aforethought." We can further say, which I have no doubt would be true, that we are cited to no case to show that the word "murder" is not sufficient of itself, and that forms and text-books or precedents copied from forms can alone be cited as showing the indictment insufficient. And I think that we could also cite section 1025, Rev. St., to say that the words omitted in the indictment related only to form, or, as Mr. Justice Brewer expresses it, "mere manner of stating a fact"; and we could go still further, and say that the defendant must have understood, from the use of the word "murder," that the killing charged against him was with malice prepense or aforethought, and that no one reading the indictment could come to any other conclusion than that the indictment charged murder, and cite Mr. Justice Peckham in *Price v. U. S.*, 165 U. S. 315, 17 Sup. Ct. 368, 41 L. Ed. 729: "When this is the case, the indictment is good enough." In the case supposed, notwithstanding the cogency of these reasons, the indictment would be held bad in every court in this country; but the suggested case well illustrates the danger of departing in criminal pleading from well-recognized principles, and particularly from that declared in *U. S. v. Carll*, supra:

"The fact that the statute in question, read in the light of the common law and of other statutes on a like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent."

UNITED STATES v. GREENE et al.

(District Court, S. D. New York. May 15, 1901.)

1. CRIMINAL LAW—REMOVAL OF DEFENDANT TO ANOTHER DISTRICT—DEFENSE TO APPLICATION.

A federal court will not, on an application for an order removing to another district for trial persons there indicted, hold the indictment void for irregularity in drawing the grand jury, where the question involved is a new one of statutory construction, which has never been adjudicated, but will leave the accused to raise the question in the trial, where the decision can be reviewed in the regular course of appeal.

It is only where there can be no reasonable doubt of the alleged invalidity that removal should be refused on such ground.

2. SAME—FINDINGS OF COMMISSIONER—REVIEW.

Where the commissioner on the hearing in proceedings for the removal of persons charged with crime to another district for trial had before him any competent legal evidence upon which to exercise his judgment as to whether there was probable cause to believe the accused guilty, his finding upon that question cannot be reviewed by the court on an application for an order of removal.

3. SAME—EVIDENCE BEFORE COMMISSIONER.

The evidence receivable on a hearing before a commissioner in proceedings for the removal to another district of persons charged with the commission of a crime therein is not to be strictly limited by the technical rules applicable on a final trial. Where fraud is charged, or a conspiracy to defraud, a somewhat wide latitude must necessarily be given in the introduction of circumstantial evidence.

On Application for an Order for the Removal of Defendants to Another District for Trial.

Marion Erwin, Ass't U. S. Atty.
Kellogg & Rose, for respondents.

BROWN, District Judge. Since this matter was previously before me (100 Fed. 941) a large amount of testimony pro and con has been taken by the commissioner on the question as to probable cause of the commission of the offense charged, as well as proof also concerning alleged irregularities, which it is contended vitiated the indictment upon which the removal of the defendants is sought.

1. The facts as respect the latter objections are briefly as follows:

The offenses charged being in the Eastern division of the Southern district of Georgia, the grand jury was necessarily impaneled and the indictment found in that division. The drawing of the names of jurors for the venire was done at Macon in the Western division. Prior to the drawing of the names the judge of the district, pursuant to section 802 of the United States Revised Statutes, for the purpose of securing a jury "the most favorable to an impartial trial and so as not to incur any unnecessary expense," directed "that the jurors be returned from the counties of said Eastern division other than the counties of Chatham and Glyn," so that the jurors from Chatham and Glyn counties, in which Savannah and Brunswick are situated were excluded from consideration although their names were not removed from the box before drawing.

Names were then drawn from the box, and as they were drawn, all such names as were from those two counties were laid aside, and the venire was made up from the others drawn. Afterwards the latter jurors, as thus drawn, were summoned to appear at Savannah within the Eastern division and from them the grand jury was selected and sworn.

The whole number in the jury box for the Eastern division when last revised in 1897 was 562, of which 305 were from Chatham and Glyn counties. From these 197 had been drawn out for several prior juries. But even supposing that the names of all those who were previously drawn out had been put back, the whole number of jurors in the box, excluding those from Chatham and Glyn counties, would be

but 257. Section 2 of chapter 52 of the act of June 30, 1879 (Supp. Rev. St. p. 270), requires, however, "that all such jurors * * * shall be publicly drawn from a box containing at the time of this drawing the names of not less than three hundred persons possessing the qualifications prescribed in section 800 of the Revised Statutes," etc.

It is contended for the defendants that by the order of the judge excluding all jurors from Chatham and Glyn counties, there remained in the box at the time of this venire at most but 257 competent jurors, instead of 300, as required by the above act; because by force of the judge's order the jurors became incompetent for this venire; and that the legal force and effect of the order were the same as if the names of the Chatham and Glyn county jurors had been actually withdrawn from the box before the drawing commenced.

I have no doubt that the requirements of the act of 1879 are mandatory, and that any substantial departure from its provisions will invalidate the subsequent proceedings if due objection is seasonably raised. But even if the judge's order was equivalent to a withdrawal from the jury box of the names of the jurors from Chatham and Glyn counties, as the defendants contend (which is itself a question), so that in legal effect only 257 names remained in the box when the jury was drawn, there are still two sufficient reasons why this objection should not prevent a removal of the accused for trial, if a case for removal is otherwise made out: (a) because the question is a new one arising upon the construction and effect of an important statute, and not decided or in any way passed upon by the supreme court as the ultimate authority. Any decision in defendants' favor in this proceeding could not be reviewed or corrected if erroneous in the ordinary mode of review, and justice would by such an erroneous ruling be defeated; whereas by leaving the question for the trial court, this objection will continue to be equally available to the defendants there, and any decision thereon adverse to the defendants, if erroneous, can be corrected in the regular course of appeal. It is only where there can be no reasonable doubt concerning the invalidity alleged that removal should on such grounds be refused.

(b) Under the ruling of the supreme court in the case of *Agnew v. U. S.*, 165 U. S. 36, 17 Sup. Ct. 235, 41 L. Ed. 624, there is at least some question whether the objection to the grand jury has not been waived. The general rule is that such objections should be taken at the first opportunity, and unless so taken are waived. I had supposed, indeed, that the time when the accused was arraigned and called on to plead, was regarded as the first opportunity and in time; but in the above case the accused was held to have waived the objections because being within the district he had not before arraignment come into court and moved to set aside the proceedings. This question like the last must be referred to the trial court.

Of the same nature is the further objection that the grand jury were drawn in the Western division of the district instead of the Eastern division as is incorrectly stated on the face of the indictment. So far as I know, it has never been adjudged, nor is it clear to me that the drawing as proved is such an irregularity, if it be an irreg-

ularity, as to make void the subsequent proceedings, under the act of January 29, 1880 (1 Supp. Rev. St. p. 277), dividing the Southern district of Georgia into the Eastern and Western divisions. That act has no specific directions on this point; and the place of drawing, if within the district, seems immaterial, and this objection as well as that relating to the mode of putting the names into the box, should be referred to the trial court.

2. Probable Cause. Upon a large amount of testimony taken under the order referring the matter back to the commissioner, he has committed the defendants for trial by order of March 21, 1901, in which he states that:

"After full and fair examination touching the charge in the annexed warrant named, it appears from the testimony offered that there is probable cause to believe the defendants guilty of the charges therein contained."

Upon the question of the existence of probable cause to believe that an offense has been committed, the rule as respects any review of the commissioner's finding, is the same whether the question arises upon an application for removal to another district under section 1014, Rev. St., or upon habeas corpus and certiorari or an appeal therefrom in cases of international extradition. In all such cases the question upon review never is whether the proof was such as would be required to convict the accused upon a trial by jury; but only as to the existence of any legal evidence before the commissioner upon which he might find that there was reasonable cause to believe that the crime has been committed. In the case of *Bryant v. U. S.*, 167 U. S. 104, 17 Sup. Ct. 744, 42 L. Ed. 94, the question in the opinion of Mr. Justice Brown is stated to be,

"Whether there was any legal evidence at all upon which the commissioner could decide that there was evidence sufficient to justify his commitment for extradition; or, as stated in *Ornelas v. Ruiz*, 161 U. S. 502, 508, 16 Sup. Ct. 691, 40 L. Ed. 789, 'If the committing magistrate has jurisdiction of the subject-matter and of the accused, and the offense charged is within the terms of the treaty of extradition, and the magistrate in arriving at a decision to hold the accused has before him competent legal evidence on which to exercise his judgment as to whether the facts are sufficient to establish the criminality of the accused for the purposes of extradition, such decision cannot be reviewed on habeas corpus.'"

In the prior case of *Oteiza v. Jacobus*, 136 U. S. 330, 334, 10 Sup. Ct. 1032, 34 L. Ed. 466, the supreme court by Mr. Justice Blatchford says:

"If the commissioner has jurisdiction of the subject-matter, * * * and the commissioner, in arriving at a decision to hold the accused, has before him competent legal evidence on which to exercise his judgment as to whether the facts are sufficient to establish the criminality of the accused, for the purposes of extradition, such decision of the commissioner cannot be reviewed by a circuit court or by this court, on habeas corpus, either originally or by appeal."

The commitment by the commissioner and his finding of probable cause have been made after an extremely full hearing of all the evidence offered on both sides. No evidence reasonably pertinent has been rejected. Objection is made that irrelevant and incompetent evidence offered by the government was received by him; but as stated in the former decision, the evidence receivable in such preliminary

examinations is not to be strictly limited by the technical rules applicable upon the final trial; and upon a charge of fraud, or of conspiracy to defraud, a somewhat wide latitude in the testimony is always allowed even on the final hearing, for the purpose of showing the intent. The proof of the charges in this case does not consist of any direct and certain testimony of the commission of the offenses charged, but rests upon many facts and circumstances in a long course of dealing, from which it is claimed that the inference of an unlawful intent to defraud the government must reasonably be inferred; and the bills alleged to be fraudulent in the last counts of the indictment, are claimed to be fraudulent, not so much because they were not according to contract, as because the contracts themselves were fraudulent, and procured through a fraudulent conspiracy with Capt. Carter, an employé of the government. Considering the nature of the case, therefore, I find no such objections to the testimony admitted by the commissioner as to vitiate his findings or require reconsideration by him.

As respects the finding of probable cause, I have carefully considered the very extended briefs and arguments of counsel, and have examined the voluminous evidence with a view to ascertain whether there was competent evidence before the commissioner sufficient in itself to sustain his finding of probable cause. Under the rule above stated, it is not for the judge on an application for removal to compare different parts of the testimony in order to determine their relative weight, or to substitute his own judgment for that of the commissioner, even though it might on the whole evidence be different. By this, however, I do not mean to be understood as expressing any opinion whatsoever on the merits of the case. The defendants have given a great deal of evidence tending to show that their contracts were fairly obtained, their work well and honestly done, and that the government has not been defrauded of a dollar.

The government on the other hand has given evidence tending to a contrary conclusion; and it has shown beyond question that Capt. Carter, the employé of the government and the engineer in immediate charge of the work on the government's behalf, had for several years immediately preceding the contracts referred to in the indictment received from the contractors continuously, through his father-in-law, in many divisions of profits, one-third of the final net proceeds of each contract remaining for division among the chief contractors; and that this one-third amounted in the aggregate to over \$700,000. This, it is claimed gives significance and meaning to many other facts evidence showing a fraudulent and illegal combination between the defendants and Capt. Carter to benefit themselves at the expense of the government, and to procure the allowance and payment of excessive and fraudulent bills by means of contracts fraudulently procured.

A case presenting such circumstances is especially one that should be submitted to a jury trial. Nor need there be any apprehension that an impartial court and jury will not reach essential justice, or that while guarding jealously the honor and interests of the government, they will not also appreciate the legitimate rights of the defendants, the peculiar difficulties, risks and hazards of such contract

work, the excellence and merit of that which is well done, and the rights of the defendants by legitimate business methods to lessen competition and to secure as favorable contracts as they can; and determine fairly whether the contracts in question were fraudulent, or obtained by illegal methods, or by a conspiracy with the engineer in charge to abuse the opportunities of his position in order to despoil the government and obtain exorbitant prices for their common benefit.

Having found in the previous decision that the ninth and tenth counts of the indictment are good, whatever may be held as to the counts preceding them, the defendants should be ordered to be removed for trial or to give bail for their due appearance.

SHAVER et al. v. HELLER & MERZ CO.

(Circuit Court of Appeals, Eighth Circuit. April 29, 1901.)

No. 1,474.

1. UNFAIR COMPETITION—INJUNCTION PROPER RELIEF.

The sale of the goods of one manufacturer or vendor as those of another is unfair competition, and constitutes a fraud which a court of equity may lawfully prevent by injunction.¹

2. TRADE-MARKS—GEOGRAPHICAL AND DESCRIPTIVE WORDS MAY NOT BE.

Geographical terms and words descriptive of the character, quality, or places of manufacture or of sale of articles cannot be monopolized as trade-marks.²

3. SAME—USE OF, IN UNFAIR COMPETITION, MAY BE ENJOINED.

But the use of such geographical or descriptive terms to palm off the goods of one manufacturer or vendor as those of another, and to carry on unfair competition, may be lawfully enjoined by a court of equity to the same extent as the use of any other terms or symbols.

4. SAME—PROPRIETARY INTEREST IN, NOT ESSENTIAL TO INJUNCTION AGAINST USE.

A proprietary interest in the terms or symbols used to palm off the goods of one manufacturer or vendor as those of another, or to commit any other fraud, is not essential to the maintenance of a suit to enjoin the perpetration of the wrong, but an interest in the good will of the business or in the other property threatened is sufficient.

5. "AMERICAN"—USE OF TO CREATE UNFAIR COMPETITION ENJOINED.

A manufacturer had applied to certain articles which it made the names "American Ball Blue" and "American Wash Blue" until they became well known to the trade and the public by these names, and commanded a large and lucrative trade. A firm of merchants applied these names to goods of other manufacturers, and offered them for sale under these names for the purpose of diverting complainant's trade to themselves. *Held*, the use of these names and of the word "American" therein by the defendants was properly enjoined.

6. UNFAIR COMPETITION—ATTACHING NAMES OF FRAUDULENT DEALERS WILL NOT EXCUSE.

One who offers the goods of one manufacturer under the well-known names and established reputation of articles of another manufacturer

¹ Unfair competition in trade, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.

² Use of geographical names, see notes to *Hoyt v. J. T. Lovett Co.*, 17 C. C. A. 657; *Illinois Watch-Case Co. v. Elgin Nat. Watch Co.*, 35 C. C. A. 242.

for the purpose of deceiving the public and defrauding the latter aggravates, rather than justifies, his wrong by placing his own name upon the packages.

7. EQUITY—WRONG OF COMPLAINANT BARRING RELIEF MUST RELATE TO EQUITY SUED FOR.

The principle, "He who comes into equity must do so with clean hands," repels a complainant only when his iniquity has an immediate and necessary relation to the equity for which he sues.

Thayer, Circuit Judge, dissenting.

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the Northern District of Iowa.

This is an appeal from a decree which enjoins the appellants, Isaac H. Shaver, Frederick H. Shaver, James E. Blake, and Ella Bever-Blake, co-partners as Shaver, Blake & Co., from using the brands or names "American Ball Blue" and "American Wash Blue" to palm off bluing made by parties other than the appellee, the Heller & Merz Company, a corporation, as the bluing made and sold by that corporation. 102 Fed. 882. The chief objection assigned to the decree is that it forbids the appellants to use the word "American" to deceive the public and to defraud the appellee, while the latter has no proprietary interest in that word, or in its exclusive use.

Charles K. Offield (Henry S. Towle, Charles C. Linthicum, and U. C. Blake, on the brief), for appellants.

Edmund Wetmore (Archibald Cox, on the brief), for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

May a court of equity lawfully enjoin one from using the word "American" to sell the goods of one manufacturer as those of another to the damage of the latter and the deceit of the purchasers? This is the real issue which this case presents. It arises out of this state of facts: The appellee is a corporation which succeeded in 1889 to the business of manufacturing and selling bluing which had been established in the state of New Jersey by Heller & Merz in 1869. In 1872 the predecessors of the appellee put upon the market bluing of their manufacture in small round balls under the name "American Ball Blue," and from that time until 1898 they continued to make and sell this form of bluing under this name. By energy, enterprise, and perseverance they established a large demand for, and a lucrative trade in, this specific article of their manufacture. In 1898 there were many different names used to distinguish the origin or ownership of the various bluing upon the market in the form of balls. Among these were the "American Ball Blue" of the appellee, the "National Ball Blue," the "Royal Ball Blue," "Sauer's Ball Blue," and "Fischer's Ball Blue." The article made by the appellee became known to the trade by its name, quality, and character, and it was generally ordered, bought, and sold by its title "American Ball Blue." No one but the appellee had ever made or sold any bluing under this name, and the appellee's use of it had been continuous, notorious, and exclusive. In 1897 the appellants bought the business of a firm of soap makers at Cedar Rapids, in the state of Iowa, styled G. M. Olmsted & Co. Olmsted & Co. had for many

years purchased of the appellee bluing of its manufacture styled "American Wash Blue," but they had never bought or sold the American ball blue. In the early part of the year 1898 the appellants bought bluing made by others than the appellee, and very properly issued notices to the trade that after May 1, 1898, the "American Wash Blue" which their predecessors, Olmsted & Co., had been selling, would be succeeded by the "Salome Laundry Blue." But in July of that year, after an effort to sell the Salome blue for two months, their cupidity seems to have overcome their honesty, and they proceeded to solicit purchasers, and to make sales of bluing not made by the appellee at greatly reduced prices, under the names "American Ball Blue" and "American Wash Blue." In their correspondence they called these names their brands, and styled themselves "Manufacturers of American Ball Blue, American Wash Blue," although they never made any bluing of any kind, and never purchased any of these articles which they pretended to sell. Upon the packages in which they shipped the articles which they sold they placed their own names and their residence, Cedar Rapids, Iowa, and by colors and in other ways differentiated the dress of their goods from that of those manufactured by the appellee. But, as the appellee's bluing was generally ordered and sold by correspondence and by its names, these differences in the dresses of the packages did not prevent, and cannot prevent, the fraud and deceit which the appellants perpetrate by the use of these names, and by soliciting orders for and selling their goods under them. The result of this course of action on the part of the appellants was that they diverted to themselves a large portion of the trade of the appellee in the West, and reaped the benefit of the established reputation of its goods.

The history of the American wash blue differs to some extent from that of the American ball blue. The predecessors of the appellee applied the former name in 1874 to bluing of their manufacture in the form of lozenges packed in small cylinders, and proceeded to sell it. From 1878 to 1897 the predecessors of the appellants, Pomeroy & Olmsted and G. M. Olmsted & Co., purchased this article from the appellee and from its predecessors, and sold it from their place of business at Cedar Rapids, in the state of Iowa. They advertised this article of bluing in connection with their advertisements of the soaps they were selling, and at their request the manufacturers of the bluing, in addition to putting upon the packages their trade-mark, which was the letter "U" surrounded by a triangle and the name of their factory, "American Ultramarine Works," placed the names of Pomeroy & Olmsted and G. M. Olmsted & Co. thereon. During five years of this term G. M. Olmsted & Co. bought the American wash blue of the Consolidated Ultramarine Company, Limited, but that company was a distributor for the appellee and other manufacturers, and the bluing was made and packed by the appellee or its predecessors during all this time. The customers who purchased of Pomeroy & Olmsted and of G. M. Olmsted & Co. knew the bluing, its character, and its name, but they did not know who manufactured it, and supposed Pomeroy & Olmsted or G. M. Olmsted & Co. to be its manufacturers. When the appellants purchased the

business of G. M. Olmsted & Co., they bought its good will, and they insist that they thereby became entitled to use the name "American Wash Blue" upon any bluing which they may buy and sell, whether it is manufactured by the appellee or not. The facts which condition this claim were stated more at length and were carefully considered by the court below in its opinion in *Heller & Merz Co. v. Shaver*, 102 Fed., at pages 882, 886. That court came to the conclusion that the appellants had no better right to use the name "American Wash Blue" to palm off the goods of other manufacturers as those made by the appellee than G. M. Olmsted & Co. had, and that the latter firm stood in such a fiduciary relation to the appellee that they could not be permitted to take such action. It held that the good will of the business established under the name "American Wash Blue" was the property of the appellee. These conclusions are, in our opinion, well founded in fact and in law. The brand "American Wash Blue" was conceived and applied to their manufacture by the predecessors of the appellee. The excellence of the article, and the introduction which the appellee gave it or induced Olmsted & Co. to give it, by the character and price of the bluing it furnished, established the trade in it, and gave that trade its value. Purchasers in the trade and the public came to know, to demand, and to buy the appellee's manufacture by this brand. The inevitable result is that the good will of this trade became the appellee's property, which neither Olmsted & Co. nor their successors could lawfully lead away from it by fraud or falsehood. One does not lose the good will of his trade in an article of his manufacture by placing upon it the names of his customers who are engaged in selling it, nor by the fact that the consumers know only the name and excellence of the article, and neither know nor care who makes it. *Brewery Co. v. Powell* [1897] App. Cas. 710, 716; *Lichtenstein v. Goldsmith* (C. C.) 37 Fed. 359.

The conclusions which must be drawn from the facts of this case, therefore, are that by industry and energy the appellee has built up an extensive and lucrative trade in the specific articles of its manufacture, which have become known to the trade and the public as "American Ball Blue" and "American Wash Blue"; that these articles are ordered, bought, and sold by mail and telegraph by their names or brands, without a view of the packages in which they are inclosed; that the appellants have put these names or brands on goods made by other manufacturers, have offered these goods to the public at reduced prices, and have solicited purchasers to buy them under these names, for the purpose and with the intent of selling these goods as the manufactures of the appellee; that they succeeded in this way in deceiving purchasers and defrauding the appellee of a portion of its trade; and that these brands cannot be used as the names of the products of other manufacturers than the appellee without creating confusion in the trade and purloining the latter's custom.

In this state of the case the appellants have been enjoined from using these names, and one of their loudest complaints is that the goods they sell are made in America, and that they are forbidden to use the word "American" to notify the public of this fact. There are

two answers to this objection: (1) That the injunction does not prohibit the appellants from using the word for that purpose, and (2) that they neither need nor seek so to use it, but their only object in trying to make use of it is to filch the good will and trade of the appellee. The injunction restrains them only from "holding themselves out to the public as the owners of the names or brands 'American Ball Blue' and 'American Wash Blue,' or as the manufacturers of the commodities heretofore known and sold under these names, or from selling or offering for sale under these names or brands, or names or brands intended to simulate the same, any blue or bluing manufactured by parties other than complainants." They insist that they have the right to state that the goods they sell are made in America, and the right to use the word "American" for that purpose. The injunction does not forbid them from doing so. They may state in their correspondence or upon their packages, notwithstanding the inhibition of the court, that their ball blue or wash blue is an American manufacture, an American article, or an American product. They may express the same idea by the declaration that it is a New York, or a New Jersey, or an Iowa product, as the case may be, and they may convey the same thought in many other ways without impinging upon the decree of the court. The truth is, however,—and there could be no more conclusive proof of it than the prosecution of this appeal,—that they do not desire to use the word "American," or any other word, for the purpose of declaring that the articles which they sell are made in America. Every one who purchases them either knows or presumes that to be the fact already. What they seek, and the only thing they really desire, is to use this word to divert to themselves the appellee's trade in American ball blue and in American wash blue, and they well know that they can accomplish this only by using it in those brands for the sole purpose of conveying to the public the falsehood that the goods they sell are made by the appellee.

Another proposition of counsel for the appellants is that the appellee has, and can have, no proprietary interest in the word "American," or in its exclusive use; and therefore it is entitled to no injunction to restrain its use by another. But an ownership and an interest in the means by which a fraud or wrong is about to be committed are not essential to the maintenance of a suit to enjoin its perpetration. A title to the property about to be injured is sufficient. One gathers the seeds of pernicious weeds, and threatens to sow them on the field of his neighbor. The latter has no proprietary interest in the seeds, but he owns the field and the crop it is producing, and these facts are sufficient to warrant any court in granting him summary relief by injunction against the threatened injury. The appellants scatter throughout the land, for the purpose of deceiving the public and diverting to themselves the trade, custom, and good will of the appellee, words and names which convey the false statements that the goods they are selling were made by the Heller & Merz Company. That company has no property in the words or in the means by which this fraud is committed, but it owns the good will,—the custom,—which the false and fraudulent use of these

words and names injures and destroys; and its proprietary interest in this good will is ample to warrant the court in enjoining its destruction by the fraud. The contention of counsel for the appellants here is a confusion of the bases of two classes of suits,—those for infringements of trade-marks, and those for unfair competition in trade. Suits of the former class rest on the ownership of the trade-marks. Suits of the latter class are founded upon the damage to the trade of the complainants by the fraudulent passing of the goods of one manufacturer for those of another. In the former, title to the trade-marks is indispensable to a good cause of action; in the latter, no proprietary interest in the words, names, or means by which the fraud is perpetrated is requisite to maintain a suit to enjoin it. It is sufficient that the complainant is entitled to the custom—the good will—of a business, and that this good will is injured, or is about to be injured, by the palming off of the goods of another as his. *Lee v. Haley*, 5 Ch. App. 155, 161; *Flour-Mills Co. v. Eagle*, 86 Fed. 608, 628, 30 C. C. A. 386, 406, 41 L. R. A. 162; *Coats v. Thread Co.*, 149 U. S. 562, 13 Sup. Ct. 966, 37 L. Ed. 847; *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118. This is not a suit for the infringement of a trade-mark. It is a suit for unfair competition, for selling goods of the appellee as those of another. For this reason no proprietary interest in the word “American” or in the names whose use is enjoined was essential to the issue of the injunction.

For the same reason this case is not governed nor affected by the principle that geographical terms and words descriptive of the character, quality, or place of manufacture of an article are not capable of monopolization as trade-marks. *Canal Co. v. Clark*, 13 Wall. 311, 321, 20 L. Ed. 581; *Mill Co. v. Alcorn*, 150 U. S. 460, 464, 14 Sup. Ct. 151, 37 L. Ed. 1144; *Iron Co. v. Uhler*, 75 Pa. 467, 15 Am. Rep. 599; *Chemical Co. v. Meyer*, 139 U. S. 540, 546, 11 Sup. Ct. 625, 35 L. Ed. 247; *Continental Ins. Co. v. Continental Fire Ass'n (C. C.)* 96 Fed. 846. There is no claim that the words whose use is enjoined constituted trade-marks, but this case rests upon the broad proposition that every man must so use his own as to inflict no unnecessary damage upon his neighbor. Under this principle the appellants had the right to buy and sell ball blue, but they had not the privilege to so exercise that right as to unnecessarily injure the business of the appellee. Right here is the broad distinction between this case and *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118; *Centaur Co. v. Heinsfurter*, 84 Fed. 955, 958, 28 C. C. A. 581, 584, 56 U. S. App. 7, 13; and *Centaur Co. v. Marshall*, 97 Fed. 785, 38 C. C. A. 413. In those cases the words whose use the plaintiffs sought to enjoin, “Singer” and “Castoria,” had become the names of the things which the defendants had the same right as the complainants to make and sell. It was indispensable to their exercise of these rights that they should use the names of the things, because these were the only names by which the articles were known. The result in those cases was that the use of these names was held to inflict no legal injury on the plaintiffs, and for this reason their use was not enjoined, but the defendants

were required to distinguish as far as possible the goods which they sold from those made by the plaintiffs. In the case at bar the appellants have no right to make or sell American ball blue or American wash blue. The names of the articles in which they have the right to deal are ball blue and wash blue. These terms perfectly describe the articles, and it is not necessary for them to use the names of the articles manufactured by the appellee in the exercise of any right which they possess.

Nor is this case ruled by that class of authorities illustrated by *Chemical Co. v. Meyer*, 139 U. S. 540, 546, 11 Sup. Ct. 625, 35 L. Ed. 247, in which there was no satisfactory proof of an intent by the defendants to sell their goods as those of the complainants, and the dresses of the articles so distinguished them that confusion and deceit would not be likely to result. The proof of the intent of the appellants here to sell the goods of other manufacturers as those of the appellee amounts to a demonstration, and there is no practicable way other than by prohibition of the use of the name by which filching the trade of an article whose sale is solicited and made by its name can be effectually prevented.

Thus the issue in this case finally narrows to the question whether or not one has the right to use the word "American" to sell the property of one manufacturer as that of another. From the facts that "American" is a geographical term, that it may not constitute a trade-mark, that no one may have a proprietary interest in it, counsel for the appellants draw the conclusion that every one has the right to use it to palm off the goods of one vendor as those of another. Does the conclusion necessarily follow from the premises? Every one has the right to use and enjoy the rays of the sun, but no one may lawfully focus them to burn his neighbor's house. Every one has the right to use the common highway, but no one may lawfully apply it to purposes of robbery or riot. Every one has the right to use pen, ink, and paper, but no one may apply them to the purpose of defrauding his neighbor of his property, of making counterfeit money, or of committing forgery. The partner has the right to use his firm's name, but he may not lawfully employ it to cheat his co-partner out of his property. Every one has the right to use his own name, but he may not lawfully apply it to the purpose of filching his property from another of the same name. The use of a geographical or descriptive term confers no better right to perpetrate a fraud than the use of any other expression. The principle of law is general, and without exception. It is that no one may so exercise his own rights as to inflict unnecessary injury upon his neighbor. It is that no one may lawfully palm off the goods of one manufacturer or dealer as those of another to the latter's injury. It prohibits the perpetration of such a fraud by the use of descriptive and geographical terms which are not susceptible of monopolization as trade-marks as effectually as it prohibits its commission by the use of any other expressions. The most instructive case upon this subject, in view of the claim of counsel for the appellants that the injunction should be so modified as to permit them to use the word "American" in the names of the articles they sell on condition that they

state upon their packages and circulars the names of the manufacturers or vendors, is *Thompson v. Montgomery*, 41 Ch. Div. 35, 38, 47, 51; on appeal, *Montgomery v. Thompson* [1891] App. Cas. 217, 220. In that case the plaintiffs and their predecessors had operated a brewery at Stone, a place of about 6,000 inhabitants, and had called the ale they brewed "Stone Ale." After this ale became well known to the trade and the public, the defendant built a brewery at Stone, and called ales which he manufactured there by the same name. The question presented by the case was whether an injunction should be granted against the defendant prohibiting him from using the words "Stone Ale" without any qualification, or should simply enjoin him from using these words "so as to induce the belief that the ale sold by the defendant is the ale sold by the plaintiff." Page 38. Chitty, J., in considering the question, said:

"Now, he is clearly entitled to set up his brewery at Stone, and he is clearly entitled to brew beer and ale at Stone, and to sell them in such a manner as is not calculated to deceive. He may mention on any ale that he makes that the ale is brewed at Stone. But that is not the question. Can he honestly use the term 'Stone Ale,' having regard to what the plaintiffs have shown to be the present market meaning of that term?"—and then held that he could not do so, and granted an unqualified injunction against the use of the words. Pages 40, 41.

This injunction was sustained in the court of appeal, where Lindley, J., said:

"The evidence in this case convinces me that any ale which may be sold by this particular defendant as 'Stone Ale' will be intended by him to be passed off as the plaintiff's ale. I am satisfied that he does not use the words 'Stone Ale' for any honest purpose whatever, but, according to the evidence, with a distinctly fraudulent purpose. Is there any reason, then, why the court should not deal with him accordingly, and prevent him from carrying out such intention by restraining him from using the words which he will only use for that purpose?" Page 51.

An appeal was taken to the house of lords, and there the decree for the injunction was affirmed. Lord Herschell, delivering his opinion, said:

"They insisted that the appellant ought not to have been restrained from 'selling or causing to be sold any ale or beer not of the plaintiffs' manufacture under the term "Stone Ales" or "Stone Ale."' They contended that such an injunction was too wide in its language; that the plaintiffs had no property in the word 'Stone,' as applied to ale; and that they could not monopolize the use of the name of that town merely because for a time they had been the only brewers there, and exclude the rest of the public from employing it to describe the place of origin of such beer as they might choose to brew there. I do not think the principle on which the court ought to act in such a case as the present is open to doubt. The respondents are entitled to ask that a rival manufacturer shall be prevented from selling his ale under such a designation as to deceive the public into the belief that they are obtaining the ale of the respondents, and he ought not the less to be restrained from doing so because the practical effect of such restraint may be much the same as if the persons seeking the injunction had a right of property in a particular name. * * * The court having come to the conclusion that he could not sell the liquor manufactured by him under that name without inducing the belief in the mind of the purchaser that he was obtaining the plaintiffs' ale,—a conclusion from which I see no ground for differing,—I do not think that it was improper to frame the injunction in the form adopted, and thus to determine the question at once, instead of

leaving it to be raised and contested on an application to commit." *Montgomery v. Thompson* [1891] App. Cas. 217, 220, 221.

The case before us is on all fours with that from which these quotations have been made. The appellants used the word "American" for the purpose and with the intention of selling the goods of other manufacturers for those of the appellee. They cannot use that word in the names whose use is enjoined without producing the effect which they intend. They have no right to produce this effect, or to use them for this purpose, and the action of the court below was not without the support of high authority.

In the leading case of *Seixo v. Provezende*, 1 Ch. App. 192, 194, decided in 1866, an injunction was issued against the use of the word "Seixo," which was the name of a region from which the wine of both parties to the suit was derived.

In *Lee v. Haley*, 5 Ch. App. 155, 161, an injunction was granted against the use by the defendant, who was doing business in Pall Mall, of the name "The Pall Mall Guinea Coal Company" in Pall Mall, because the plaintiff had previously become known by that name. The judge said:

"I quite agree that they have no property in the name, but the principle upon which the cases on this subject proceed is, not that there is property in the word, but that it is a fraud on a person who has established a trade, and carries it on under a given name, that some other person should assume the same name with a slight alteration, in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a reputation to the name."

In *Knott v. Morgan*, 2 Keen, 213, the use of the word "London" was forbidden. Lord Langdale said:

"The right which any person may have to the protection of this court does not depend upon any exclusive right which he may be supposed to have to a particular name, or to a particular form of words. His right is to be protected against fraud, and fraud may be practiced against him by means of a name, though the person practicing it may have a perfect right to use that name, provided he does not accompany the use of it with such other circumstances as to effect a fraud upon others."

In *Wotherspoon v. Currie*, L. R. 5 H. L. 508, 522, 523,—a case decided in 1872,—*Wotherspoon* and another were the successors of a firm which had manufactured starch for many years at Glenfield until their product had become known as "Glenfield Starch." But the plaintiffs were then engaged in business at another place. Currie, the defendant, established a manufactory of starch at Glenfield, placed the name "Currie & Co." in large letters upon his packages as manufacturers thereof, and his agents proceeded to sell his product as Glenfield starch. An injunction was granted restraining him "from using the word 'Glenfield' in or upon any labels affixed to packages of starch manufactured by or for him, and from in any other way representing the starch manufactured by or for him to be 'Glenfield Starch,' and from doing any act or thing to induce the belief that starch manufactured by or for him is 'Glenfield Starch.'"

In *Reddaway v. Banham* [1896] App. Cas. 199, 204, 211, 215, the plaintiffs sold "camel-hair belting" under that name until the name

came to signify their belting. Thereupon the defendant made belting which was properly described by the same name, because it was belting, and was made in part of camel's hair. But, notwithstanding the fact that these words were descriptive, and might not be monopolized as a trade-mark, the defendants were enjoined from using them. Lord Halsbury, in delivering his opinion in the house of lords, stated that the case rested on the principle "that nobody has any right to represent his goods as the goods of somebody else" (page 204), and Lord Herschell said:

"In my opinion, the doctrine on which the judgment of the court of appeal was based—that, where a manufacturer has used as his trade-mark a descriptive word, he is never entitled to relief against a person who so uses it as to induce in purchasers the belief that they are getting the goods of the manufacturer who has theretofore employed it as his trade-mark—is not supported by authority, and cannot be defended on principle. I am unable to see why a man should be allowed in this way more than in any other to deceive purchasers into the belief that they are getting what they are not, and thus to filch the business of a rival." Pages 210, 211.

In *Brewery Co. v. Powell* [1897] App. Cas. 710, 716, the use of the words "Yorkshire Relish" was enjoined.

In *North Cheshire & M. Brewery Co. v. Manchester Brewery Co.* [1899] App. Cas. 83, the use of the word "Manchester" in the name of the defendant was enjoined.

The principles of law and the practice illustrated by these cases from the English courts have been sustained and followed in the courts of the United States. In *American Waltham Watch Co. v. U. S. Watch Co.*, 173 Mass. 85, 53 N. E. 141, a defendant engaged in the manufacture of watches in Waltham, Mass., was enjoined at the suit of a prior manufacturer from using the words "Waltham Watch" or "Waltham Watches." In *Flour-Mills Co. v. Eagle*, 86 Fed. 608, 628, 30 C. C. A. 386, 406, 41 L. R. A. 162, an injunction was issued forbidding the use of the words "Minneapolis" and "Minnesota." In *American Brewing Co. v. St. Louis Brewing Co.*, 47 Mo. App. 14, 20, an injunction was issued against the use of the word "American." In *Cady v. Schultz*, 19 R. I. 193, 195, 32 Atl. 915, 61 Am. St. Rep. 763, 29 L. R. A. 524, a defendant was enjoined from using the term "U. S. Dental Rooms" at the suit of one who had established a business under the name "United States Dental Association." In *Néwman v. Alvord*, 49 Barb. 588, an injunction was issued against the use of the word "Akron" in the name or description of a cement. In the following cases the defendants were enjoined from using their own names to pass off their goods as those of others: *Croft v. Day*, 7 Beav. 84, 89, 90; *Meyer v. Medicine Co.*, 58 Fed. 884, 887, 7 C. C. A. 558, 565, 18 U. S. App. 373, 378; *Garrett v. T. H. Garrett & Co.*, 78 Fed. 472, 477, 478, 24 C. C. A. 173, 178, 179; *Walter Baker & Co. v. Sanders*, 80 Fed. 889, 26 C. C. A. 220, 51 U. S. App. 421; *Tarrant & Co. v. Hoff*, 76 Fed. 959, 961, 22 C. C. A. 644, 646; *R. W. Rogers Co. v. Wm. Rogers Mfg. Co.*, 70 Fed. 1017, 1019, 17 C. C. A. 576, 578, 35 U. S. App. 843, 847, 848; *Thread Co. v. Armitage*, 45 U. S. App. 62, 73, 21 C. C. A. 178, 186, 74 Fed. 936, 944. In *Block v. Distributing Co.* (C. C.) 95 Fed. 978, 980, *Fuller v. Huff*, 43 C. C. A. 453, 104 Fed. 141, 144, 51 L. R. A. 332, and *Williams v.*

Mitchell (C. C. A.) 106 Fed. 168, the use of descriptive words such as "Standard Distilling," "Health Food," and "Carrom" was enjoined.

The leading cases in support of injunctions restraining the use of geographical terms for the purpose of selling the goods of one manufacturer as those of another are *Wotherspoon v. Currie*, where the use of the name "Glenfield" was enjoined, and *Montgomery v. Thompson*, where the use of the word "Stone" was forbidden. The principles upon which these cases rest have been repeatedly considered and affirmed by the supreme court of the United States. In *McLean v. Fleming*, 96 U. S. 245, 254, 255, 24 L. Ed. 828, that court said:

"Nor is it necessary, in order to give a right to an injunction, that a specific trade-mark should be infringed; but it is sufficient that the court is satisfied that there was an intent on the part of the respondent to palm off his goods as the goods of the complainant, and that he persists in so doing after being requested to desist. * * * Chancery protects trade-marks upon the ground that a party shall not be permitted to sell his own goods as the goods of another; and therefore he will not be allowed to use the names, marks, letters, or other indicia of another, by which he may pass off his own goods to purchasers as the manufacture of another. *Croft v. Day*, 7 Beav. 84; *Perry v. Truefitt*, 6 Beav. 66; *Newman v. Alvord*, 51 N. Y. 192, 10 Am. Rep. 588."

In *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 549, 550, 551, 11 Sup. Ct. 396, 34 L. Ed. 997, the court cites and reviews with approval *Wotherspoon v. Currie* and *Montgomery v. Thompson*, and says:

"Undoubtedly an unfair and fraudulent competition against the business of plaintiff, conducted with the intent on the part of the defendant to avail itself of the reputation of the plaintiff to palm off its goods as plaintiff's, would, in a proper case, constitute ground for relief."

In the last case in which this subject is considered—*Elgin Nat. Watch Co. v. Illinois Watch-Case Co.*, 179 U. S. 665, 674, 21 Sup. Ct. 270, 45 L. Ed. 365, a suit for the infringement of a trade-mark—that court held, in accordance with the established rule, that the word "Elgin" was not susceptible of monopolization as a trade-mark. But it also reviewed with approval *Wotherspoon v. Currie* and *Reddaway v. Banham*, and said upon this subject:

"But it is contended that the name 'Elgin' had acquired a secondary signification in connection with its use by appellant, and should not, for that reason, be considered or treated as merely a geographical name. It is undoubtedly true that, where such a secondary signification has been acquired, its use in that sense will be protected by restraining the use of the word by others in such a way as to amount to a fraud on the public, and on those to whose employment of it the special meaning has become attached."

From the opinions which have now been reviewed and the authorities cited below the following principles may be safely deduced:

1. The sale of the goods of one manufacturer or vendor as those of another is unfair competition, and constitutes a fraud which a court of equity may lawfully prevent by injunction. *Manufacturing Co. v. Spear*, 2 Sandf. 599; *Seixo v. Provezende*, 1 Ch. App. 192, 194; *Coats v. Thread Co.*, 149 U. S. 562, 13 Sup. Ct. 966, 37 L. Ed. 847.

2. Geographical terms and words descriptive of the character, quality, or places of manufacture or of sale of articles cannot be

monopolized as trade-marks. *Canal Co. v. Clark*, 13 Wall. 311, 321, 20 L. Ed. 581; *Mill Co. v. Alcorn*, 150 U. S. 464, 14 Sup. Ct. 151, 37 L. Ed. 1144; *Chemical Co. v. Meyer*, 139 U. S. 540, 546, 11 Sup. Ct. 625, 35 L. Ed. 247; *Manufacturing Co. v. Trainer*, 101 U. S. 51, 56, 25 L. Ed. 993; *Goodyear's India-Rubber Glove Mfg. Co. v. Goodyear Rubber Co.*, 128 U. S. 598, 602, 9 Sup. Ct. 166, 32 L. Ed. 535; *Continental Ins. Co. v. Continental Fire Ass'n (C. C.)* 96 Fed. 846; *Brown Chemical Co. v. Frederick Stearns & Co. (C. C.)* 37 Fed. 361; *Chemical Works v. Muth (C. C.)* 35 Fed. 524, 1 L. R. A. 44; *Illinois Watch-Case Co. v. Elgin Nat. Watch Co.*, 94 Fed. 667, 35 C. C. A. 237; *New York & R. Cement Co. v. Coplay Cement Co. (C. C.)* 45 Fed. 212; *Iron Co. v. Uhler*, 75 Pa. 467; *Connell v. Reed*, 128 Mass. 477.

3. But the use of such geographical or descriptive terms to palm off the goods of one manufacturer or vendor as those of another, and to carry on unfair competition, may be lawfully enjoined by a court of equity to the same extent as the use of any other terms or symbols. *Knott v. Morgan*, 2 Keen, 213; *Wotherspoon v. Currie*, L. R. 5 H. L. 508, 522, 523; *Thompson v. Montgomery*, 41 Ch. Div. 35; *Montgomery v. Thompson* [1891] App. Cas. 217, 220; *Lee v. Haley*, 5 Ch. App. 155; *Seixo v. Provezende*, 1 Ch. App. 192, 194; *Brewery Co. v. Powell* [1897] App. Cas. 710, 716; *North Cheshire & Manchester Brewery Co. v. Manchester Brewery Co.* [1899] App. Cas. 83; *McLean v. Fleming*, 96 U. S. 245, 255, 24 L. Ed. 828; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 550, 551, 11 Sup. Ct. 396, 34 L. Ed. 997; *Elgin Nat. Watch Co. v. Illinois Watch-Case Co.*, 179 U. S. 665, 673, 674, 21 Sup. Ct. 270, 45 L. Ed. 365; *Saxlehner v. Eisner & Mendelson Co.*, 179 U. S. 19, 41, 21 Sup. Ct. 7, 45 L. Ed. 60; *Flour-Mills Co. v. Eagle*, 86 Fed. 608, 628, 30 C. C. A. 386, 406; *City of Carlsbad v. Kutnow*, 71 Fed. 167, 173, 18 C. C. A. 24, 30, 35 U. S. App. 750, 763; *Block v. Distributing Co. (C. C.)* 95 Fed. 978, 980; *Meyer v. Medicine Co.*, 58 Fed. 884, 887, 7 C. C. A. 558, 565, 18 U. S. App. 372, 378; *Garrett v. T. H. Garrett & Co.*, 78 Fed. 472, 478, 24 C. C. A. 173, 178, 179; *Walter Baker & Co. v. Sanders*, 80 Fed. 889, 26 C. C. A. 220, 51 U. S. App. 426; *Tarrant & Co. v. Hoff*, 76 Fed. 959, 961, 22 C. C. A. 644, 646; *R. W. Rogers Co. v. Wm. Rogers Mfg. Co.*, 70 Fed. 1017, 1019, 17 C. C. A. 576, 578, 35 U. S. App. 843, 847, 848; *Thread Co. v. Armitage*, 45 U. S. App. 62, 73, 21 C. C. A. 178, 186, 74 Fed. 936, 944; *Fuller v. Huff*, 104 Fed. 141, 144, 43 C. C. A. 453, 51 L. R. A. 332; *Williams v. Mitchell (C. C. A.)* 106 Fed. 168; *Salt Co. v. Burnap*, 73 Fed. 818, 821, 20 C. C. A. 27, 30, 43 U. S. App. 243, 250; *Saxlehner v. Apollinaris Co.*, 13 Times Law Rep. 258; *American Waltham Watch Co. v. U. S. Watch Co.*, 173 Mass. 85, 53 N. E. 141; *Cady v. Schultz*, 19 R. I. 193, 195, 32 Atl. 915, 61 Am. St. Rep. 763, 29 L. R. A. 524; *American Brewing Co. v. St. Louis Brewing Co.*, 47 Mo. App. 14, 20; *Newman v. Alvord*, 49 Barb. 488; *Taylor v. Carpenter*, 11 Paige, 292, 42 Am. Dec. 114; *Id.*, 2 Sandf. Ch. 603; *Croft v. Day*, 7 Beav. 84, 89, 90; *Reddaway v. Banham* [1896] App. Cas. 199; *Cochrane v. Macnish* [1896] App. Cas. 225, 229.

4. A proprietary interest in the terms or symbols used to palm off the goods of one manufacturer or vendor as those of another, or to commit any other fraud, is not essential to the maintenance of a

suit to enjoin the perpetration of the wrong; but an interest in the good will of the business or in the other property threatened is sufficient. *Knott v. Morgan*, 2 Keen, 213; *Lee v. Haley*, 5 Ch. App. 155; *Thread Co. v. Armitage*, 45 U. S. App. 62, 73, 21 C. C. A. 178, 186, 74 Fed. 936, 944.

The decree of the circuit court is in perfect accord with these principles and authorities. The appellants were using the word "American" and the names of the appellee's manufactured articles with the intent and for the sole purpose of selling the manufactures of others as those of the appellee, and they were accomplishing this illegal end. The only effectual method of preventing the continuous perpetration of this fraud and of protecting the good will of the business of the appellee from injury or destruction was to enjoin the appellants from applying the names of the appellee's articles to the manufactures of others, and the court wisely and lawfully granted that relief. This conclusion ends the discussion of the real issue in hand, and practically determines the decision of this case. A few minor objections to the decree which do not require extended consideration will be briefly noticed.

Counsel for appellants maintain that the fact that they have placed their names and residence in conspicuous places on their packages, and have otherwise distinguished them from those of the appellee, should relieve them from the injunction. But the "American Ball Blue" and the "American Wash Blue" were articles well known to the trade and to the public as the manufactures of the appellee before the appellants entered upon the business of selling bluing. These articles, and the names by which they were known, had an established reputation, and commanded a lucrative trade. To the dealers in bluing the appellants were unknown. The only effect of placing their unfamiliar names and residence upon the packages of bluing under the names of the appellee's well-known articles was to give to the appellants the benefit of the established reputation of the appellee's articles, and thus to enable them to derive greater benefit from their fraud. "That is an aggravation, and not a justification, for it is openly trading in the name of another upon the reputation acquired by the device of the proprietor." *Menendez v. Holt*, 128 U. S. 514, 521, 9 Sup. Ct. 143, 32 L. Ed. 526; *Gillott v. Esterbrook*, 48 N. Y. 374, 378, 8 Am. Rep. 553.

It is said that the appellee was entitled to no relief because the names "American Ball Blue" and "American Wash Blue" do not denote origin or ownership, and therefore cannot constitute trade-marks, and because the appellee registered its trade-mark, which did not consist of any of the words constituting these names, and it thereby disclaimed their use as trade-marks. But this is not a suit for the infringement of trade-marks, but to restrain the sale of the goods of one manufacturer as those of another, and a complainant has the same right to an injunction against the perpetration of such a fraud by the use of words or names which do not in themselves indicate origin or ownership, and which are incapable of use and are disclaimed as trade-marks, as he has against its commission by the use of any other terms or expressions. Whether the brands "American

Ball Blue" and "American Wash Blue" indicated the origin and ownership of the articles to which they were applied in 1872 and 1874, when they were first used, or not, the evidence is overwhelming that by association they came to point out to the trade articles made and owned by the appellee long before 1898, when the appellants first appropriated them, and it was for this reason alone that they used them in their endeavor to deceive the public and to filch the business of the appellee. These facts furnish ample grounds for the injunction whether the words were capable of use as trade-marks or not.

The appellee has, since 1895, been engaged in manufacturing and selling bluing under the names "Germania Ball Blue" and "Bavarian Ball Blue" in boxes simulating foreign products, and counsel for appellants insist that these names were false and misleading, and that the appellee was entitled to no relief from a court of equity, because it did not come with clean hands. The principle that "he who comes into equity must do so with clean hands" is familiar and indisputable. But it does not repel all sinners from courts of equity, nor does it disqualify any complainant from obtaining relief there who has not dealt unjustly in the very transaction concerning which he complains. The iniquity which will repel him must have an immediate and necessary relation to the equity for which he sues. *Dering v. Earl of Winchelsea*, 1 Cox, Ch. 318, 319; *Lewis & Nelson's Appeal*, 67 Pa. 153, 166; *Bateman v. Fargason*, 4 Fed. 32, 33; *Bisp. Eq.* 61. There is no evidence that the appellee has been guilty of any injustice, fraud, or wrong in acquiring the good will of its business in the American ball blue and the American wash blue, which is the subject of this suit, or in its relations with the appellants, and relief cannot be denied to it because it may have been wicked in other transactions which affect neither the appellants nor the equity here under consideration. The decree below is affirmed.

THAYER, Circuit Judge (dissenting). As I have reached a conclusion different from that announced by my associates, I deem it proper to state my views concerning the questions of law and fact which arise in the case, and, first, with respect to the facts. The Heller & Merz Company, hereafter termed the "complainant," or its predecessors, began the manufacture of bluing, as it seems, at Newark, N. J., about the year 1868 or 1869. At first they manufactured bluing only in the form of a powder. Later, in the year 1872, they began to put it up in the form of round pellets or balls about the size of small marbles; and later still, in the year 1874 or 1875, they began to manufacture bluing, to some extent, in the form of round lozenges or wafers. To the bluing which was put up in the form of balls they applied the name "American Ball Blue," and to that put up in the form of round lozenges they claim to have applied the name "American Wash Blue" when they first began to manufacture it in that form. The evidence shows, however, that what is now termed "American Wash Blue" was as commonly, and perhaps more frequently, termed "Lozenger Blue" until the year 1878, when Pomeroy & Olmsted, a firm which subsequently be-

came G. M. Olmsted & Co., took hold of the latter kind of bluing, and advertised it extensively in the Northwest, with the consent of the complainant, as an article of their own manufacture, under the name "American Wash Blue." Even while Olmsted & Co. were thus advertising and selling it as their own product under the name "American Wash Blue," the plaintiff company most frequently referred to it in their letters and bills as "Lozenger Blue." To my mind, the evidence leaves little room for doubt that the words "American Ball Blue" and "American Wash Blue" were originally adopted by the complainant itself solely for descriptive purposes,—that is to say, to describe a bluing made in the United States, and to be used for laundry purposes; the one kind put up in the form of balls, and the other in the shape of round lozenges. There is no evidence, I think, which indicates that either name was chosen as an artificial brand, but the testimony rather indicates that the names were selected because they accurately described the articles to which they were applied, the word "American" differentiating them from several kinds of bluing which were made abroad, and imported into this country for sale. Olmsted & Co., who were soap makers at Cedar Rapids, Iowa, for 20 years succeeding the year 1878, advertised bluing put up in the form of round lozenges, extensively, as "American Wash Blue," throughout the states of Iowa, Minnesota, and the Dakota territories, and built up an extensive trade in the article in those states and territories. The bluing was put up in cylindrical-shaped blue paper boxes of sufficient diameter to contain the lozenges. The cylindrical boxes bore on one end a white label on which was stamped the letter "U" surrounded by a small triangle, and on the three sides of this triangle were printed in very small letters the words "American Ultramarine Works. Trade-Mark." Wrapped around the cylindrical box was another larger label, commending the qualities of the article, and giving directions for its use, which was signed as follows: "G. M. Olmsted & Company, Soap Makers, Cedar Rapids, Iowa." The small cylindrical paper boxes were packed in larger wooden ones, on the ends of which were stenciled the following words: "American Wash Blue. G. M. Olmsted & Co., Cedar Rapids, Iowa." The packages of American wash blue as put up and sold by Olmsted & Co. with the full knowledge of the complainant bore no marks indicating to the public that the article was made by the complainant other than the above-described label on the end of the cylindrical boxes, and the evidence shows beyond peradventure that nearly all of Olmsted's customers were ignorant of the existence of such a concern as the Heller & Merz Company, and supposed that the article was made by or for Olmsted & Co., and that the words "American Wash Blue" were wholly descriptive. While Olmsted & Co. handled American wash blue,—that is to say, for 20 years succeeding the year 1878,—the complainant manufactured and sold no other lozenger bluing, except a small amount in the states of Illinois and Wisconsin. They manufactured bluing in that form for 20 years, principally to fill orders for Olmsted & Co. The defendants below, Shaver, Blake & Co., acquired the good will of the business of Olmsted & Co. when the latter firm was dissolved

by the death of one of its members. Shortly thereafter, in the year 1898, they commenced to advertise and sell lozenger blue in the same form of package that it had been sold by Olmsted & Co., using the words "American Wash Blue," as their predecessor in interest had used them; but they ceased to affix the label at the end of the cylindrical boxes which bore the impress of the letter "U" surrounded by the triangle above described. The defendants purchased the bluing from, or had it manufactured for them by, the International Ultramarine Works located at Staten Island, N. Y., and they ceased to patronize the complainant company. Thereupon, as it seems, the complainant began to sell American wash blue put up in the form of lozenges in the territory formerly occupied by Olmsted & Co., and—to retaliate apparently, as Olmsted & Co. had never sold the ball blue—the defendants began to advertise and sell it as well as the wash blue. The boxes, however, in which the defendants packed and sold ball blue which was manufactured for them by the International Ultramarine Works, bore no resemblance whatever to the boxes in which the complainant had theretofore packed and sold its ball blue. The defendants' boxes were different in color, and had the words "Shaver, Blake & Company, Cedar Rapids, Iowa," prominently displayed on the face of the boxes. No one, in my judgment, could have possibly mistaken the defendants' ball blue for similar goods of the complainant's manufacture, if he had exercised the slightest care. Moreover, this record fails to show that there is any substantial difference in the bluing made by the complainant and by the International Ultramarine Works. The article manufactured by each concern is the same, and nothing in this record would indicate that one is a better article than the other. This litigation, as I view it, is the outgrowth of the foregoing facts.

The decree of the lower court, which is approved by the majority opinion, enjoins the defendants, among other things, from selling or offering for sale any blue or bluing under the name "American Wash Blue" or "American Ball Blue" unless it is manufactured by the complainant company. It is also said in the majority opinion that the defendants "have no right to make or sell American ball blue or American wash blue"; and, furthermore, that "the names of the articles in which they [the defendants] have the right to deal are 'Ball Blue' or 'Wash Blue.'" At the same time it is conceded in the majority opinion—and of this proposition there can be no doubt—that the words "American Wash Blue" and "American Ball Blue" are purely descriptive words and phrases, which cannot be monopolized as a trade-mark by any manufacturer of bluing. To my mind, the two propositions thus announced are antagonistic, namely, that a manufacturer of bluing cannot, as respects that article, obtain a monopoly of the aforesaid words and phrases, because they are confessedly descriptive, but that he may make use of the words himself, and enjoin another manufacturer, who makes the same article, from using them to describe his own product. If the latter of these propositions is sound law, then it is apparent, I think, that the former proposition ought to be abandoned, and that it be henceforth conceded that one

of the fundamental doctrines of the law of trade-mark is no longer tenable, namely, that no one is entitled to monopolize either words or phrases, which, as applied to a given article, are purely descriptive of its kind, or quality, or place of manufacture. It will be observed that the opinion of the majority concedes the defendants' right to sell their product under the names "Ball Blue" and "Wash Blue," but denies their right to make use of the word "American" in connection therewith, and I am unable to perceive any substantial reason why the right to use the former of these words should be admitted, and the right to use the latter denied. The word "American" is no less descriptive than the words "Wash Blue" or the words "Ball Blue." It indicates that the bluing is made in America, and is a domestic product, just as the word "Wash" indicates that the bluing is designed for washing purposes, and the word "Ball" indicates that the bluing is put up in the form of small pellets. The words in question are each purely descriptive, and, as the complainant company and as the defendants both employ them, they are used in a very natural relation to each other to aptly describe the two articles to which they are applied, and to show that they are a domestic, and not a foreign, product.

Another observation to be made concerning the decree below and the majority opinion is that the relief afforded is not based on the ground that the descriptive words in question have been used on boxes or packages containing bluing which are made in imitation of the complainant's boxes and packages, and for that reason are liable to deceive the public, and lessen the complainant's trade. The injunction is so framed that the phrases "American Wash Blue" and "American Ball Blue" cannot be used by the defendants under any circumstances, even though they put up ball blue and lozenger blue in boxes which are so totally unlike those employed by the complainant that they would not mislead a customer who was grossly negligent. The injunction against using the words, therefore, is not founded upon any deception practiced or attempted to be practiced, except such as may result from the use of words in a purely natural relation to each other, which are confessedly descriptive, and cannot be monopolized as a trade-mark. The reason assigned for awarding such an injunction is that it may be granted on the ground that the defendants employ these words with intent to purloin some of the complainant's trade, and that their conduct in so doing is fraudulent. But, in my opinion, an appropriate answer to this suggestion is that a person cannot be said to have been guilty of any such fraud as a court of law or equity will redress when he makes use of words or phrases to describe an article which he manufactures, which, as applied to that article, are purely descriptive, and hence are the common property of all who manufacture or deal in the article. The law, except in a few rare cases, does not concern itself with the motives of men when their acts are lawful, and injuries which result to others from the exercise of lawful rights or privileges are *damnum absque injuria*. *Passaic Print Works v. Ely & Walker Dry-Goods Co.*, 44 C. C. A. 426, 105 Fed. 163. If the words "American Wash Blue" and "American Ball Blue," as the complainant contends, have

become associated in the public mind with two articles which it manufactures in such a way that they have ceased to be descriptive of the articles, and have acquired a meaning which is secondary and arbitrary, then this result is attributable to the complainant's own fault. If such a result was liable to ensue, it should have chosen a brand originally which was arbitrary, and that might have been monopolized. It had no greater need of employing the descriptive words in question than the defendants have to describe the bluing which they sell. It cannot, therefore, by reason of the peculiar result above mentioned, insist that other manufacturers of bluing in this country shall not call their product "American Wash Blue" and "American Ball Blue" if it is so in fact. It requires but little penetration to see that, if this doctrine of "secondary signification" is adopted in these days of fierce competition, the most common descriptive words and phrases will be monopolized, or at least that attempts will be made repeatedly to monopolize them, and little difficulty will ordinarily be experienced in obtaining testimony to support the claim that common and necessary descriptive words have by long-continued use acquired a secondary meaning. I am willing to concede that one or two English cases cited in the majority opinion, particularly *Thompson v. Montgomery*, 41 Ch. Div. 35, and the same case as reported in [1891] App. Cas. 217, sustain the doctrine contended for by my associates that a descriptive word by association with an article may acquire a secondary signification, and that, when such secondary meaning has been acquired, the use of it by another may be enjoined; but, as I read and construe the American decisions,—particularly the decisions of the supreme court, which are controlling authority here,—the doctrine in question has not been approved to the extent to which it has been carried in the case in hand. In *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118, the right of the public to make use of the word "Singer" as descriptive of a particular sewing machine after the expiration of the patent on the machine was upheld, with the single limitation that one who makes such machines, and calls them by that name, must, by other marks and signs on the machines, clearly indicate to the public that they are made by him, and not by the original Singer Company. The recent case of *Elgin Nat. Watch Co. v. Illinois Watch-Case Co.* (decided Jan. 7, 1901) 21 Sup. Ct. 270, 45 L. Ed. 365, as I construe it, inculcates the same doctrine, namely, that a manufacturer cannot be enjoined from making use of words or phrases which in their primary sense are clearly descriptive of the article which he manufactures, and that, even when such words, as used by another, have acquired a secondary signification, the most that a court of equity can do for his protection is to require third parties who have occasion to use them to affix other marks and signs, or indulge in such explanations, as will most effectually prevent a confusion of goods. These are the latest decisions by the supreme court on the subject, but prior thereto it was said in *Chemical Co. v. Meyer*, 139 U. S. 540, 547, 11 Sup. Ct. 625, 35 L. Ed. 247, concerning descriptive words which could not become a trade-mark:

"If the words * * * cannot be lawfully appropriated as a trade-mark, it is difficult to see upon what theory a person making use of these or similar words can be enjoined. We understand it to be conceded that these words do not in themselves constitute a trade-mark. It follows, then, that another person has the right to use them unless he uses them in such connection with other words or devices as operate as a deception upon the public."

Similar views were also expressed in the case of Goodyear's India-Rubber Glove Mfg. Co. v. Goodyear Rubber Co., 128 U. S. 598, 602, 9 Sup. Ct. 166, 32 L. Ed. 535. See, also, Illinois Watch-Case Co. v. Elgin Nat. Watch Co., 35 C. C. A. 237, 94 Fed. 667.

My conclusion is, therefore, that the injunction in its present form ought not to stand, because the defendants have the right to use the words "American Wash Blue" and "American Ball Blue," and to use the words in that relation to each other, these being clearly descriptive words and phrases, provided they neither simulate the complainant's boxes or packages, and provided they display their own name prominently on their boxes, circulars, and advertisements, and with equal prominence state that the bluing which they sell is manufactured for them by the International Ultramarine Works of Staten Island, N. Y., and is not the complainant's product. I have no fault to find with that part of the restraining order which enjoins the defendants from holding themselves out to the public as the owners of the names "American Wash Blue" and "American Ball Blue," or as the manufacturers of those articles, since no one, in my judgment, is or can be the owner of these names, or have an exclusive property therein.

EDISON v. HAWTHORNE et al.

(Circuit Court of Appeals, Third Circuit. May 10, 1901.)

No. 19.

TRADE-NAMES—USE OF INVENTOR'S NAME ON SIGN—RIGHT TO INJUNCTION.

Defendants were formerly agents for the sale of phonographs which are the invention of the complainant, Edison, and commonly known as the "Edison Phonograph." While such agents they placed over their place of business a sign reading "The Edison Phonograph Agency," which sign they allowed to remain after the termination of their agency, although they continued to sell phonographs. Complainant neither manufactured nor sold phonographs, but was a stockholder in the corporations which manufactured and sold the same. *Held*, that the sign did not imply that defendants were agents for complainant, but only that they were agents for the sale of the machine known as the "Edison Phonograph," and that complainant had no pecuniary interest in the matter, either as an individual or as a stockholder, which entitled him to maintain a bill to enjoin such use of his name.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 106 Fed. 172.

Howard W. Hayes, for appellant.

E. C. Rhoads, for appellees.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. The material facts of this case are sufficiently stated in the opinion of the court below, as follows:

"The defendants are merchants of the city of Philadelphia, and (among other articles) deal in phonographs, graphophones, and supplies for such instruments. A sign above their place of business displays the words, 'The Edison Phonograph Agency;' and the object of this bill is, to quote from the principal prayer, 'that the said defendants may be restrained from using the name "Edison Phonograph Agency" in connection with the said business carried on by them, and from using your orator's name, or any part thereof, in connection with their said business, and from holding themselves out in any way as agents of your orator.' The use of the sign began in October, 1894, or thereabouts, when the relation of the defendants to the sale of the Edison phonograph justified them in so describing this branch of their business. They were then actively employed in advertising and advancing the sale of the Edison phonograph, and were properly described as agents for the sale of this instrument. In the early part of the year 1899, however, these relations came to an end with some abruptness, and since that time, although they still sell Edison phonographs, they are in no sense agents, either for the corporation that manufactures the phonographs, or for the corporation that sells them. Mr. Edison, as an individual, neither manufactures nor sells."

It is not necessary to the decision of this appeal that we should consider any general question respecting the authority of a court of equity to restrain the unauthorized use of a person's name, where, by such use, a property right of that person is injuriously affected. The present case must be determined with reference to its special circumstances, and this the learned counsel of the appellant has recognized by submitting an argument based upon the three propositions which will now be referred to.

1. It is contended that the words "The Edison Phonograph Agency" imply to the public that the persons using them are agents for Thomas A. Edison; and, if we could affirm this statement, the conclusion deduced from it, that "therefore Mr. Edison may prevent the unauthorized use of the term," would, no doubt, be warranted. But we cannot agree that, as here used, the word "agency" relates, or would be understood to relate, to Mr. Edison. The apparent and natural meaning of the term is not that the persons using it are agents of Mr. Edison, but that they constitute an agency for the sale of the machines which are known as "Edison Phonographs."

2. The words "Edison Phonograph" designate a particular machine. They do not import that Mr. Edison has anything to do with making such machines. Therefore the appellant's contention that Mr. Edison is entitled to prevent the unauthorized use of these words, because of their supposed implication that he is concerned in the manufacture of the phonographs referred to, is without foundation.

3. The proposition that Mr. Edison is entitled to prevent the appellees from calling themselves "The Edison Phonograph Agency," because he has a pecuniary interest in preventing those who are not duly-authorized agents for the selling of Edison phonographs from holding themselves out as such, is unsupported in point of fact. He neither manufactures nor sells them. The rights to manufacture and to sell are vested in corporations, in each of which he is, it is true, a stockholder, but which, as was said by the court below, "are nevertheless distinct legal entities, and, if any person

is injured by the defendants' sign, it is they, or one of them, and not he."

The case was, in our opinion, adequately considered and correctly decided by the circuit court, and therefore its decree is affirmed.

STRAUSS v. BLUMENTHAL.

(Circuit Court, S. D. New York. June 10, 1901.)

PATENT—VALIDITY.

The Strauss patent, No. 628,640, for an improved harmonica, involves merely a slight change in the covering plate of a well-known toy, without accomplishing any new result, or a patentable change in an old result, and is void.

In Equity.

Frank Von Briesen, for complainant.

R. B. McMaster, for defendant.

COXE, District Judge. This is an action brought for the infringement of letters patent No. 628,640, granted to the complainant July 11, 1899, for an improved harmonica.

The specification says:

"This invention relates to a harmonica of the class in which the covering-plates are provided with corrugations between the reeds, so as to form a separate pipe or air-chamber for each of the reeds. I form these corrugations across the rear part of the covering-plates only, while the front part remains smooth and is turned inward to constitute the mouthpiece. Thus the construction of the instrument is simplified and inaccessible dust-collecting spaces between the corrugations are avoided. * * * It will be seen that by my invention the mouthpiece and pipes are formed upon one and the same plate, so that the construction of the instrument is greatly simplified. As the corrugations merge into the plain portion of the plates, I am enabled to obtain a smooth mouthpiece at the forward edge of such plates. Finally, as the corrugations are fully exposed from end to end the intervening grooves are not apt to accumulate dust."

The claim is as follows:

"A harmonica provided with a covering-plate having a rear transversely-corrugated section, a smooth front section, and an inwardly-projecting front edge that constitutes a mouthpiece, substantially as specified."

The defenses are the usual ones—lack of novelty and patentability and noninfringement. The device of the claim involves merely a slight change in the covering plate of a well-known toy, without accomplishing any new result or a patentable change in an old result. Everything shown or described in the drawings and description is found in the prior art, except the single feature of making the corrugated covering device in one piece instead of in two pieces. The Weiss harmonica is identical in every particular with the patented structure, except that in the former the upper section of the corrugations is covered with a separate plate which forms the mouthpiece. In the patented structure these two plates are integral. The patentee has evidently taken the Weiss design and, by a well-known method, has stamped the corrugations upon the same sheet of metal

which serves as the mouthpiece. The change has accomplished nothing except, perhaps, a slight saving in expense. There is not even a distinctively new appearance. The pretense that the tone of the instrument is strengthened and improved over the same type of harmonicas in the prior art is so obviously untenable that it is unnecessary to discuss it. The court is clearly of the opinion that the patentee has contributed nothing to the art worthy to rank as an invention. The bill is dismissed.

SHAW v. AMERICAN TOBACCO CO.

(Circuit Court of Appeals, Fifth Circuit. May 7, 1901.)

No. 1,030.

1. PATENTS—SUITS FOR INFRINGEMENT—JURISDICTION AND VENUE.

Under Act March 3, 1897 (29 Stat. 695), defining the jurisdiction of the circuit courts in cases for infringement of patents, such a suit can be maintained only in the district of which the defendant is an inhabitant, or in a district in which the defendant has committed acts of infringement, and has a regular and established place of business.

2. PLEADING—AMENDMENT—TIME OF APPLICATION.

A motion for leave to amend a petition comes too late, where not made until several days after a demurrer has been sustained thereto for want of allegations showing jurisdiction, and a judgment of dismissal has been entered, and after the court has fixed the amount of the bond to be given on proceedings in error, on plaintiff's application.

In Error to the Circuit Court of the United States for the Northern District of Texas.

W. A. Kemp (T. J. Freeman, on the brief), for plaintiff in error.

Junius Parker (Thompson & Thompson and W. W. Fuller, on the brief), for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. This is an action at law for damages for the infringement of a patent. The petition discloses that Wilder S. Shaw, the plaintiff, is a citizen of Texas, and that the American Tobacco Company, the defendant, is a corporation chartered under the laws of New Jersey, and that it is doing business in the state of Texas, having its principal office and agent in Dallas county. It is alleged that on January 18, 1898, the plaintiff obtained letters patent for a new and useful snuff package, the letters patent being numbered 597,623. The purposes of the patent are fully stated in the petition. It is alleged that the defendant corporation entered into negotiations with the plaintiff for the purchase of the patent, and in that way obtained a full description of the patented package, and, instead of offering to purchase the patent, the defendant "went immediately to work to put its goods on the market in plaintiff's said package, and from September, 1898, until the filing of this petition, has continuously used same, over plaintiff's protest, and in defiance of his rights under said letters patent, to plaintiff's actual damage in the sum of fifteen thousand dollars." The petition contains, also, special alle-

gations showing the extent of the plaintiff's damages. The citation or summons issued on the petition was served on L. Wells Baldwin, as local agent of the defendant. The defendant entered a special appearance, and moved to vacate and quash the service of the citation on the ground that Baldwin was not at the date of the service an officer or agent of the defendant. On the trial of this motion, evidence was offered by both parties bearing upon the question as to whether or not Baldwin was such an agent of the defendant that legal service could be made upon him. The view that we take of the case makes it unnecessary to consider this evidence. On July 2, 1900, this motion coming on to be heard, the court made an order sustaining the motion, and vacating and quashing the service of the citation. At this hearing the court also made the following order:

"And, it appearing that this court is without jurisdiction to hear and determine this cause, it is further ordered that this cause be dismissed for want of jurisdiction, and that the defendant go hence without day, and have and recover of the plaintiff all costs in this behalf incurred, for which let execution issue."

The record shows that the plaintiff excepted to these orders in open court, and gave "notice of appeal, and at plaintiff's request the amount of the bond is fixed by the court at \$200." On July 6, 1900, the following bill of exceptions was filed:

"Be it remembered that, on the trial of the above-entitled cause, defendant demurred to plaintiff's petition on the ground that it did not allege facts sufficient to give this court jurisdiction; it nowhere appearing that plaintiff was a citizen of the state of Texas, and Northern district, nor that the alleged infringement of patent occurred in said Northern district of Texas. On hearing the argument of counsel, the court sustained said demurrer, whereupon plaintiff's counsel asked leave to file an amended petition setting up said facts, which motion to so amend was overruled by the court, to which action of the court in refusing plaintiff leave to amend plaintiff then and there excepted, and files this, his bill of exceptions, and asks that the same be allowed and made a part of the records in said cause.

"W. A. Kemp, Attorney for plaintiff."

"This bill is given with the following qualifications: Plaintiff asked leave to amend on this the 6th day of July, 1900, after the court had ruled on the motion on the 2d day of July, 1900, sustaining the same and dismissing the cause for want of jurisdiction, to which ruling of the court plaintiff excepted and gave notice of appeal in open court, and asked the court to fix the amount of the appeal bond, which by the court was fixed at \$200; and the parties were preparing the bills of exception to the rulings of the court, and, during the controversy between counsel as to the contents of the bill, plaintiff asked leave to amend his petition as above.

"Edward R. Meek, Judge."

The errors assigned all relate either to the setting aside of the service of process on Baldwin, or to the dismissal of the suit. It will only be necessary to consider those relating to the dismissal of the suit; for, if the case was properly dismissed for want of jurisdiction appearing on the face of the petition, the judgment of the court setting aside the service is immaterial.

In suits for the infringement of letters patent, the circuit courts of the United States have jurisdiction in law and in equity, without regard to the citizenship of the parties to the suit. In such cases the courts have jurisdiction because of the subject-matter of the suit. The act of March 3, 1897 (29 Stat. 695), defines the jurisdiction of the

United States courts in such cases, and states the particular court in which the suit must be brought. This act is copied in the margin.¹ It provides that the suit must be brought either in the district of which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement, and have a regular and established place of business. The petition does not show that the defendant is an inhabitant of the district in which the suit was brought. On the contrary, it is alleged that the defendant is a corporation chartered under the laws of New Jersey. A corporation chartered under the laws of New Jersey is not an inhabitant of the district in Texas in which it does business. It might have agents and carry on business in every one of the many districts in the United States, and it could not be held that, because of such business, it was an inhabitant of every district in which it did business. *Shaw v. Mining Co.*, 145 U. S. 444, 450, 12 Sup. Ct. 935, 36 L. Ed. 768; *Carter*, Jur. Fed. Cts. 155. To give the court below jurisdiction, the petition failing to show that the defendant is an inhabitant of the district in which it is sued, it is necessary that it should aver that the act of infringement complained of was committed in the district, and that the defendant had a regular and established place of business in the district. If it be conceded that the petition sufficiently shows that the defendant has a regular and established place of business in the district in which the suit was brought, the petition contains no averment showing where the acts of infringement were committed. It is not alleged that the acts were committed at any named place. It does not appear from the petition that the acts of infringement were committed in the district in which the suit is brought. The petition, therefore, on its face, does not show that the court below had jurisdiction. It was subject to demurrer for that defect. The record does not show that any demurrer was filed, but it appears from the bill of exceptions presented by the attorney for the plaintiff that the objection to the jurisdiction made on the trial of the motion was, without objection, considered by the parties and treated by the court as a demurrer. This defect in the petition could have been amended. If, on the hearing of the motion, or after its decision, the plaintiff had made timely offer to amend the petition by alleging that the acts of infringement complained of were committed in the district in which the suit was brought, the court should have allowed the amendment. Rev. St.

¹ An act defining the jurisdiction of the United States circuit courts in cases brought for the infringement of letters patent.

Be it enacted, etc., that in suits brought for the infringement of letters patent the circuit courts of the United States shall have jurisdiction, in law or in equity, in the district of which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement and have a regular and established place of business. If such suit is brought in a district of which the defendant is not an inhabitant, but in which such defendant has a regular and established place of business, service of process, summons, or subpoena upon the defendant may be made by service upon the agent or agents engaged in conducting such business in the district in which suit is brought. Act March 3, 1897 (29 Stat. 695).

Tex. 1895, art. 1188. On July 2d, when the order was made dismissing the petition, no motion was submitted to the court asking leave to amend. The plaintiff, on the contrary, indicated that he would abide by the petition as it was written, by giving notice of a proceeding to review the decision of the court. It was not until July 6th, after the bond for reviewing the case had been fixed on the plaintiff's motion, and while the parties were preparing the bills of exceptions, that the motion to amend was made. If it be conceded that the ruling of the court on the question of the amendment was subject to review here,—a question which need not be considered,—we think the learned judge in the trial court decided correctly in declining to allow the amendment at the time the motion to amend was made. The dismissal did not affect the plaintiff's right to immediately bring another suit, in which he could have averred the jurisdictional facts. The judgment of the circuit court is affirmed.

CROWN CORK & SEAL CO. OF BALTIMORE CITY v. ALUMINUM
STOPPER CO. OF BALTIMORE CITY et al.

(Circuit Court of Appeals, Fourth Circuit. May 7, 1901.)

No. 387.

1. PATENTS—VALIDITY—PRESUMPTION OF UTILITY.

The granting of a patent is *prima facie* evidence of the utility of the invention, which is one of the essential elements of patentability; and this is not negatived by the fact that the device is susceptible of improvement, or that like inventions are so far superior to it that they have entirely superseded its use. To sustain the defense of want of utility in a suit for infringement the defendant must show either that it is theoretically impossible for the device of the patent to operate, or demonstrate by clear proof that a person skilled in the art has endeavored in good faith to make the invention work, and has been unable to do so.

2. SAME—INFRINGEMENT—SUPERIOR UTILITY OF INFRINGING DEVICE.

Comparative utility between machines or processes is no criterion of infringement, and the fact that a defendant's device is simpler and produces better results than that of the patent does not tend to avoid infringement unless its superiority is due to a difference in function or mode of operation or some essential change in character.

3. SAME—PROOF OF INUTILITY—UNSUCCESSFUL EXPERIMENTS.

The object of the drawings filed in the patent office is attained if they clearly exhibit the principles involved, and a rigid adherence to dimensions therein shown is not required or expected if an intelligent mechanic skilled in the art would so proportion the dimensions given as to secure practical results. The inutility or inoperativeness of the device is not demonstrated by the fact that experiments made with material identical in form and proportion of parts with the drawings failed to produce successful results, and especially where it does not appear that the experimenter was desirous of success.

4. SAME—EFFECT OF NONUSER.

While the fact of nonuser is entitled to some weight upon the question of the utility of a patented device, it is of slight significance where the patent was but recently issued, its validity was questioned, and its use required the construction of expensive machinery.

5. SAME—ABANDONMENT.

Abandonment of an invention to the public which will defeat a subsequent patent therefor is not established by evidence that the inventor temporarily abandoned experiments which had to that time proved un-

successful, where he subsequently resumed them, successfully perfected the device, and applied for a patent therefor before any adverse rights accrued.

6. SAME—DELAY IN PATENT OFFICE.

Delay in obtaining a patent after the filing of the application, due to adverse rulings of the examiners which necessitate appeals, will not work an abandonment of the inventor's rights, where he proceeds with his case within the time limited by the statute, and ultimately succeeds in obtaining his patent.

7. SAME—VALIDITY OF REISSUE.

The decision of the examiners and board of appeals in the patent office sustaining the right of a patentee to a reissue, applied for within seven months after the issuance of the original patent, where the matter was fully contested for two years, and both parties were represented by able counsel, while not conclusive, is entitled to great weight.

8. SAME—BOTTLE STOPPERS.

The Painter reissued patent, No. 11,685, for a bottle stopper, which contains claim 5 additional to those of the original patent (No. 540,072), is valid. While such claim is broader than any claim of the original patent, it is within the invention therein stated, and the right to incorporate such claim was not lost by the delay of seven months after the issuance of the original patent before applying for the reissue as against another patent granted for a similar device in the meantime, but on an application filed before the issuance of the original patent to Painter.

9. SAME—INFRINGEMENT.

The Painter reissue, No. 11,685, for a bottle stopper (original No. 540,072), which consists of a cup-shaped disk of tin, or other metal having permanent flexion, which is inserted in the neck of the bottle, and then expanded into a groove in such neck in which a gasket has been placed, thus making a tight stopper, covers a pioneer invention, and is entitled to a liberal construction. Claims 1, 4, and 5 are infringed by stoppers made in accordance with the Hall patent, No. 541,203, which embody the Painter invention by using merely a modified, but mechanically equivalent, form of disk.

10. SAME—EQUITABLE ESTOPPEL.

Within two weeks after the issuance of a patent to defendants they were notified by complainant of his claim that it was an infringement of a patent to him just previously issued. Within six months thereafter complainant applied for a reissue, which, after a contest by defendants, was granted. *Held*, that defendants were presumed to have knowledge of complainant's right under the law to a reissue, and, as they were also familiar with plaintiff's invention, they proceeded to manufacture under their patent at their peril, and could not claim that complainant was estopped to assert his rights under his reissued patent.

11. SAME—SUIT FOR INFRINGEMENT—EQUITY—JURISDICTION.

The jurisdiction of equity to entertain a suit to enjoin infringement and for an accounting is not defeated by the fact that claimant has not made use of his patent, where it was but recently granted, and the litigation was necessary to establish its validity, which was denied by defendants, so that no implication arises from such fact unfavorable to the complainant.

Appeal from the Circuit Court of the United States for the District of Maryland.

For opinion in court below, see 100 Fed. 849.

W. Cabell Bruce and Robert H. Parkinson (Wm. A. Fisher, on the brief), for appellant.

Albert H. Walker (W. E. Hoffman, on the brief), for appellees.

Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

BRAWLEY, District Judge. Prior to the inventions hereinafter to be described, which are the subject-matter of this controversy, the common method of stopping bottles was with cork, wood, rubber, or some other resilient material inserted longitudinally into the neck of the bottle, and held there by its elastic lateral pressure in frictional contact with the circumference, supplemented, in cases where gaseous liquids caused internal pressure, by wire or twine on the outside of the bottle head. About the year 1876, William Painter, foreman of the machine shops of Murrell & Keizer, began experiments upon a device for bottle stoppers, which culminated years afterwards in patented inventions, the essential features of which lie in the forcible contact of a permanently expanded or flexed margin of a disk with the packing material held between the disk and bottle surface. A rough draught, purporting to show the original conception, drawn from memory by William Fifer, a workman then employed in the shops, but who has long since ceased any connection therewith, has been offered in evidence. These preliminary experiments, according to Fifer, were not successful. Fifer tells us that Painter said to him, "George, we'll have to try something else, as we can't get these bottles blown near enough to use this kind of cap;" and that he was then directed by Painter to "lay all the parts and tools that he had used on the shelf until after a while." We have no direct testimony as to the later experiments. Fifer found other employment, and Painter has not testified in the case; the record showing that at the time the testimony was taken he was, and had been for a long time previous thereto, subject to nervous prostration, unable to stand the strain of business and the excitement incident to a long examination and cross-examination. Robert A. Hall entered into the service of Murrell & Keizer as an apprentice about the year 1873, and, with the exception of about six months in 1889, has been continuously engaged in the machine shops under the direction of Lewis R. Keizer, who conducts the business under the firm name; his partner, Murrell, having long since died, and Keizer being the sole owner thereof. Hall worked under the direction of Painter, whose first application for a patent for a bottle stopper was filed June 5, 1885, and letters patent No. 327,099 were issued September 29, 1885, to William Painter and Lewis R. Keizer, to whom a one-half interest was assigned. This patent, with No. 449,822, application for which was filed March 7, 1890, covers what are known and may be hereafter referred to as the "Rubber Seal Patents." On October 12, 1885, Painter filed an application for the patent out of which this controversy arises. The history of the proceedings in the patent office will be hereafter referred to. Patent No. 540,072 was issued May 28, 1895, application for reissue of the same was filed December 26, 1895, and July 26, 1898, it was reissued as No. 11,685. On November 5, 1889, June 16, 1890, and May 19, 1891, Painter filed applications for other patents, which were issued February 2, 1892,—No. 468,226, No. 468,258, and No. 468,259. These last named cover what are known as the "Crown Seal Patents." Robert A. Hall filed his application for a patent for a bottle-sealing device February 28, 1894, and letters patent No.

541,203, issued June 18, 1895. All of Painter's patents were assigned to the Bottle Seal Company, of Baltimore, to whose rights and business the complainant company, organized and incorporated under the laws of Maryland in 1892, succeeded. The defendant Keizer was one of the organizers of the Bottle Seal Company, the stock in which he subsequently sold, but continues to receive a royalty of \$2,000 or \$3,000 a year from the complainant company on account of his interest in the rubber seal patent. All of the machinery for the making of the rubber seals and crown seals for the complainant company were manufactured in Keizer's shops under the direction of Hall from the date when those seals began to be used up to about the time of the obtaining of the Hall patent. This patent was assigned to the defendant company, a corporation organized under the laws of the state of Maryland, May 2, 1896. The defendant Keizer was the organizer and is the controlling stockholder and the active manager of this company, Hall being a stockholder therein. The complainant company manufactures and sells about 30,000,000 stoppers per annum; the defendant company, since its organization, has been engaged in manufacturing and selling its stoppers to a considerable extent,—the two being the only companies engaged in supplying the market with the bottle-stopping devices which originated with the Painter inventions. The bill of complaint was filed November 12, 1898, in the circuit court of the United States for the district of Maryland, in equity, and prayed for an injunction restraining the defendants from infringement, and for an account, etc. The answer denied the infringement, alleged want of novelty and patentability, attacked the validity of the reissue, charged abandonment, fraud, and perjury, and set up an estoppel. The court below held that there was no infringement, and ordered the bill dismissed on this ground, and a decree was entered accordingly, and the appeal from this decree brings the case here. It is necessary, under the practice in this class of cases, for this court to ascertain and decide whether the decree appealed from should have been rendered for the complainants or for the defendants; for, if it should conclude that the court below erred on the question of infringement, that conclusion will not avail the appellant unless it should also decide all the other defenses against the appellees. It will be convenient to consider these defenses in the order in which they have been presented by the learned counsel for the defendants, and, like him, we will use the terms "complainant" and "defendants" instead of "appellant" and "appellees."

First. It is claimed that the original and reissued patent, No. 11,685, is void for want of utility. Utility being one of the qualities necessary to patentability, the granting of the patent is prima facie evidence of it; and this is not negated by the fact that the device is susceptible of improvement, or that like inventions are so far superior to it that they may entirely supersede the use of it. Comparative utility between machines or processes is no criterion of infringement, and comparative superiority or inferiority does not necessarily import noninfringement; nor does it tend to avoid infringement if the defendant's device is simpler and produces bet-

ter results, unless the cause is due to a difference in function or mode of operation or some essential change in character. Differences in utility do not necessarily import differences of invention. The burden is upon the defendant, in a case like this, to prove want of utility. He must show either that it is theoretically impossible for such a device to operate, or demonstrate by clear proof that a person skilled in the art to which the invention pertains has endeavored in good faith to make the patent work, and has been unable to do so; and it follows that such evidence is overthrown, or will be overthrown, if it is demonstrated by practical experiments of credible persons that they have succeeded in producing by the patent process the results claimed by the patent. The defendants have undertaken to show by the expert Lorenz that the patent is a failure; that, after experiments, he could not succeed in stopping bottles by following the directions of the patent; and the expert Hall, being the person heretofore referred to, has undertaken to show theoretically that it is a failure. Lorenz was admittedly not familiar with the art, in that he had had no practical experience in connection with bottle stoppers, and his experiments were conducted during a few hours on two separate days. It cannot be said that they proved any more than that a person not skilled in the art, and without the special tools which presumably would be devised for the purpose, was unable to accomplish practical results. The complainant's experts, Spear and Hawkins, testified that they had successfully sealed bottles in accordance with the patent, and the results of those experiments have been produced before the court. One of the reasons for the failure of the experiments of Lorenz and Hall may be found in the fact that they followed closely the directions in the drawing of the Painter patent as to the dimensions of the devices shown therein. The object of the drawings filed in the patent office is attained if they clearly exhibit the principles involved, and, in a case like this, rigid adherence to the dimensions thus exhibited is not required or expected, and, if an intelligent mechanic would so proportion the dimensions as to secure practical results, inutility is not demonstrated by experiments with material identical in form and proportion of parts with the drawings in the patent. The special reason assigned for lack of utility consists in the shortness of the flange of the cup which constitutes the bottle stopper, and increase in the length of the flange would cure the defect. That is so obvious that no inventive faculty need be invoked to suggest it, and the learned counsel for the defendants admits in his argument that the bottle stopper of Fig. 6 in the Painter patent can be made useful by sufficiently increasing the length of its flange so as to increase the depth of the cup. We cannot think that a decision adverse to the utility and operativeness of this invention could safely rest on the ill success of experiments made by those who were not specially skilled in the art, and where it is not obvious that they were specially desirous of making their experiments succeed. Another ground upon which the learned counsel for the defendants relies is the failure of Fifer's experiments under Painter's directions in 1876. It is a novel contention

that admitted failures during the preliminary stage of experiments should be adduced as evidence of want of utility in the perfected invention. Some stress is laid upon the fact that the complainant has never done anything towards introducing either of the forms of bottle stoppers described in this patent, and the learned judge below seems to regard it as somewhat significant. This circumstance would seem to be entitled to some weight as tending to show that the patent was useless; but inasmuch as title to this patent was not finally secured until July 26, 1898, and the validity of it, in view of the contest made by the defendants, would have to be settled by litigation, common prudence would suggest delay in incurring the expense of providing the machinery and other appliances that would be necessary in order to put it upon the market; and as the complainant was and is supplying the market for this character of stoppers with sealing devices belonging to the same general class, some of them later in date of invention, and containing certain improvements and advantages that have popularity and which have created a demand that complainant is fully supplying, all of these considerations are adequate reasons for any delay in the manufacturing of sealing devices under this particular patent, and no implication of lack of practical operativeness or utility in the invention can be drawn from such delay.

The second ground of defense is abandonment. Undoubtedly, an inventor may give to the public the benefits of his ingenuity as persons may give away any other kind of property, and such relinquishment may be either direct or it may be inferred from circumstances. Where there is an entire abandonment of all expectation of succeeding in an invention and securing a patent under circumstances that justifies the formation of the expectation that the ideas of the inventor will be always free to the public, and the inventor clearly manifests his intentions to relinquish any rights thereto, the inchoate right to the patent thus abandoned cannot be resumed. But the law does not favor forfeiture, and, it being a question of fact whether there has been abandonment, all reasonable doubts must be solved in favor of the patent. There may be abandonment before application or thereafter. Under the first head, the sole reliance of the defendants is the testimony of Fifer, already cited, wherein it appears that the early experiments were unsuccessful, in that they only succeeded in getting one bottle to stand about 40 pounds pressure, that bottle being the only one of the proper size. Whether nonsuccess was due to the packing used in this experiment, which was of paper felt, or whether delay in consummating the work was due to inability then to procure suitable bottles, or whether further tests with better tools or more accurate workmen were required, or whether modification of the device in other ways was contemplated, or whether Painter, who was then a poor man, could not give the time necessary to perfect this invention, being engaged in developing his other patents, which have since proved valuable, is left to conjecture. But, whatever may have been the cause or causes of the delay, there is an entire absence of proof either that he abandoned the hope of success, or that he intended to abandon

the invention to the public. His assistant was directed to "lay all parts and tools on the shelf until after awhile." This manifests an intention to resume experiments "after awhile," and results show that he did so resume, and later experiments enabled him to so far perfect his invention that his patent was applied for before any adverse rights accrued. There is no proof or suggestion even that there was any public use or sale, or that any person except Fifer was informed of the abortive experiments. Experimental use for the purpose of testing the qualities of an invention is never public use, nor is there any proof that the delay operated to mislead others into taking up the invention and with greater diligence perfecting it. The case would be presented in a different aspect if another inventor had entered the field, induced by the supposed abandonment and misled by the delay. It is of no advantage to the public that an inventor should apply for his patent before he satisfies himself as to the best form in which to embody his invention, and the statute which provides that two years' public use shall work a forfeiture clearly has no application to a case of merely uncompleted experimentation. Mr. Justice Swayne, in *Wood v. Rolling-Mill Co.*, 4 Fish. Pat. Cas. 550, Fed. Cas. No. 17,941, says, "where it had not been abandoned to the public, and had not been in public use or on sale with the consent and allowance of the inventor, no lapse of time, however protracted, barred an application for a patent, nor, after it had been granted, affected its validity." Numerous cases are cited to support the proposition, but it is so well established that we will not swell this opinion by citing them. In that case the invention was made in 1835; the patent was not taken out until 1851.

Again, it is strenuously urged that the delays in the patent office pending the application worked a forfeiture. The record shows that the inventor encountered serious difficulties in the securing of his patent, successive objections being interposed by the examiners, necessitating appeals. In each case, however, the necessary steps were taken within the two years limited by the statute, and during the long period which intervened between the filing of the application and the issuance of the patent, although there are abundant signs of discouragement, there are none of abandonment, for towards the end of each period of limitation he resumes the struggle, and, although often stricken down, he did by successive appeals, and in strict conformity with the requirements of the statute, at last succeed in establishing his right to the patent. The argument of the learned counsel assumes that the inventor is under some sort of obligation to give the public the benefit of his invention as speedily as possible, and that he is in fault for any avoidable delay. The inventor does not determine the measure of his rights or of his obligations. The law determines that for him, and, if the government thinks that more speed is desirable in the interest of the public, it should change the law; the courts cannot do so. Nor can they exact of inventors any degree of diligence other than compliance with the statutory provisions, official regulations, departmental requirements, and formal demands which are prescribed by

and for the officials and others charged with duties under the patent laws. Certain fixed periods are provided in sections 4894 and 4904, Rev. St., for securing progress in applications for patents. If the inventor is allowed two years after a judgment against him within which to take appeal, he may wait until the last day of the two years. If congress thinks this is too long a time, it should fix another limitation, but courts cannot deny the benefits which the statute gives. There are no special reasons for invoking that power in this case if we had it, for it does not appear that during all these years of delay any other inventor was attempting to enter the field. This whole subject had full consideration in *U. S. v. American Bell Tel. Co.*, 167 U. S. 224, 17 Sup. Ct. 807, 42 L. Ed. 144, where there was a delay of fourteen years in the patent office. Nor can forfeiture be predicated upon failure to put the patented device upon the market. In some countries, patentees are required to manufacture within a certain period after the granting of the patent, but there is no such requirement in our statute. Nor is this a mere paper patent, bought up only for the purpose of being laid away until it should be brought forth against a rival, as we have already shown in setting forth the reasons which explain and excuse the delay in putting this device upon the market.

The third defense is that there was no legal foundation for the surrender and reissue of the original Painter patent, and therefore the reissue is void for want of jurisdiction in the commissioner to grant it. The fourth defense is that claim 5 of the reissued patent is void because it is broader than any claims in the original, and because it was not applied for until after the lapse of an unreasonable time. The fifth defense is that the said claim 5 is not for the same invention as the original patent. These three defenses relating to the reissue will be considered together. The jurisdiction to grant the reissue is found in section 4916 of the Revised Statutes, which provides that:

"Whenever any patent is inoperative or invalid by reason of a defective or insufficient specification or by reason of the patentee claiming as his own invention and discovery more than he had a right to claim as new, if the error has arisen by inadvertence, accident or mistake, and without any fraudulent or deceptive intention, the commissioner, on the surrender of such patent and payment of the duty required by law, shall cause a new patent for the same invention and in accordance with the corrected specification to be issued to the patentee," etc.

The words of this section are largely borrowed from the opinion of Chief Justice Marshall in *Grant v. Raymond*, 6 Pet. 243, 8 L. Ed. 376. In that case Grant had received a patent for an improved mode of manufacturing hat bodies in 1821, and four years thereafter presented a petition stating that the specification of his patent was defective, praying that it might be canceled and a new and correct one granted, embracing the improvements so far as they were set forth in certain new specifications; and, although at that time there was no statute authorizing such proceeding, the letters patent were canceled and a reissue granted, and the validity of this proceeding was sustained by the supreme court. A review of the earlier decisions of the supreme court would seem to show that

by "defective or insufficient specifications" was meant any failure either to describe or claim the complete invention upon which the application for the patent was founded, and that "inadvertence or mistake" was used in antithesis to fraudulent intent, and that the right to reissue depends upon any failure to make specifications and claims legally adequate to their purpose, if due to any cause except an intention to deceive. The defendants contend that there is no jurisdiction in the commissioner to reissue a patent except where the facts exist which the statute prescribes as the foundation for his action. There have been numerous decisions as to how far the decision of the commissioner as to the existence of the statutory grounds for reissue is conclusive, and in one of the earliest cases Justice Story, who participated in the decision of *Grant v. Raymond*, 6 Pet. 243, 8 L. Ed. 376, says:

"I very much doubt whether his decision is or can be reviewable in any other place or in any other tribunal unless his decision is impeached on account of gross fraud and connivance between him and the patentee, or unless his excess of authority is manifest on the very face of the patent; as, for example, if the original patent were for a chemical combination, and the new amended patent were for a machine. In other cases it seems to me, the law having intrusted him with the authority to ascertain the facts and grant the patent, his decision, bona fide made, is conclusive."

In *Ball v. Langles*, 102 U. S. 129, 26 L. Ed. 104, Justice Strong, in a case where the original patent was granted in 1856 and surrendered in 1869, and reissue granted in 1869 and 1870, uses this language:

"When the reissues of 1869 and 1870 were granted, the commissioner of patents had authority under the acts of congress to grant reissues only in certain specified cases. These were whenever a patent was inoperative or invalid by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new, if the error had arisen by inadvertence, accident, or mistake, without any fraudulent or deceptive intention. The commissioner was invested with authority to determine whether the surrendered patent was invalid by reason of a defective or insufficient specification, or because the patentee had claimed more than he had a right to claim as new, and, if he found such to be the case, and found, also, that an error had been due to inadvertence, accident, or mistake without fraud, his decision was conclusive, and not subject to review by the courts. But the law did not confer upon him jurisdiction to grant a reissue embracing new matter or a broader invention than what was revealed by the original specifications or drawings or models, except in some cases, where there was neither model nor drawing. A reissue for anything more is therefore inoperative and void. Accordingly this court has repeatedly held that if on comparing the reissue with its original the former appears on its face to be for a different invention than that described or indicated in the latter it must be declared invalid."

In *Miller v. Brass Co.*, 104 U. S. 350, 26 L. Ed. 783, decided in 1881, a patent for an improvement in lamps was granted in 1860 for 14 years, and extended 7 years longer. It was twice surrendered, and reissued once in 1873, and again in 1877. Mr. Justice Bradley, in delivering the opinion of the court, held that the court below was clearly right in holding that the invention specified in the reissued patent was not the same invention which was described and claimed in the original patent. He says: "It is manifest on the face of the patent, when compared with the original, that the sug-

gestion of inadvertence or mistake in the specification was a mere pretense, or, if not a pretense, the mistake was so obvious as to be instantly discernible in opening the letters patent, and the right to have it corrected was abandoned and lost by unreasonable delay." Further: "The pretense in this case that there was an inadvertence and oversight which had escaped the notice of the patentee for 15 years is too bald for human credence. He simply appealed from the judgment of the office in 1860 to its judgment in 1876,—from the commissioner and examiners of that date to the commissioner and examiners of this,—and upon a matter that was obvious upon the first inspection of the patent." And he animadverted upon the evils which had grown up under the practice which allowed patents to be so expanded and idealized years after their first issue, for hundreds and thousands of mechanics who had just reason to suppose that the field of action was open had been obliged to discontinue their employments; that the granting of reissues for such purpose was an abuse of power,—and says, "When this is a matter apparent on the face of the instrument upon the mere comparison of the original patent with the reissue, it is competent for the courts to decide whether the delay was unreasonable, and whether the reissue was therefore contrary to law and void." The court held in that case that the delay was altogether unreasonable, and that the patent could not lawfully be reissued for the purpose of enlarging the claim and extending the scope of the patent. This case is thought to mark a new departure by the supreme court in the line of strict construction of the right of reissue. It must be interpreted in the light of the special circumstances which gave rise to it, of the evils that had grown up under the loose practice theretofore prevailing, and the remedy required in the interest of the public. The evil to be corrected was this: Unscrupulous speculators, watching the development of successful inventions, could, in searching the records of prior inventions, find one which might embody the same principles, and, availing themselves of the opportunity given by the reissue law, embody in the older patent claims which it might have had, but did not, and the result would be that the owner of the later patent, who had spent time and money in the development of a profitable business, would be confronted with a patent earlier in date than his, but reissued later, which would completely control his business. This evil certainly demanded correction. Again, there was a presumption—and generally it was a fact—that what was not claimed was not invented by the patentee, and the public had the right to use what was not claimed, either because it had not been invented by the patentee, or because, by his own act, he had made it public property, if it was not so before. This case did not deny that a claim might be enlarged in a reissued patent, but held that there must be a bona fide mistake, and that there must not be unreasonable delay; any considerable lapse of time affording opportunities and temptations to commit fraud when the circumstances of the original application had passed out of mind. It is interesting to note, as a part of the history of the development of the law on this subject, that so great a judge

as Mr. Justice Miller, in *Mahn v. Harwood*, 112 U. S. 364, 6 Sup. Ct. 451, 28 L. Ed. 665, expressed his dissent from the opinions of the court in those cases, beginning with *Miller v. Brass Co.*, 104 U. S. 350, 26 L. Ed. 783, wherein reissues had been held invalid. In connection with *Miller v. Brass Co.* it may not be without profit to refer to the case of *Giant Powder Co. v. California Powder Works*, in 98 U. S. 126, 25 L. Ed. 77, where the opinion was delivered by Mr. Justice Bradley only a few years before, as illustrating what he means when he speaks of a reissue for a different invention. That case shows that the court fully recognizes the right to modify the claims so as to secure fully the invention described, or attempted to be described, in the original. The original patent was for a mode of exploding nitroglycerin; the reissue was for the composition; and the court says:

"It is impossible not to say that they are for an entirely different invention than that secured, or attempted to be secured, by the original patent. If the patent had not been for the mode or process of exploding nitroglycerin, but for a process of compounding nitroglycerin with gunpowder or other substances, and inadvertently omitted to claim the exclusive right of the substance so produced, the case would have been one of very different consideration. If the last patent differs from the first only in stating more clearly and definitely the real principles of the invention, so that those who wish to pirate it may not be allowed to escape with impunity through the imperfection of the language used in the first, there has arisen one of the cases for which it was the intention of the act of congress to provide."

And after pointing out the distinction that, in the case before the court, the processes described in the original had no connection with the compounds or mixtures which were patented in the reissued patents, and that the invention of one did not involve the invention of the other, the learned judge says:

"These specifications may be amended so as to make it more clear and definite, the claim may be modified so as to make it more conformable as to the exact rights of the patentee, but the invention must be the same. The legislature was willing to concede to the patentee the right to amend his specifications so as to fully describe and claim the very invention attempted to be secured by his original patent, and which was not fully secured thereby in consequence of inadvertence, accident, or mistake, but was not willing to give him the right to patch up his patent by the addition of other inventions, which, though they might be his, had not been applied for by him, or, if applied for, had been abandoned or waived. For such invention he is required to make a new application, subject to such rights as the public or other inventor may have acquired in the invention."

In *Beach v. Hobbs*, 92 Fed. 146, 34 C. C. A. 248, the circuit court of appeals, reviewing the decision of Judge Putnam in the same case, wherein he held, after reviewing the decisions, that the decision of the commissioner upon mere questions of fact resting upon the applicant's allegation as to inoperativeness and inadvertence will not be re-examined by the courts, says:

"If by reason of any inadvertence or mistake in the drawings or specifications a patent is rendered in part inoperative, and the patentee promptly applies for a reissue, and no substantial rights are affected or fraudulent intent charged, we think the commissioner has a right, under section 4916 of the Revised Statutes, to cause a new patent to be issued, and that under such circumstances his decision is conclusive. We know of no authority in conflict with this proposition."

In *U. S. v. American Bell Tel. Co.*, 167 U. S. 267, 17 Sup. Ct. 809, 42 L. Ed. 144, Judge Brewer, in delivering the opinion of the court in 1896, says:

"But, further, congress has established the patent office, and thereby created a tribunal to pass upon all questions of novelty and utility. It has given to that office exclusive jurisdiction in the first instance, and has specifically provided under what circumstances its decision may be reviewed, either collaterally or by appeal. As stated in *Butterworth v. Hoe*, 112 U. S. 50, 5 Sup. Ct. 25, 28 L. Ed. 656, that it was intended that the commissioner of patents, in issuing or withholding reissues, interferences, and extensions, should exercise quasi judicial functions, is apparent from the nature of the examinations and decisions he is required to make, and the modes required by law, according to which, exclusively, they may be reviewed."

In *Topliff v. Topliff*, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658, decided in 1891, Mr. Justice Brown reviews the authorities, and states what is the settled rule of that court as to the power to re-issue; and his summary is as follows:

"(1) That it shall be for the same invention as the original patent, as such invention appears from the specifications and claims of such original. (2) That due diligence must be exercised in discovering the mistake in the original patent, and that, if it be sought for the purpose of enlarging the claim, the lapse of two years will ordinarily, though not always, be treated as evidence of an abandonment of the new matter to the public to the same extent that a failure by an inventor to apply for a patent within two years of the public use or sale of his invention is regarded by the statutes as conclusive evidence of an abandonment of the patent to the public. (3) That this court will not review the decision of a commissioner upon a question of inadvertence, accident, or mistake, unless the matter is manifest from the record, but that the question whether the application was made within a reasonable time is in most, if not all, such cases, a question of law for the court. To hold that a patent can never be reissued for an enlarged claim would be not only to override the obvious intent of the statute, but would operate in many cases with great hardship upon the patentee. The specification and claim of a patent, particularly if the invention be at all complicated, constitutes one of the most difficult legal instruments to draw with accuracy, and, in view of the fact that valuable inventions are often placed in the hands of inexperienced persons to prepare such specifications and claims, it is not a matter of surprise that the latter frequently fail to describe with requisite certainty the exact invention of the patentee, and err either in claiming that which the patentee had not in fact invented, or in omitting some element which was a valuable or essential part of his actual invention. Under such circumstances it would be manifestly unjust to deny him the benefit of a reissue to secure to him his actual invention, provided it is evident that there has been a mistake, and he has been guilty of no want of reasonable diligence in discovering it, and no third persons have, in the meantime, acquired the right to manufacture or sell what he failed to claim. The object of the patent law is to secure to the inventors monopoly of what they have actually invented or discovered, and it ought not to be defeated by a too strict and technical adherence to the letter of the statute or by application of artificial rules of interpretation."

In *Coon v. Wilson*, 113 U. S. 268, 5 Sup. Ct. 537, 28 L. Ed. 963, the reissue was not founded on the invention described in the original, but upon an entirely distinct invention. The court, holding it invalid, says:

"In the present case there was no mistake in the wording of the claim of the original patent. The description warranted no other claim; it did not warrant any claim covering the bands not short or sectional. The description in the reissue is not a more clear and satisfactory statement of what is described in the original patent, but it is a description of a different thing,

so ingeniously worded as to cover collars with continuous long bands, and which have not short or sectional bands. The original patent industriously excluded from its scope the continuous band."

That case did not deal with the question whether a patentee can reissue to properly claim the invention exhibited in the original, and included under the statement of invention therein, but with the question whether, under the circumstances there existing, he could properly reissue to embrace an invention that was not so included or exhibited. In the present case the reissue is strictly confined to the invention described in the original and included under the statement therein. It does not fall within the class of cases represented by *Miller v. Brass Co.*, 104 U. S. 350, 26 L. Ed. 783, or *Coon v. Wilson*, 113 U. S. 268, 5 Sup. Ct. 537, 28 L. Ed. 963, where a different invention is described in the claim, but in that other class where reissue is authorized by the plain terms of the statute and by a long line of decisions of the supreme court, where the patent had failed to clearly and adequately secure the invention upon which the original was founded, and where the unquestionable object and effect of the reissue was to cover an invention not covered by the original claims. In this class of cases there should not be applied a stricter rule of diligence than that applied by statute in case of public use before application for the patent, even if so strict a limitation as that is applicable. The suggestion in *Miller v. Brass Co.*, and other like cases, of two years as the ordinary limit of reasonable diligence, was based not upon any such limitation in the statute, but upon the fact that the two years were allowed for amendments after action of the patent office, and two years was the limit of public use allowed before application for the patent. The learned counsel for defendants assumes that the subject is so simple that Painter should have discovered instantly, upon reading the original patent, the occasion for the reissue, if it existed. He forgets that what seems so simple and easy to him, a past master of the subject, was not so to a mere inventor, unskilled in the art of interpretation, who could not, upon a mere reading of his patent, determine what his claims covered. Painter had no hesitation and no doubt what his invention covered, and almost immediately upon the hearing of the issue of Hall's patent he said that it was covered by his invention; but it was not until he was advised by his lawyer that he learned that his claims were not commensurate with his invention, and there was no delay then in filing his application for reissue. Some allowance may well be made for an unlearned man, when we remember that in the recent case of *Westinghouse v. Power-Brake Co.*, 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136, the supreme court itself required three hearings before it could determine the meaning and scope of the patent claims, and the record in this case shows that such learned experts as Gen. Spear and Mr. Walker differ radically as to what the claims of the original patent cover. The cases relied upon by counsel in support of his contention that an unreasonably long time passed between the granting of the original and the application for reissue are *Miller v. Brass Co.*, where there was a delay of about

fourteen years; *Mahn v. Harwood*, 112 U. S. 364, 6 Sup. Ct. 451, 28 L. Ed. 665, where there was a delay of about four years; *White v. Dunbar*, 119 U. S. 52, 7 Sup. Ct. 72, 30 L. Ed. 303, where the delay was about five years; *Hartshorn v. Barrel Co.*, 119 U. S. 674; 7 Sup. Ct. 421, 30 L. Ed. 539, where there was a delay of nine or ten years; *Leggett v. Oil Co.*, 149 U. S. 293, 13 Sup. Ct. 902, 37 L. Ed. 737, which did not turn at all upon the question of delay in applying for the reissue, but was decided on other grounds which impeached the patent itself. The question of laches which arose in that case grew out of an alleged promise made in 1873, the bill seeking relief thereon not being filed until 1888; and *Dunham v. Manufacturing Co.*, 154 U. S. 110, 14 Sup. Ct. 986, 38 L. Ed. 924, which turned, not upon any question of laches, but upon questions which have no application here, wherein the court decided that the patent had clearly not been infringed by the defendant. It will not be profitable to continue the citation of the numerous cases on this subject. Analysis of them will show that there is a distinction well marked between reissues broadening the claims of the original, but confined to the invention therein exhibited, which the courts sustain, and reissues that depart from the invention exhibited in the original and included under its statement of invention.

Where there has been an expansion of the patent to describe inventions substantially different from the original, covering nebulous combinations not exhibited therein, and where there has been protracted and unreasonable delay in face of the manufacture of articles not substantially covered by the original invention, the reissue has been held void; but the courts, recognizing the fact that the ordinary inventor is not usually skilled in technical rules of construction, and is apt to suppose that his claims protect him in the essential elements mentioned in them, and that these claims and specifications are usually drawn by men who are strangers to and ignorant of the art within which they lie, and that even skilled solicitors are not infallible in framing technical documents, have sanctioned reissues which permit the framing of claims adequate to secure the full benefits of the inventions designed to be protected by the patent laws. The essential justice of allowing such reissue was recognized by Chief Justice Marshall in *Grant v. Raymond*, 6 Pet. 243, 8 L. Ed. 376, before any statute was enacted, and the reissue in that case was sustained upon general principles of right and justice in face of the argument of Mr. Webster that the defendants had begun the infringing manufacture after the grant of the original, which was four years before the reissue, the result of which was to render them liable for acts not within the description of the invention contained in the original patent; it not being denied that the machinery of the defendants, while infringing the reissue, did not infringe the original. The argument for the plaintiff in this case could not be more strongly stated than it was in that opinion, and a brief statement of the facts will show that it falls within the principles which have governed the courts in sustaining reissues, and is free from the vices which have avoided them. After long years of contention in the patent office, during the progress of which

many of the claims were disallowed and eliminated, the patent was issued May 28, 1895. The Hall patent, application for which had been filed February 28, 1894, was issued June 18, 1895. On July 2, 1895, Painter requested Alexander to call on Keizer and inform him that Hall's patent was an infringement on his patent of May 28th. There is some discrepancy in the testimony of Alexander and Keizer as to the exact conversation that took place, and the precise language used is unimportant. It is certain that, within about a fortnight after Hall's patent was granted, Painter, believing that it was an infringement, took measures to notify Keizer, who was an old associate and friend, of his belief, and that Keizer received some sort of notice. Painter at that time was in ill health, broken down with nervous prostration, and shortly thereafter went abroad, where he remained until about the end of October. On November 8th, Keizer, who represented Hall, wrote to Painter, referring to the "semiofficial statement that you cover the particular device in a patent that you had in the patent office for a number of years. It is necessary that we canvass the matter, and I write to you personally for information." In reply, Painter informs him that he had intended and expected to have seen him in relation to the bottle stoppers, but that his nerves were not yet strong enough for any business excitement, and is constrained to hand over the matter of conference on the subject to others, but tells him very frankly that he claims that the stopper in question is his own invention, and consequently the property of the complainant company. Thereupon followed some correspondence and interviews with the patent attorneys in Washington on the subject, and Painter filed his application for reissue December 26, 1895. This application and the oath accompanying it set out every jurisdictional fact required to entitle him to a reissue. Keizer and Hall filed a protest against a reissue, and during two years the whole question was thoroughly discussed before the examiners and board of appeals in the patent office. An effort was made to defeat the original claims as well as that introduced by reissue. The learned counsel for the defendants, who testified as an expert in the case, bears testimony as to the great experience and competency of these officials; and while we do not go so far as to hold that their decision upon this point is conclusive, as some of the courts are manifestly inclined to do, we are of opinion that the decision of competent experts, made after a full hearing, where both sides had been represented by able counsel and not impeached by fraud or favoritism, has great persuasive force. It is argued here that the claim introduced by reissue is substantially the same as the third and twelfth claims in the original application. The comparison of this claim, which is No. 5 in the reissued patent, shows that it is vitally distinguished from them, and the testimony of a very competent expert, Gen. Spear, points out the distinction, and the board of appeals recognized it. It is also argued that claim No. 5 of the reissued patent is broader than any claim of the original patent. We are of opinion that this claim is germane to the invention exhibited in the original, and is included under the statement of invention of

the original. It does not exhibit any change in the nature of the invention described, and it simply gives a more adequate description of such invention, which enlarges the claim, but does not enlarge the invention. We are further of opinion that there has been in this case no unreasonable delay and no intervening right which forfeits or waives the right of reissue covered by the statute. The Hall patent was applied for in February, 1894, and the application for it could not have been induced by the limitations in the claims of the Painter patent, and there is no reason to believe that the course of the parties claiming under it was in any respect different from what it would have been if the original had been precisely in the terms of the reissue. Under all the circumstances of this case, the application for reissue was made within a reasonable time. No notice of any manufacture, use, or sale under the Hall patents was brought to the knowledge of Painter before his application for reissue, and there was no manufacture or sale or publicity such as to import notice to him. The case would be different if Painter had unreasonably delayed to assert his rights to reissue after such notice was brought home to him, and where his silence and inaction had misled other parties to their injury; and the fact that the original patent contained a statement of his invention which covered the subject-matter of the reissued claim, and that a reissue to fully secure the invention disclosed was authorized by law, was sufficient notice that this patent was subject to such right of reissue, which right was liable to be exercised at any time at least within two years. The spirit and terms of the law authorizing reissues would be defeated, and the obvious purpose of its enactment would be ineffectual, if we applied to this case those restrictions which some of the decisions apply to cases where there has been long delay in the application for reissue, and the obvious purpose of such applications has been to appropriate subsequent independent inventions not originally disclosed in the patent.

The sixth, seventh, and eleventh defenses, imputing fraud and perjury, were correctly dismissed by the court below as "not entitled to consideration." The fraud alleged in the sixth is that Painter had abandoned the alleged invention to the public nine years before he filed his application for the original patent, and concealed that abandonment from the patent office in making his application. As we have already held that there was no abandonment, this charge is too trivial for further notice. The fraud alleged in the seventh defense is that Painter made a false oath in his application for reissue in stating that the errors and omissions were due to inadvertence, accident, or mistake. In that application Painter states that the specifications were hastily drawn up by R. D. O. Smith, during a hurried visit of the deponent to Washington; that he retained no copy of the papers, and took it for granted that, if the papers and drawings should be found thereafter to be faulty, they could and would be corrected or amended; that, during the several years during which his case was pending, these errors or omissions wholly escaped his own attention, and he believes that they were unnoticed by his attorneys and by the

patent-office officials who acted upon it; that during that time he was engaged in developing another bottle-sealing system involving a previous invention, and was encountering many difficulties which almost completely absorbed his attention. There is no evidence before us that any of these statements are untrue. All of these papers were before the officials of the patent office, who had before them the record of the original application, and had the best means of determining whether the facts alleged in this application for reissue were as stated. They determined them in favor of the application, and granted the reissue upon the strength of the same evidence which counsel now invokes to support his charge of fraud and perjury. What has been already said upon the subject of reissue disposes of this ground. The eleventh ground is that the president of the company, in his verification of the bill of complaint, swore to certain statements therein contained, not as from information and belief, but positively, and that it was impossible that the statements were within the personal knowledge of such president. As these statements were not denied in the answer, and were sufficiently proved by recitals in the records and by other evidence, there is no merit in this defense.

The eighth defense raises the question of infringement, and, inasmuch as the careful and learned judge below held it decisive of the case, it demands a consideration to which we would not otherwise think it entitled, for we are clearly of opinion that the Hall patent is an infringement. None of the defendants' experts have disputed it, and the protest filed by Hall in the patent office against the reissue, and the long contest made by him and his attorneys against it, are in the nature of a confession, for, had he not apprehended that the invention was the same, it would be difficult to understand why so much effort and money should have been expended to prevent the reissue. A more detailed account of the Painter invention is required under this head than we have yet given. Our conclusion differs from that of the learned judge below mainly because we look upon the invention from a different point of view. He holds that "Painter's invention was not a new application of a scientific principle to obtain a useful result, but rather an improvement in material and mechanism of a known device." In our view it represents a distinctly original conception, so essentially unlike anything in the prior art that nothing earlier has been presented to us out of which the defendants could read the invention of the patent, or either claim of it. There was no known device which could be converted into the Painter invention of any improvement short of rejection of the entire plan. The answer of the defendants, it is true, stated that this patent was void for want of novelty, and referred to the prior invention of Young in Great Britain in 1848. This was urged by Hall's attorneys upon the attention of the officials of the patent office in the reissue proceedings, and held by the board of examiners in chief not to exhibit the Painter invention; and the defendants' own expert, Lorenz, testified that the Young patent was not a practical or operative device, and seems so far to have satisfied the learned counsel for defend-

ants on that point that the Young patent was not introduced in evidence. And the Lenglet patent, No. 229,537, which the court refers to as showing that Painter should not be treated as a pioneer inventor, seems to us rather to illustrate the originality of Painter's conception than to furnish grounds for restricting it. Of course, we do not mean that Painter's was the first device ever used for stopping the mouths of bottles, but it differs fundamentally from any preceding invention, and is in no sense an improvement incorporated on an existing device. In the Lenglet device there is no disk having permanent flexion or a packing to be compressed by such disk. Lenglet takes a jar with a corrugated neck, and inserts in it a cap of metal,—apparently of soft metal,—which is to be rolled into conformity to the corrugations of the bottle neck by a mechanism such as that illustrated in another Lenglet patent, and in order to supply the rigidity necessary to maintain this cap in that position he fills it with plaster, which is supposed to harden and form a solid support. There is no elastic packing used, and no suggestion of a disk of any kind possessing the rigidity or permanent flexion necessary to compress such packing into a groove. Nothing in the Lenglet patent either points in the direction of the Painter invention, or could suggest that a simple disk of metal combining with the rubber packing could form and maintain a hermetical seal against internal pressure. The fundamental conception of Painter's patent is a flange or rim of a cup-shaped disk which has permanent flexion, and the expansion of such disk against a gasket or other elastic packing in an annular groove within the bottle neck, the flexion of the disk at once compressing the packing of the groove, and locking the combined disk and packing against internal pressure.

Numerous patents were offered in evidence, presumably because they were supposed to have some bearing. Inasmuch as the astute counsel for the defendants did not refer to them in his very full and able argument, it will be scarcely necessary to do more than glance at them. The Watts patent, No. 326,696, does not involve at all the principles of construction and action of the Painter patent. In that it is true there is a groove and shoulder in the mouth of the jar, and the packing lies in the groove and upon the shoulder, but the cup is essentially different. It is not laterally expanded, and is not capable of lateral expansion, and has and can have no permanent flexion. The cap is clamped down by a removable clamp. In the Parker patent, No. 41,532, the disk acts like a solid plug, and crowds the packing ring laterally against the neck of the jar, and the patent expressly states that the disk is "unelastic." In the De La Vergne patent, No. 232,468, there is no disk having permanent flexion, or anything like it. There is simply a plug intended to be air-tight, which has a latch to lock it in place. In the Van Vliet patent, No. 275,793, there is no groove in the mouth of the bottle, and no cup-shaped disk having permanent flexion. In the Smith patent, No. 314,885, no imagination could convert a glass disk into a cup-shaped disk having permanent flexion, and there is cement or wax poured into an annular chamber around the edge

of the disk. Seibold's patent, No. 271,527, is for a cartridge where there is no groove nor any cup-shaped disk. In the Atwood patent, No. 351,730, there is no peculiar cup-shaped disk. It seems to be a device for holding in a cork, instead of being a substitute for a cork. In the Dennis patents, No. 295,234 and No. 295,235, there is no shoulder or groove, no cap in the first four claims, and no groove, cap, or packing in the fifth claim. They relate to improvements in gun wads. The principles and functions in all are entirely different, and they have only the shade of an unsubstantial resemblance. No other such device has been brought to our attention. It is true that none of the elements here referred to are in themselves new, but the invention consists in taking elements possessing different functions, and co-operating them in a different manner from any heretofore suggested. The testimony shows that the complainant corporation and the defendant company have no competitors in furnishing bottle stoppers which at all answer to the above description. About 30,000,000 of such bottle stoppers were put upon the market by the complainant company alone during the last year, and the fact that, until the Painter patents were issued, no other bottle stoppers of like character or based upon like principles were ever sold, is of itself strong evidence of the originality of the Painter devices.

The claims of the Painter patent charged to be infringed are as follows:

"(1) The combination of a receptacle having a groove in the inside of its mouth and a shoulder projecting inward beyond the wall of the mouth above the groove, and a cup-shaped disk or plate of material having permanent flexion, all operating as set forth."

"(4) The combination of a receptacle having a groove in the inside of its mouth, and a shoulder projecting inward beyond the wall of the mouth of the groove, a cup-shaped disk or plate of material having permanent flexion, and a packing or stopper beneath and retained by the disk or plate, all operating as set forth.

"(5) The combination, substantially as hereinbefore described, of a bottle having an interior groove in its mouth, a packing or gasket in said groove, and a disk or plate of material having permanent flexion, which confines the packing in said groove, and maintains it in tight contact with the adjacent surface of the groove."

The claims of Hall's patent are as follows:

"(1) The combination, substantially as hereinbefore described, of a suitable bottle having a throat affording a sealing contact surface, a hollow ductile metallic plug having a portion of its periphery expanded within the throat of the bottle, and having an accessible shoulder for engagement by a bottle opener, and a sealing medium, which is in contact with said sealing contact surface, and is securely maintained in its sealing position by said plug.

"(2) The combination, substantially as hereinbefore described, of a suitable bottle, a hollow, ductile metallic plug, which has a portion of its periphery expanded within the throat of the bottle, and has an accessible shoulder for engagement by a bottle opener, and a gasket which is interposed between the metallic plug and the bottle, and is compressed and maintained in its sealing position by said plug.

"(3) A bottle-sealing device, embodying in combination a hollow plug, composed of strong but ductile metal, and an annular gasket mounted peripherally on the plug, substantially as described, the whole being adapted to freely enter the throat of a suitable bottle, and to be secured therein with sealing function, by peripherally expanding the portion of the plug which is adjacent

to the sealing gasket, and the latter enabling the metal to be indented and strongly engaged by a bottle opener.

"(4) The combination, substantially as hereinbefore described, of a bottle having in its throat an annular shoulder, an annular packing or gasket, and a hollow, ductile metallic plug, peripherally expanded as described adjacent to said gasket and shoulder, and thereby not only compressing the gasket into sealing contact between the plug and the bottle, but also securing the plug and the gasket against displacement under internal pressure, and also affording within the plug an accessible shoulder for engagement by a bottle opener."

The defendants' stopper follows the same plan as Painter's, and uses the same elements, which co-operate in the same way to effect the same purpose. There is a change of phraseology in this: That what Painter describes as a "cup-shaped disk" is described by Hall as a "hollow, ductile metallic plug"; what Painter describes as "a material having permanent flexion" Hall describes as "strong but ductile metal"; what Painter describes as "packing" Hall describes as a "sealing medium." The walls of this cup-shaped disk or hollow plug are expanded in the same way into a like groove for an identical purpose, and assume practically the same shape after the compression. In Hall's, as in Painter's, the part of the disk or plug which enters the bottle neck is made slightly smaller in diameter than the bottle neck. The only important difference between the two is that in the defendants' there is an outward flange on top of the cup-shaped disk or plug, which is described as "an accessible shoulder for engagement by a bottle opener." This shoulder may serve an additional purpose, and may be an improvement on Painter's patent; but, even if it answers an additional purpose, it would not thereby escape infringement. The essential operation, which is the sealing of bottles by the expansion of strong and ductile material against a packing in the groove of the bottle neck, is the same. Gen. Spear, who, after long training in other careers, became an examiner in the patent office, passing through all the grades until he was commissioner, and who has devoted much of his life to examining mechanisms and patented devices, testifies that certain of defendants' devices in evidence correspond exactly to the three claims of the Painter patent; that those made with the outward projection of the flange instead of the inward projection of the shoulder correspond in substance with each of these claims, the outward projection of the flange in Hall's patent being the mechanical equivalent of the inward projection of the shoulder in the Painter patent. None of the experts examined by the defendants have disputed the testimony for the complainant on this point. The inward projection of the shoulder in the specification of the Painter patent seems to serve no other purpose than as a safeguard against the metallic plate falling below the groove if it should happen to escape from the expanding tool. In the defendants' patent this purpose is served by the contact of the disk with the shoulder in the bottle neck. In one the glass surface expands inward; in the other the metal surface is expanded outward, to secure the desired contact, and prevent the metallic disk falling into the bottle. The outward flare of the disk above the groove in

Hall's patent is the obvious equivalent of the inward projection of the glass below the groove in the Painter patent, this outward flare or accessible shoulder serving also the additional purpose of facilitating the opening of the bottles. Without producing the drawings of the patents and the exhibits, we doubt that the subject can be made more plain than by reproducing Gen. Spear's description of the defendants' sealing device as shown in the exhibits. He describes it as—

"A stopper consisting of a metallic plug of cup shape, having around its open end or margin an outwardly turned flange, and adapted to fit into the mouth of the bottle with the open end upward; that is to say, the bottom of the cup being downward when it is inserted in the bottle. When the stopper is inserted in the bottle, in order to effect a closure it is forced outward or expanded, and this outward forcing causes the metal of the stopper to enter into a peripheral groove formed around the wall in the neck of the bottle near the mouth. A packing consisting of a band of rubber is interposed between the metal plug and the wall of the groove, and is forced by the expansion of the metal into the groove and against the wall, and is held therein by the metal, which retains its expanded shape after it is subjected to the expanding pressure. The stopper is retained in the bottle by the metal forced into the groove, and the pressure upon the packing between the metal and wall of the groove forms a seal which retains the contents of the bottle. I find this construction shown and described in the patent referred to in the question [Painter's reissued patent, No. 11,685]. I find described and shown in that patent a bottle stopper consisting of material substantially inelastic, which is expanded in the mouth of the bottle, and which, when expanded, retains its shape and holds its stopper in the bottle. Two forms of this stopper are shown in the patent and illustrated in the drawings. Both forms are cup shaped; both are expanded in the mouth of the bottle, and in expanding are forced into a peripheral groove near the mouth of the bottle. In the form shown in the first four figures of the patent the cup-shaped stopper is inverted. In the form shown in Figs. No. 5 and No. 6 the bottom is downward. The form of the stopper which is used with the bottom downward is shown in Fig. No. 6, and consists of a shallow cup, described in the specification as being made of malleable metal, substantially inelastic, such as commercial tin. A packing is inserted in the mouth of the bottle and located in the groove, and, when the cup-shaped stopper is expanded therein, the walls of the cup are forced into the groove by a lateral movement of an expanding tool shown in Fig. No. 5 of the drawings of the patent, and thus the metal is forced against the packing interposed between the cup and the wall of the groove, and the packing is compressed between the cup and the side wall, and a seal thereby formed, while the cup is held in the mouth of the bottle by its contact with its groove. The construction so far described I find in these exhibits."

After further description in reply to a question whether the improvements in stoppers for bottles mentioned in the statement of invention of the complainant's patent are substantially embodied in defendants' seals, he says:

"The statement of invention found in the second paragraph of the complainant's patent appears to be a very broad one, and is stated in comparison with the prior state of the art existing at the time of the application of the patent. It lays an especial stress upon the stopper made of substantially inelastic material expanded within a bottle's mouth, and by reason of the nature of the material remaining in the expanded shape when so expanded; this is in contrast with the old form, in which the material forming the seal was held against the bottle surface by pressure externally applied, and independent of the stopper itself. The exhibits are all included in this statement, and I find them included in the first, fourth, and fifth claims of the complainant's patent. Those claims included elements which I find in the ex-

hibits, but the third claim is excluded by a clause therein which limits it to the 'concave side downward of the disk.' This arrangement I do not find in the exhibits."

Some stress is laid upon the fact that the inward projection of the shoulder in the exhibits showing the defendants' stopping device is very slight; but only a very slight projection is required if it is sufficient to arrest a disk that would pass through the bottle mouth, as that is the only purpose which it serves. But the defendants' circulars recommend an alternative and preferred form of construction,—the insertion of a gasket before the disk is applied. In such cases the gasket rests upon the lower shoulder of the groove, and is compressed against it by the expansion of the disk. The statement of invention in claim No. 5 of the Painter patent lays no stress upon that part of a construction requiring a shoulder, and does not refer to the relative diameter below the groove, and if claim No. 5 is so construed as to eliminate the shoulder, as we do construe it according to its plain words, the fact of infringement is so plain that in argument the defendants' counsel admitted that its "permanent gasket system" infringes, if his many objections to claim No. 5 are overruled. Reference to some of the decisions of the supreme court will show that infringement is not avoided by mere change of form, or renewals of parts, or reductions of dimensions, or the substitution of mechanical equivalents, or the studious avoidance of the literal definition of specifications and claims, or the superadding of some improvement. The court will look through the disguises, however ingenious, to see whether the inventive idea of the original patentee has been appropriated, and whether the defendants' device contains the material features of the patent in suit, and will declare infringement even when those features have been supplemented and modified to such an extent that the defendant may be entitled to a patent for the improvement. *Clough v. Manufacturing Co.*, 106 U. S. 164, 1 Sup. Ct. 188, 27 L. Ed. 134, and *Clough v. Manufacturing Co.*, 106 U. S. 178, 1 Sup. Ct. 198, 27 L. Ed. 138, illustrate such a case, where certain elements in a valve were held in one case to be equivalents of those in a former patent, and to infringe, yet were so modified and improved as to sustain a later patent. In *Consolidated Valve Co. v. Crosby Valve Co.*, 113 U. S. 157, 5 Sup. Ct. 513, 28 L. Ed. 939, the improvements covered by the patents had been held by the court below to involve only mechanical modifications of the prior art, yet the supreme court regarded the Richardson invention as a "pioneer invention," and, although the defendant's valves departed widely from the terms of the claims in suit, it was held that they had secured under a change in form, and by the transposition from one member to another of certain functions, the substance of the complainant's invention, and the claim was construed to cover these modifications. Says the court (page 171, 113 U. S., page 521, 5 Sup. Ct., and page 943, 28 L. Ed.):

"Taught by Richardson and by the use of his apparatus, it is not difficult for skilled mechanics to take the prior structures, and so arrange and use them as to produce more or less of the beneficial results first made known by

Richardson; but prior to 1866, though these old patents and their descriptions were accessible, no valve was made producing any such results."

Richardson's invention was a safety valve, which, while it automatically relieved the pressure of steam in the boiler, did not, in effecting that result, reduce the pressure to such an extent as to make the relieving apparatus practically impossible because of the expenditure of time and fuel necessary to bring up the steam again to the proper working standard. His valve was the first which had a strictured orifice leading from the huddling chamber to the open air to retard the escape of steam, enabling the valve to open and to close suddenly with small loss of pressure in the boiler. In the infringing patent the valve proper was an annulus, and the extended surface was a disk. In Richardson's the valve proper was a disk, and the extended surface an annulus surrounding the disk. The defendant's had two ground joints, and only the steam which passed through one of them passed through the stricture, while in Richardson's all the steam which passed into the air passed through the stricture. The court says (page 179, 113 U. S., page 525, 5 Sup. Ct., and page 946, 28 L. Ed.):

"When the ideas necessary to success are made known, and a structure embodying those ideas is given to the world, it is easy for the skillful mechanic to vary the form by mechanism which is equivalent, and is therefore, in a case of this kind, an infringement."

These conclusions were based on the fact that no prior structure had produced the same result as Richardson's, although the court, of course, did not mean that Richardson had produced the first valve. In the case before us it is clear that no bottle-stopping device at all similar to those exhibited were ever in use before Painter's first invention. How easy it was for Hall, who commenced work under him as an apprentice, and for years was engaged in the same shop upon Painter's devices, to absorb the inventive idea, and to produce the same result by some equivalent method! *Machine Co. v. Lancaster*, 129 U. S. 263, 9 Sup. Ct. 299, 32 L. Ed. 715, was for infringement of a patent for sewing on buttons. This was not the first button-sewing machine, but the court described it as a "pioneer machine," and held that it was infringed by a machine that made use of elements which were individually considered quite different from those in the patent, saying (page 290, 129 U. S., page 308, 9 Sup. Ct., and page 725, 32 L. Ed.):

"The mechanical devices used by the defendants are known substitutes or equivalents for those employed in the Morley machine to effect the same results. And this is the proper meaning of the term 'known equivalent,' in reference to a pioneer machine such as that of Morley; otherwise, a difference in the particular devices used to accomplish a particular result in such a machine would always enable a defendant to escape the charge of infringement, provided such devices were new with the defendant in such a machine, because, as no machine for accomplishing the result existed before that of the plaintiff, the particular device alleged to avoid infringement could not have existed or been known as such a machine prior to the plaintiff's invention."

An instructive case cited in this opinion is that of *Proctor v. Bennis*, 36 Ch. Div. 740, where Lords Justices Cotton, Bowen, and Fry delivered opinions. *Sessions v. Romadka*, 145 U. S. 29, 12 Sup.

Ct. 799, 36 L. Ed. 609, was for infringing a patent for a very simple spring catch for trunks; and although the court says that the mechanical devices used by the defendant, when individually regarded, differed considerably from those of the patentee, yet, as he was the first to make this particular kind of catch, he was regarded as a pioneer in the art, and therefore entitled to a sufficiently liberal construction of his patent to cover the defendant's methods. In another case the supreme court says, "Authorities concur that the substantial equivalent of a thing, in the sense of the patent law, is the same as the thing itself." It is useless to multiply authorities. The three cases cited show how far the supreme court has gone to protect what it calls "pioneer invention." The Painter invention is more distinctly a pioneer invention than any of these. It requires no specially liberal construction of it, however, to make it cover the defendant's devices. In a late case in the circuit court of appeals for the Sixth circuit, McCormick Mach. Co. v. Aultman, Miller & Co., 69 Fed. 371, 16 C. C. A. 259, the court says, "The rule as to infringement of pioneer invention, which points the way to new products or results, is analogous to that applied in cases of infringement of process patents in which the discoverer is only required to point out one practical method of using his process, and is permitted to claim tribute from all who thereafter use the process, whether with his apparatus or with a different or improved means;" and refers to Machine Co. v. Lancaster, 129 U. S. 263, 9 Sup. Ct. 299, 32 L. Ed. 715, and other cases.

The ninth defense raises the question of equitable estoppel, arising out of the conduct of Painter, who, as alleged, stood by for nearly seven months and saw Keizer and his associates organize a company and expend large sums of money in the development of the Hall patent. We need not repeat what has been already said upon this point in the discussion of the questions raised upon the reissue. Within two weeks after the issue of the Hall patent, Painter sent a message to Keizer that he considered the Hall patent an infringement. A competent expert has testified that this patent infringed some of the claims of the original Painter patent. Keizer is presumed to have known the law which entitled Painter to a reissue. He was entirely familiar with the Painter inventions. He took his chances in the lottery of infringement, and has lost, and cannot be heard now to complain that he was misled.

The tenth defense is want of equity jurisdiction in cases of alleged infringement where the things covered by the patents have never been made or sold by the patentees. We have already disposed of this, in effect, in holding that the delay in manufacturing devices under this patent was explained by the litigation which impeached its validity, and that no implications unfavorable to the patentee arose out of such delay. The complainant company was supplying the market with bottle-sealing devices of Painter's invention of the same general type. The "Crown Seals" made under the patents of 1892 are adapted to serve the same purpose. In them the metallic disk is placed over and outside of the mouth of the bottle instead of being placed inside of it. This is a cup-shaped disk, which,

in form and function, is the same as shown in the patent in suit, made of material of the same kind, which stays in the form in which it is pressed. It is pressed into a groove, and by the same pressure the packing is held in contact forcibly with the surface of the bottle, the groove being outside instead of inside the bottle. The cases cited fall short of supporting this defense. In *Hoe v. Knap* (C. C.) 27 Fed. 204, the patented device was a small part of a complicated machine, which in other respects the defendants were entitled to use. The court did not refuse to entertain jurisdiction, but under the circumstances refused an injunction in the interlocutory decree, and allowed the defendants to use it on their giving bond. In the next case cited,—*New York Paper Bag, Mach. & Mfg. Co. v. Hollingsworth & Whitney Co.*, 56 Fed. 224, 5 C. C. A. 490,—the decree of the circuit court which had taken jurisdiction was affirmed by the circuit court of appeals, but Judge Putnam in a short separate opinion expressed a doubt whether the case submitted was not one of mere legal right, wherein complainant should be left to his remedy at common law, if entitled to relief at all. But the same judge, in the later case of *Packard v. Lacing Co.*, 33 U. S. App. 327, 16 C. C. A. 639, 70 Fed. 66, wherein it was asserted that the patent in issue was a "paper patent," and there were no proofs that the patented machines had ever been constructed or put into use, held that "the grant of the patent makes a prima facie case in this particular," and jurisdiction was entertained. In the other case relied on,—*Germain v. Wilgus*, 67 Fed. 598, 14 C. C. A. 561,—the bill showed that the right claimed by the appellants in regard to their patent was being contested in a court of law, and prayed that action be enjoined. The court held that "a party having legal rights, unless some interposing equitable right is presented, has a constitutional guaranty that the facts he presents for determination shall be tried by a jury," and, as they found no equity in the bill, it was dismissed. Some of the authorities cited deal with the question of the propriety of granting preliminary injunctions unless there had been a verdict of a jury or long acquiescence in the validity of the patent by the public. These have no bearing on the question of equity jurisdiction on final hearing. The principal case cited therein is *Root v. Railway Co.*, 105 U. S. 189, 26 L. Ed. 975, where a bill merely for an account of profits and damages against an infringer was dismissed because it did not appear that there was not a complete remedy at law, but Mr. Justice Mathews in the course of his opinion, referring to the statute which expressly vests the court with jurisdiction "to grant injunctions according to the course and principles of courts of equity to prevent the violation of any right secured by patent" (now section 4921, Rev. St.), states the well-settled principles which fully sustained the jurisdiction in this case. See *Shaw v. Cooper*, 7 Pet. 292, 8 L. Ed. 689; *Walk. Pat.* § 106.

Upon the whole case, we are of opinion that the complainant is entitled to the relief prayed in the bill. The inventive idea whereby a bottle-sealing device of great economy of material, great facility in operation, and great stability in maintenance was secured by the joint and co-operating action of elements which had never before been combined to accomplish the same purpose or operate in the same

way was entirely original with Painter. Nothing in the prior art affects his patent. The defendants enjoyed the unusual opportunity of presenting to the trained experts of the patent office every substantial defense which has been presented here. The original and reissued patents were granted in strict accordance with the law. The claims therein clearly cover the invention disclosed in the defendants' patent, and the infringement is so apparent that the experts called by them have scarcely disputed it. Painter's invention is not one of those great epoch-marking discoveries like that of printing, or the steam engine, or the electric telegraph, which opened to their inventors the portals of the Pantheon of the immortals. For such as these the love of fame and the glory of being benefactors of human kind served alike as motive and reward, but to the patient laborer in workshop and factory the incentive of fame and glory is absent. For them the stimulus of the rewards offered by our patent laws is needed to encourage by the hope of profit that zealous eagerness to improve processes, to remedy defects in machinery, to invent new methods and appliances for saving labor and cheapening production in the numberless articles that are in daily use. It is this stimulus that has made the American mechanic the most alert, observant, and studious of any in the world, and it is the indefinite multiplication of these small inventions and improvements that has wrought an industrial revolution and brought his country to the forefront of the world's commerce. It was the consciousness that in the knapsack of every private soldier there might be the baton of a marshal of France that inspired her soldiers to unparalleled achievements. In our unheroic, industrial age the central processes of a nation's life lie in production and distribution. The protection and hope of profit held out by our patent laws inspires that stimulating energy which leads to experiment, invention, and all the resulting benefits; a refusal of that protection in a proper case will deaden and destroy it. The decree of the court below is reversed, and the case remanded with instructions to grant the relief prayed for in the bill. Reversed.

PIAGET NOVELTY CO. v. HEADLEY et al.

(Circuit Court of Appeals, Second Circuit. May 8, 1901.)

No. 160.

1. PATENT—ASSIGNMENT OF INTEREST.

Where a joint owner of a patent assigned his joint interest therein, and the assignment recited a consideration paid, if it was not paid such fact would not invalidate the assignment as to those dealing with the assignee under it.

2. SAME—INFRINGEMENT.

The owner of a patent for a toy savings bank manufactured such banks for many years, improving the mechanism thereof, and taking out two additional patents, and from the beginning to the end of his dealings thereunder manufactured and sold the banks, with the date of the first patent, though in course of time improvements in the new patents were incorporated in the goods so manufactured and sold. Thereafter he gave

to a party to whom he had sold the manufactured goods a license to manufacture the same bank which he had previously sold them. It had always been marked with the date of the original patent, though it contained the improvements in the succeeding patents. *Held* that, complainant having acquired the right to manufacture under the original patent, the patentee could not claim that the banks he thereafter manufactured and sold with the improvements were not infringements as against complainant.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decree of the circuit court, Southern district of New York. 107 Fed. 134. The suit was brought for alleged infringement of two patents, and the court held claim 3 of the earlier one to be infringed, and claim 5 of the later one not to be infringed. The defendants only appeal. The facts appear in the opinion.

W. H. Kenyon, for appellants.

Clifton V. Edwards, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The first patent is for a toy registering savings bank, and has for its object to provide a receptacle for money, which shall be secure against being opened except when a certain sum has been deposited therein, and which shall at all times visually indicate the exact sum or sums of money that have been deposited. The third claim reads:

"(3) The combination with a money receptacle provided with an indicating dial or dials and mechanism, substantially as described, for indicating the exact money value of deposited coins, of a door or locking mechanism and interlocking devices, whereby entrance to the receptacle can only be had after a definite amount of money has been deposited, substantially as set forth."

The defendant Headley was the inventor. The patent is No. 379,534, dated March 13, 1888 (application filed March 17, 1887), and is to Headley, assignor of one-half to William G. Horton. The complainant claims title under a conveyance of Headley to Horton, June 7, 1893, and a subsequent conveyance from Horton to itself. The conveyance to Horton is attacked on the ground that no consideration actually passed, and on the further ground that it does not specifically convey the patent. Upon this branch of the case it is sufficient to say that we entirely concur in the findings and conclusions of the judge who heard the cause at circuit. It seems not to be disputed that, if the claim be broadly construed, the pattern of toy bank now made by defendants' firm will be within its terms, but if it be narrowly construed there is no infringement. Being himself the inventor and applicant for the patent, defendant Headley, under well-settled principles, may not challenge its validity, and he does not undertake to do so. It will therefore be most convenient first to consider whether he is in like manner confined to such a construction of the claim as will preclude him, either generally or against the present complainant, from contending that the structure his firm now makes is not within the patent. Should this proposition be settled in the

affirmative, it will not be necessary to discuss the mechanics of the case.

The complainant is a corporation organized by one Piaget, as a successor to various firms composed of himself and one or more of his sons, which concerns since 1889 have been engaged in the sale of such banks. Between the Piagets and complainant there is such privity as will entitle complainant to avail of any estoppel touching the manufacture and sale of such banks inuring to the Piagets. Some time prior to 1888 Headley took up the subject of toy registering savings bank, and became acquainted with Horton, to whom he assigned the half of his first patent. The two became partners, and continued manufacturing such safes until 1892. During this time they made improvements in the mechanism of such banks, and took out two additional patents, No. 384,523, June 12, 1888, to Headley & Horton, and No. 450,071, April 7, 1891, to the same. In 1889 a contract was made between Headley & Horton and the Piagets, under which the former were to manufacture and the latter to have the exclusive sale of such banks. The business was at first highly profitable, and during three years the Piagets paid Headley & Horton \$160,000 for banks manufactured at a named price in excess of cost. Of this sum nearly \$80,000 represented royalties, and during the same period the Piagets paid out \$40,000 in advertising. By the close of 1891, however, the business had fallen off, Horton was in a sanitarium, and Headley agreed in February, 1892, to rescind the contract, upon the Piagets purchasing at cost 20,000 banks which he then had in stock. This new arrangement was carried out, and the 20,000 banks bought, delivered, and paid for. Subsequently, having disposed of this stock, the Piagets, on March 3, 1893, took a license from Headley alone to manufacture and sell the banks on a royalty, and did manufacture and sell such banks, paying the royalty to him until June 7, 1893. From the very beginning to the end of these transactions the banks were marked with the words and figures, "Pat. Mch. 15, '88," "Pat. June 12, '88," cast in the bottom plate, and as the years went on, and improvements were made, they were incorporated in the new goods manufactured and sold. The mechanism described in the patent of 1891 was incorporated in banks made after it was devised, and after it was patented, and which had the same patent markings. The banks claimed in this suit to infringe are precisely the same as those manufactured by Headley & Horton subsequent to the patent of 1891.

We find, therefore, that during the existence of the contract of 1889 Headley made banks precisely like those now complained of, marked them "Patented March 13, 1888," and sold them to complainant's predecessor at a price per bank which included, not only the cost of production, but also a considerable royalty; that, upon the abrogation of that contract, he sold to the same party a considerable number of the same banks, stamped in the same way, and received the price; that he gave to the same party a license to go on and manufacture the same bank which had been theretofore made by his firm, and received royalty on banks manufactured under that license. We are satisfied that now, when complainant has obtained title to this

patent of March 13, 1888, it does not lie in the mouth of Headley to assert, as against complainant, that the banks he used to stamp and sell as being within said patent are not infringements. The decree of the circuit court is affirmed, with costs.

CARY MFG. CO. v. ACME FLEXIBLE CLASP CO.

(Circuit Court of Appeals, Second Circuit. May 14, 1901.)

No. 144.

1. PATENTS—CONTEMPT—VIOLATION OF INJUNCTION.

A defendant, which, after the issuance of an injunction prohibiting it from selling an infringing article, continues to circulate advertising matter having thereon a picture of such article, and to sell to its customers an article which, while not the one adjudged an infringement, is similar, and also an infringement, and subject to the same objections pointed out in the opinion of the court to the one in litigation, is guilty of a violation of the injunction.

2. CONTEMPT—FINE—AWARDING PART TO COMPLAINANT.

A circuit court has power to direct the payment to a complainant of a part or all of the fine imposed on a defendant for contempt in violating an injunction as a compensation for his time and outlay in prosecuting the application.

In Error to the Circuit Court of the United States for the Southern District of New York.

This is a writ of error by the defendant below to review a judgment of the circuit court for the Southern district of New York, which imposed a fine of \$2,000 upon the defendant for a violation of an injunction by that court against an infringement of letters patent No. 314,204, dated March 17, 1885, issued to William O. Swett for a staple fastener for wooden vessels.

A. G. N. Vermilya, for plaintiff in error.

Albert M. Austin (Douglas Dyrenforth, of counsel), for defendant in error.

Before WALLACE and SHIPMAN, Circuit Judges.

PER CURIAM. This court, upon the appeal of the Cary Manufacturing Company, affirmed a decree of the circuit court for the Southern district of New York (99 Fed. 500) wherein upon a bill in equity brought by the Acme Flexible Clasp Company the Cary Company was adjudged to have infringed the Swett patent (41 C. C. A. 338, 101 Fed. 269). In the opinion the patented fastener was said to be a "fastener having two tapered or pointed shanks at the ends of an integral thin connecting strip, the connecting strip being in such form and so proportioned as to bend readily in use, and without such elasticity as to tend to draw the shanks from the wood; the metal of the fastener, at the points of junction of the connecting strip with the shank, being sufficiently heavy to receive the force by which the shanks are driven into the wood of a package in use." The defendant was making and selling a fastener which had tapered and pointed shanks at the ends of an integral connected strip which had been thinned and then split longitudinally. An in-

junction was thereupon issued, and proceedings in contempt were subsequently commenced by the Acme Company to punish the alleged violation of the order. The defendant is openly manufacturing and selling staple fasteners, but says that they are made in accordance with the expired letters patent No. 88,501, dated March 30, 1869, to Purches Miles, for an improved curtain and carpet fastener, which consisted in a tack and binder formed of two penetrating points at or near the ends of a clamping bar of the same material with the tacks, and flattened so as to hold the fabric securely along an extended surface. The bar is said in the specification to have been flattened and made slightly concave on the under side so as to be stiff, and at the same time clamp the curtain or carpet. It is manifest that it was not intended that the clamping bar of the Miles fastener should be bent around the edge of a wooden vessel, but the intent was that it should be stiff, and clamp the surface of the fabric. The connecting strip of the defendant's new staple is thin enough to be flexible, although not as flexible as its predecessors, and is bent, and used for the same purpose. By what means the Miles rigid fastener has been made to become the staple which takes the place and answers the purpose of the original infringing staple we are not advised, but the result is apparent. The defendant, after knowledge that the injunction had been issued, did not cease the publication of its former advertisements, which exhibited the "split fastener," or the circulation of postal cards having the picture of the same device. It says that before the injunction was issued it had previously made a contract with several periodicals for a year's advertising, that the advertisement as prepared included a picture of the split fastener, and therefore that the further publication was not the act of the defendant; but it did not change or take steps to alter the advertisement, and it continued to circulate the old postal cards. An additional defense is that the injunction prohibited selling the fastener, but did not prohibit offering it for sale. These advertisements and postal cards showed a careless disregard of the spirit of the order. If they had stood alone, the acts would very likely not have been visited with punishment, but, coupled with the sales of the new fastener, they indicated an intent which was not consistent with innocence.

The part of the judgment of the circuit court which directed a payment by the clerk to the complainant of one-half of the fine is objected to. The power of the circuit court to direct the payment of a part or all of the fine to the complainant in an application for contempt, as a compensation for his time and outlay in prosecuting the application, has been often recognized in the circuit courts, especially in this circuit; and in practice is a power which ought to be exercised when the expenses and trouble to which the complainant has been subjected justify its exercise. *In re Mullee*, 7 Blatchf. 23, Fed. Cas. No. 9,911; *Macaulay v. Machine Co.* (C. C.) 9 Fed. 698; *In re Tift* (D. C.) 11 Fed. 463; *In re North Bloomfield Gravel-Min. Co.* (C. C.) 27 Fed. 795; *Wells, Fargo & Co. v. Oregon Ry. & Nav. Co.* (C. C.) 19 Fed. 20. The judgment of the circuit court is affirmed, without costs.

THE SAMUEL F. HOUSEMAN.

(Circuit Court of Appeals, Third Circuit. May 10, 1901.)

No. 13.

SHIPPING—SINKING OF LIGHTER—LIABILITY OF OWNER.

Evidence held to show that the sinking of a barge, 14 hours after being loaded as a lighter, and while still lying alongside the ship with another large steamship close on the other side, was caused by her being crushed between the two during a storm, and was not due to her unseaworthy condition, so as to render her owner liable for the loss of the cargo.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

See 103 Fed. 663.

Henry R. Edmunds, for appellant.

Horace L. Cheyney, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. This is an appeal from a decree of the district court for the Eastern district of Pennsylvania, in admiralty. The facts of the case, as established by what seems to us the preponderating weight of the testimony, are as follows: In the month of July, 1898, the steamship *Scotia* was in the port of Philadelphia, laden with a cargo of kainit, consigned to the appellee. This cargo was being discharged into lighters furnished to the appellee by the Philadelphia Lighterage Company, to be transported by it to the Tygert-Allen Company's works at Greenwich, on the Delaware river. Mr. Roth, a clerk of the appellee, who had the hiring of the barges, called at the office of the lighterage company to procure another barge, in order to finish the lightering of the cargo. Mr. Brown, the superintendent of the lighterage company, informed Roth that they did not have a barge; whereupon Roth, who had been specially instructed by the appellee not to do any business with Hagan, the appellant, requested Brown to get one from Hagan, whose place of business was but a few doors below that of the lighterage company. Brown went into Hagan's, hired the barge *Samuel E. Houseman*, and on his return informed Roth that he could get this barge, but would not be responsible for it, and that he would have to take the risk himself; to which Roth says, "I concluded to take the barge at our risk." The instructions from the appellee to its agent, Roth, not to do business with the appellant, and the conversation between the agent and the superintendent of the lighterage company, as well as the purpose for which the boat was to be used, were not made known to the appellant. The hiring was for an indefinite time, at five dollars per day, which included a man on board to keep her pumped out, but who had nothing to do with the loading, discharging, or moving of the boat. The hire money was paid to the appellant by the lighterage company. On the 2d day of July, 1898, the lighterage company's tug came to the appellant's shipyard, and took charge of the *Houseman*, which had been recently repaired, and was in good seaworthy condition, and took her to pier 43, Dela-

ware river, where she was placed alongside the ocean steamship Scotia, which was lying in the same dock with the ocean steamship Florida, at pier No. 44. So that the barge was lying between the two steamships, and so close together were they that the captain of the barge could reach over his boat, and touch the Florida. They commenced to load the Houseman about noon of Saturday, July 3d, and finished about 11:30 p. m. the same night. No attempt was made to remove the boat from this dangerous position between the two steamers, but it was permitted by appellee to remain there for a day after being loaded. Nothing more than the ordinary pumping of the boat in summer time was required, and she remained in good seaworthy condition, with a man in charge, until about 3 p. m. of July 4th, when a storm arose, with wind blowing at the rate of 41 miles an hour. This had the effect of drawing the steamers together in the dock, squeezing the barge, tearing and breaking her planks, and causing her to make water so fast that, notwithstanding the efforts of two men on board, it was impossible to keep her afloat by pumping, and she sank in the dock, between the two steamers, shortly after 10 o'clock p. m. In August, 1899, more than a year thereafter, a libel in personam was filed by the appellee against Peter Hagan, the owner of the barge, for the loss of the cargo of kainit, alleging the unseaworthiness of the barge as the cause thereof. A decree was entered by the court below against Peter Hagan, the owner and respondent, for the sum of \$1,268.16, from which decree this appeal was taken.

The questions raised by this appeal are, in the main, questions of fact, and the assignments of error, 10 in number, are, with one exception, to findings of fact by the court below. In our reading of the testimony, we are compelled to take a different view of the evidence from that taken by the court below, as is indicated by the statement, just made, of facts that we think the weight of the testimony establishes. Much of the testimony was conflicting and unsatisfactory, but we think the court below erred in giving undue weight to that on the part of the appellees, and in holding that their contentions had been maintained.

In regard to the crucial question of fact, as to what caused the sinking of the barge of the appellant, whether hired directly from him or from the lighterage company, it seems to us that the testimony of the appellant, and the circumstances tending to corroborate it, were lost sight of by the court below, and that the conclusion that she sank from the unseaworthy condition existing at the time of hiring was reached on insufficient evidence, resting, as it did, largely on the inconsistent testimony of the man in charge of the barge in regard to the necessity of pumping prior to the storm of the afternoon of July 4th. The testimony, however, shows that the barge had been recently overhauled and repaired just prior to the hiring, having only been used for lightering three cargoes; that she was in fair condition on the 3d of July, when she was loaded from the Scotia by the appellee; that if any pumping was done after she was loaded, and prior to the storm on July 4th, it is not at all clear from the testimony that it was other than the pumping usually

necessary in a loaded barge, and consistent with a seaworthy condition.

On the other hand, we think an adequate and efficient cause of the sinking was shown by the testimony in regard to the storm which occurred on the afternoon of July 4th. We think the clear weight of testimony is that the barge was squeezed by the two steamships on either side of her, in the narrow space that she occupied between them. The condition of the barge, as to her planking above and below water, disclosed when she was raised, was such as must have resulted from some such pressure as would be caused by the movement of the two steamships towards each other consequent upon the storm. The testimony as to this condition is not controverted. It includes, not only that of the man in charge, but of the ship carpenter, who inspected the barge just after she was raised and hauled out for repairs. The planks above and below the water line were broken in, and her lines were pressed out of shape. These breaks were new breaks, as testified to, and could not possibly have existed prior to the storm. The storm was more than an ordinarily severe one, and shown by the official reports of the weather bureau to have been characterized by a wind blowing at the rate of 42 miles an hour. The only testimony relied upon to controvert this conclusion is, as we have said, that of the man in charge of the barge, in regard to pumping on the morning of the 4th of July, and whose inconsistent testimony is undoubtedly open to criticism. But he testifies distinctly that the two steamships "pulled away from their wharves during the squall," and "did squeeze the barge so hard that there were two planks broken just over the pump at the butts, and then her bilges were squeezed in and crooked, and also some of the planks," and that he was "on the barge, in the cabin, at the time." John Lynch, also, who testifies that he "came on board during the storm, to help the captain," says that "the two steamers were touching her," and that the "wind caused the steamers to pull against her," and were "smashing her." After a careful reading of the testimony on this point, we think that the sinking of the barge is reasonably accounted for by the testimony which connected it with the storm, and the consequent pressing together of the two large steamships, between which she was lying, and in which dangerous place the appellee had allowed her to lie for 14 hours after she had been loaded.

Although, in this view of the case, it may not be necessary to discuss the testimony as to the other points raised by the assignments of error, we are of opinion that the testimony supports the contention that the barge was hired to the Philadelphia Lighterage Company, and not to the appellee, and that, therefore, the present action, being in personam against the appellant, must fail. For the reasons stated, the decree of the court below must be reversed, and a decree entered dismissing the libel.

THE C. F. BIELMAN.

(District Court, E. D. Wisconsin. May 7, 1901.)

1. SALVAGE—RIGHT TO COMPENSATION—SERVICES OF SEAMEN ON BEHALF OF THEIR SHIP AND CARGO.

A claim for salvage services can only be preferred by persons who were not bound by their legal duty to render them; and since it is the duty of seamen, in the event of distress or shipwreck, to exert themselves to the utmost to save the vessel, cargo, and stores, they cannot become salvors, unless they have been discharged, or the voyage is terminated by the wreck of the vessel or her absolute abandonment by all, or all except the salvors, without hope or expectation of recovery.

2. SAME—ABANDONMENT OF SHIP.

The abandonment of a stranded vessel and her cargo by the owners to the insurers is not an abandonment, within the meaning of the maritime law, which terminates the voyage, but results merely in a change of owners; and the duty of master and seamen to stand by the vessel and cargo is unaffected by such change, and services thereafter rendered by them in that regard are not salvage services which can be compensated as such by the courts, however meritorious they may have been.

3. SAME—AUTHORITY OF MASTER—PROMISE OF EXTRA PAY.

A master whose vessel has stranded has no authority to promise the seamen additional pay, on behalf of the insurers, for work done for the saving of the ship and cargo, which it was their imperative duty to do without extra compensation; and such a promise cannot operate as a discharge of the men from the service of the ship, or entitle them to recover as for salvage services.

In Admiralty. Suit by seamen to recover for salvage services.

Libel of seamen for alleged salvage service under these circumstances: The steamer was on her voyage from Buffalo to Milwaukee, laden with coal; and the libelants were serving on her as common seamen, engaged for the round trip at \$25 each per month. On the night of September 17, 1900, the steamer stranded on Fisherman's reef, in Lake Michigan, about 2 miles off shore, and about 15 miles from Washington Harbor, under no stress of weather. The master took five of the crew in a yawl to secure help, placed his order for a tug and a vessel for lightering, returned next morning, and ordered the crew to commence throwing the coal overboard; and the libelants concur in the statement that the master and mate said it was "insurance work," and they must "do the right thing," and would be treated right; that "it is seventy-five cents per hour." But the master denies that any such statement was made by him, or in his hearing. The libelants worked during that and succeeding days up to the liberation of the steamer on September 22d,—not constantly, but from time to time; and as the steamer was scuttled, as a precautionary measure, and the sea washed the decks during part of the time, the work was difficult as well as unusual, but involved no imminent peril. One day and night, the libelants testify, there was quite a gale, interfering with operations; and a portion of the crew went ashore for the night, at the instance of the United States life-saving crew, fearing danger aboard if the storm increased, returning to the vessel next morning. A tug with lighter and 40 men reached the steamer September 18th at 6 p. m., and a load of coal was taken on and carried to port next day; returned September 20th, and another cargo was taken, coal being shoveled into the lake meantime. A wrecking outfit arrived September 20th, with further help; and the steamer was released September 22d, arriving at Milwaukee September 23d with about one-third of her cargo, and was put into dry dock for repairs. At Milwaukee the three libelants declined to return with the steamer. Two demanded their pay, and were paid at the contract rate, and gave receipts. The other, William Batchelder, claimed extra pay, refused to accept otherwise, and the answer of the respondent tenders his wages at the contract rate, and the amount is deposited for his

Jackson B. Kemper, for libelants.
Markham & Hamilton, for claimant.

SEAMAN, District Judge (after stating the facts). The libelants were seamen engaged in the performance of their duty to ship and cargo, as such, when the alleged service in the nature of salvage was rendered. The doctrine is well settled that their duty and allegiance were due continuously throughout the term of engagement; that it was imperative, in the event of distress or shipwreck, to exert themselves "to the utmost to save the vessel, cargo, and stores," and their failure so to do is declared by statute a bar to any claim for wages. Section 4525, Rev. St. Salvage services can be performed only "by persons not bound by their legal duty to render them" (2 Pars. Shipp. & Adm. 264), and seamen "are not allowed to become salvors, whatever may have been the perils or hardship or gallantry of their services in saving the ship or cargo," as remarked by Mr. Justice Story in the early case of *Hobart v. Drohan*, 10 Pet. 108, 122, 9 L. Ed. 363, unless their connection with the ship is dissolved. The authorities on the subject are reviewed in the case of *The C. P. Minch*, 20 C. C. A. 70, 73 Fed. 859, 865, and the opinion thus states the deductions therefrom:

"In every case where compensation in the nature of salvage has been awarded to seamen, the voyage has terminated by the shipwreck of the vessel, which has either gone to the bottom or left her bones on the shore, or she has been abandoned by all, or by all except the salvors, under circumstances which show conclusively that the abandonment was absolute, without hope or expectation of recovery, or the seaman has been by the master unmistakably discharged from the service of the shipowner."

The fairness of this summary is conceded in the brief submitted on behalf of the libelants, but it is contended that the testimony presents a case within the exceptions, based upon the twofold assumption (1) that a so-called "abandonment" to the underwriters appears; and (2) that such fact, in connection with the alleged conduct of the master, operated as a discharge of the seamen "from the service of the shipowner." I am of opinion that neither of these theories is tenable; that the first is unsupported by proof, and the second is unfounded either in law or in fact. Under the law of marine insurance, the property at risk may be abandoned to the insurer in cases of constructive total loss, and such act amounts to "the cession by the insured of all his interest in the subject insured to the insurer." 1 Am. & Eng. Enc. Law (2d Ed.) 5. But there is no testimony in this case of such an abandonment in fact, nor of circumstances calling for its exercise; and the utmost that can reasonably be inferred is that underwriters were duly informed of the stranding, and either furnished or approved the relief expeditions. If so, they were acting within their right as insurers for the protection of their interest in the property, whether vessel or cargo or both, and not as salvors or volunteers. The *Lydia A. Harvey* (D. C.) 84 Fed. 1000. An abandonment to the insurers, however, merely results in a change of owners, and the duty of master and seamen to stand by the ship and cargo is unaffected by such change. Their service is due to both and to all interests involved in the venture.

Moreover, as remarked by Mr. Justice Grier in *Clarke v. Fashion*, 2 Wall. Jr. 339, Fed. Cas. No. 2,851, the abandonment thus referred to is confined to the insurance contract, and "has never been imported into courts of admiralty, and has no application to cases" otherwise.

In the case at bar it is manifest that the steamer was not "absolutely abandoned, without hope of recovery," and that neither master nor seamen so regarded the situation; but she was on the shoals, in September, when storms were to be expected and with a storm threatening, and it was well understood that speedy release was essential. The duty was unmistakable and urgent for the utmost exertion on the part of master and crew to that end, and without demand or promise of extra compensation. If the master, under such stress of circumstances, promised the seamen better pay at the expense of the insurers, as the libelants testify, the promise was unwarranted. So made, whether exacted or volunteered, it merely called for the performance of an imperative existing obligation, and, at best, was without consideration. Therefore, while the proof preponderates in favor of the alleged promise, I am satisfied that it can receive no judicial sanction as a binding agreement, or as a discharge in any sense from the service of the ship. The libels must be dismissed accordingly, but no costs will be charged. The amount of the tender in favor of the libelant Batchelder will be paid to him.

THE SOUTHWARK.

(Circuit Court of Appeals, Third Circuit. May 13, 1901.)

No. 8.

SHIPPING—INJURY TO CARGO FROM DEFECTIVE REFRIGERATOR—LIMITATION OF LIABILITY BY BILL OF LADING.

An agreement in a bill of lading for dressed meats to be transported across the Atlantic, that the carrier shall not be responsible for any loss or damage arising from breakdown or injury to the ship's refrigerator or its machinery, even though arising from defect existing at or previous to the commencement of the voyage, is one which it is competent for the parties to make, and it relieves the carrier from liability for loss arising from such causes unless negligence is shown, the burden of proving which rests upon the shipper.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

Horace L. Cheyney, for appellants.

J. Rodman Paul, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. The appellants suppose that the learned judge of the district court misconceived the ground upon which they rested their right of recovery. They have extracted a single sentence from his opinion, which, it is said, shows that he assumed that their case was based upon the facts that the rotting of the meat (for which the libel prayed an award of damages) "was due to the breakdowns of

the machinery, and that the breakdowns were caused by negligence"; whereas their actual contention was and is: "First. That an improperly high temperature existed in the commercial box before the accidents, namely, (1) at the time the meat was received, and (2) at the time the ship sailed; and that it was solely due to the unfit condition of the refrigerating machinery. Second. That, even if the breakdowns occurred, as the respondents assert, an hour or two after the vessel sailed, this was evidence that the machinery was in unfit condition at the time of the receipt of the meat and the beginning of the voyage." The court below did say that the machinery supplied by the appellee failed to reduce the temperature sufficiently; that this was due to the several breakdowns, and that the vessel was not to blame for them; but it also referred to and rejected the argument "that the machinery could not have been in good condition at the beginning of the voyage, because the breakdown occurred so soon after the vessel set sail." It is evident, therefore, that the position which the appellants now take was considered, and was decided to be untenable, because the rotting of the meat in question was not due to any condition of temperature or of machinery which existed when it was received, or at the time of sailing, but to the breakdowns that subsequently happened; and that the occurrence of these accidents so soon after the vessel had sailed did not relieve the shippers (appellants) from the burden of proving the carrier's (appellee's) negligence. In so dealing with the case the learned judge did not overlook, but manifestly disposed of, the libelants' contention; and our independent examination of the record has led us to the conclusion that he disposed of it correctly. His opinion, which may be found in 104 Fed. 103, sufficiently states the facts, and rightly rules the law. The decree is affirmed.

SMITH v. YELLOW PINE CO.

(District Court, S. D. New York. May 16, 1901.)

WHARVES—LIABILITY FOR INJURY TO VESSEL—UNAUTHORIZED REMOVAL.

A dock owner is liable to the owner of a steam canal boat for injury caused by its resting at low water on an uneven bottom in a slip into which it was moved, by the dock superintendent's orders, in the absence of the master, who had previously protested against the removal on the ground of the danger from such cause, which he had ascertained by soundings.

In Admiralty.

Martin A. Ryan, for libellant.

Johnson & Hess, for respondent.

BROWN, District Judge. The evidence and circumstances leave no doubt that the canal boat was moved into the slip by the stevedore's men by the dock superintendent's orders, about 10 a. m., near high water, in the captain's absence, and without his consent; and that the boat, as low water approached, rested on an uneven bottom, her stern only being afloat, whereby she was strained and damaged, and soon began excessive leaking. The captain had previously found

by sounding that the bottom was uneven, and for that reason objected previously to being moved as the superintendent desired. The defendants are therefore responsible for the damages which their own unauthorized removal of the boat caused.

The evidence indicates that many other boats had previously lain in the same berth without injury; but there is no evidence that steam canal boats like this had lain there at low tide. The master objected to going in because this being a steam canal boat, with all her heavy machinery at the stern, her great weight aft would endanger her. The next day when removal took place in the master's absence, objection was renewed by the man in charge. Whether the foreman said that this boat would lie there well enough and that he would be responsible for any damages, as alleged by the boat's witnesses, but disputed by the foreman, is not material. The respondent took the risk of the change. There is no evidence that the boat herself was not in a reasonably sound and good condition, and the reasons for hauling her upon an uneven bottom were sufficiently stated; so that there is no ground for holding the master in any way remiss as in the cases of *The Reba* (D. C.) 22 Fed. 546; *The Niagara* (D. C.) 20 Fed. 152, 155; *The Bordentown* (D. C.) 16 Fed. 270, 273; *The Syracuse* (D. C.) 18 Fed. 828.

Decree for the libellant with costs.

CONTINENTAL COAL CO. v. BIRDSALL

(Circuit Court of Appeals, Fourth Circuit. May 7, 1901.)

No. 402.

1. SHIPPING—CONSTRUCTION OF CHARTER—CUSTOM OF PORT.

A custom or usage of the port in which a charter was made may be shown in evidence in a suit to determine the rights of the parties under such charter, where it is silent on the subject to which the custom relates, in order to place the court in the position of the parties when the charter was made; but, to entitle such custom to be read into the charter, there must be no room to doubt its existence, and it must be reasonable, certain, consistent with the contract, and not contrary to law, and so general and long established that the parties are conclusively presumed to have contracted with reference to it.

2. SAME—EVIDENCE OF CUSTOM.

A charter, which by its terms required the charterer to "provide and furnish the vessel a full and complete cargo of coal," cannot be held to exempt him from such requirement on account of a strike among coal miners, merely upon the testimony of coal operators that such was the custom of the port where no provision to the contrary was made in the charter, when no one of the witnesses ever knew of a case in which a charterer had been so relieved, and as against the testimony of other witnesses of longer experience that no such custom existed.

Appeal from District Court of the United States for the District of Maryland.

The schooner *John B. Manning*, of 1,130 tons burden, was chartered to the Continental Coal Company, February 17, 1900, to carry a cargo of coal from Baltimore to one of several Eastern ports, at the option of the charterer, who contracted to "provide and furnish to the said vessel a full and complete cargo of coal," and to pay freight at the rate of two dollars per ton

to Boston or Portland, and more or less to other ports named. At the date of the said charter the Manning was bound to Boston with a cargo, and when discharged she was to proceed to Baltimore to enter on this charter, six days being allowed for loading, Sundays and legal holidays excepted, the vessel to get demurrage at the rate of 6 cents per ton per day if longer detained. The schooner sailed from Boston on March 15th, and arrived at Baltimore on March 29th, reporting the same day to the charterer that she was ready for cargo. On March 21, 1900, while the schooner was on the voyage from Boston to Baltimore, the charterer sent a letter to Jones & Co., brokers for the schooner, that in consequence of a strike then prevailing at its mines they would be unable to load the schooner, and suggested that these agents should recharter her. This notice was communicated to the managing owner of the vessel, and, on March 27th, Jones & Co. notified the charterer that it would be held to its contract, and that, as the vessel was then nearing Baltimore, the captain, on his arrival, would report to it for cargo. The schooner arrived at Baltimore on March 29th, and on the same day reported to the charterer that she was ready for cargo. It declined to load her, giving as a reason that there was a strike at its mines. The schooner was rechartered on April 7th to S. M. Hamilton & Co., for Boston, at 90 cents per ton, and took on board 1,687 tons, with which she sailed on April 14th. The libel was filed for the difference in freight and nine days' demurrage. The court gave a decree for the former, namely \$1.10 per ton for 1,687 tons, amounting to \$1,855.70, but did not allow demurrage, and from this decree the Continental Coal Company appealed.

The main question in the case is whether the existence of a strike relieved the charterer from its contract to load the vessel. The charter is silent on the subject, the contract in the charter party being absolute and unqualified to furnish a full and complete cargo. The contention of the appellant is that, by the custom of the port of Baltimore, strikes at coal mines, preventing the charterer providing cargoes as stipulated, abrogated the charter party, in the absence of special provisions therein with reference thereto, and that libellant failed to exercise reasonable diligence to obtain other cargo after notification of the strike. In support of this defense, the president of the appellant company testified that he had been president for three years, "and that he had always understood it was an established, recognized, and universal custom that strikes relieved from charter parties, although not provided against in the charter party." The secretary of the company testified to the same effect. Two witnesses whose business for three years was dealing in and shipping coal, one witness, who had been the treasurer of a coal company for five or six years, and one witness who had been connected with the like business for twelve years, testified to like effect. None of these witnesses had ever known of a single instance in which the charterer had been relieved from his charter by a strike at his mines when there was no provision in the charter party to that effect. The witness whose experience had covered twelve years testified that in one case about twelve years ago the question was made, and that there was a compromise, but he did not know whether there was a provision in the charter party relieving in cases of strikes. The letter heads of the Continental Coal Company contain these words in conspicuous red type: "All agreements contingent upon strikes, accident, or other causes beyond our control." There was no proof that these letter heads had been used in any correspondence with the owner or agent of the schooner prior to the date of the charter party.

In reply to this testimony, the libellant produces three witnesses, one of whom had been in the ship brokerage business for 20 years, and one for 25 years, who testified that their business was principally in the coasting trade, and that they were familiar with the customs prevailing in that port, and that there was no custom in such trade that a strike at the mines of the charterers relieved from the loading of the vessel where the charter party was in writing and silent on the subject, and that they had never heard of an instance at that port where the charterer had been relieved under such circumstances. The other witness for the libellant was connected with the firm of Jones & Co., ship brokers. He had signed the charter for the schooner, and testified that he was familiar with the customs prevailing with

the coasting trade in Baltimore, and that there was no custom, as was claimed by the charterer. He also testified that there had been no correspondence between the charterer and his firm with reference to this charter, and that he had never had any correspondence with the charterer before this charter was made. The same witness testified: That on March 27th a bark was chartered to load coal for Portland at \$1.10 per ton; a schooner was chartered on March 21st for Fall River at \$1.15; a schooner on March 26th for Boston at \$1.20 per ton; a schooner on March 30th for Boston at \$1.10; a schooner April 10th for Boston at \$1.10. That these were all small vessels and suited the orders which the merchants had at the time. That on April 6th a schooner of 1,720 tons was chartered for Boston at 90 cents per ton; on April 11th a schooner of 1,250 tons for Boston at 80 cents per ton; and on April 16th a schooner of 1,438 tons for Boston at 80 cents per ton. He also testified that the agents of the schooner had made no efforts to recharter the vessel until after her arrival in Baltimore, on March 29th, and after they had notified the charterer of the schooner's readiness for cargo, and that they began their efforts to secure such recharter on March 31st; that the master thereupon gave notice to the charterer that they would proceed to do so as soon as possible, without prejudice to the rights of the owners, under the charter party of February 17th.

Henry W. Williams (Williams, Thomas & Williams, on the brief), for appellant.

Robert H. Smith, for appellee.

Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

BRAWLEY, District Judge, after stating the case as above, delivered the opinion of the court.

The appellant having agreed in the charter party "to provide and furnish the vessel a full and complete cargo of coal," and this contract being unqualified, and being expressed in plain language, the testimony offered has been objected to on the ground that there is no uncertainty in the meaning of the language used, and that the terms of the written contract cannot be varied or changed by parol evidence. The grounds upon which testimony as to usage is admissible in a case of this kind is that such evidence is necessary to place the court in the situation in which the parties were when they contracted, and thus enable it to understand the meaning of their language. Whether such usage be called a "custom," or by any other name, if it is one of the circumstances surrounding the parties to the transaction, and was presumably in their minds when the contract was written, then, in contemplation of the law, such usage is written into the contract. But to have that effect there must be no room to doubt the existence of such a custom, and it must be reasonable, certain, consistent with the contract, uniformly acquiesced in, and not contrary to law.

The existence of such a custom as would control the charter party—that is to say, that would be tacitly incorporated in it on the ground that the parties must be presumed to have contracted with reference to it, and to have had it in mind when making the contract, and for that reason be required to conform to it—must be so ancient, uniform, notorious, and reasonable that all parties doing business of this kind at the port of Baltimore are conclusively presumed to have been acquainted with it, and impliedly annex it to

the language and terms of any contract made which is to be performed at that port. Any usage of such doubtful authority as to be known only to a few has not this character. The witnesses for the appellant have entirely failed to prove facts essential to make out a custom, in the sense of the law. They are all dealers in coal, and all testify, in substance, that it was the custom at the port of Baltimore that strikes at the mines relieved the charterers, yet none of them knew of a single instance where a charterer had been so relieved. This amounts to nothing more than a self-serving opinion of parties engaged in the coal business that they have certain rights, with no evidence that such right has ever been acknowledged or acquiesced in; while the witnesses for the libelant, of much longer and larger experience and greater opportunities of knowledge respecting charter parties, testify that there is no such usage or custom. It is incredible that a uniform, long-established, notorious usage, such as those who make shipments from that port are presumed to have knowledge of, and therefore to be bound by, should exist, if such witnesses as the libelant produced were ignorant of it, and it is only such notorious, reasonable, and well-defined custom that the courts can presume to have been in the minds of the contracting parties, and therefore to prevail over the express words of the contract. *Scrutton, Charter Parties*, 16; *Bliven v. Screw Co.*, 23 How. 431, 16 L. Ed. 510; *The Harbinger* (D. C.) 50 Fed. 941, 943.

The only other point in the case is that made in the sixth and seventh assignments of error, which rest upon the doctrine of the duty of the party to a contract to mitigate, by reasonable diligence, the loss necessarily resulting from the breach. Assuming that this is a case where such a duty was imposed, we are of opinion that the facts proved do not show any fault in the libelant. The owners of the vessel were not in Baltimore, and before undertaking to make a new charter they were entitled to know the entire situation, and it appears that shortly after the arrival of the schooner, when the charterer refused to provide a cargo, the agents of the vessel did, without unreasonable delay, make all proper efforts to secure another cargo. There had been a sharp decline in freight rates for coal vessels on account of the strike, and although it is proved that a few small vessels had secured cargoes prior to the 29th March, at somewhat better rates, yet the testimony shows that, about the time this new cargo was arranged for, other vessels of like capacity were chartered at the same or lower rates. Under the conditions then prevailing, a vessel of this tonnage could not probably upon the instant secure a cargo suitable to her capacity. The broker's clerk testified "that this was the best business we could get for the Manning," and the record does not disclose that any better business was offered, or that the defaulting charterer made any effort to assist or procure a cargo upon any better terms, which it might well have done. The judgment of the court below is affirmed.

THE ONEIDA.

(District Court, S. D. New York. May 6, 1901.)

1. SHIPPING—CARGO DAMAGE—UNSEAWORTHINESS DUE TO IMPROPER LOADING—HARTER ACT.

Neither section 1 nor 3 of the Harter act relieves a shipowner from responsibility for the unseaworthy condition of the ship, due to her improper loading, which renders her topheavy and unstable to such an extent as to make her unfit to encounter the ordinary perils of navigation which should reasonably have been anticipated during the voyage.

2. SAME—UNSTABLE SHIP.

A steamer was so improperly loaded as to render her topheavy and of slight stability of equilibrium, and to give her a decided list, when she commenced her voyage. During the voyage the list shifted from starboard to port, and back again, although she encountered no weather more severe than should reasonably have been anticipated at that season, and finally became so great that the master put into an intermediate port. While lying at a pier, and while the master was removing cargo from a side port to enable him to load more coal in the lower hold, the ship rolled over, bringing the open port under water, and she filled and sank, damaging her cargo. *Held* that, even if the manner of shifting cargo was negligent, and the immediate cause of the disaster, and even if it could be considered a fault in the "management of the ship," within the meaning of the Harter act, yet it was not negligent in itself, but was rendered so only because of the unstable condition of the vessel, which must be considered the essential cause of the damage, and one for which the owner was responsible.

3. SAME—GENERAL AVERAGE.

See note at end of case.

In Admiralty. Suit to recover for cargo damage.

Butler, Notman, Joline & Mynderse and F. M. Brown, for libellant.
Robinson, Biddle & Ward, for respondent.

BROWN, District Judge. At 4 a. m. of Monday, September 21, 1897, the steamship Oneida, then on a voyage to Boston from Jacksonville and Charleston, loaded with lumber and cotton, turned her course to New York in order to right a list, which had increased from the time the steamer left Charleston to about 22° to starboard, so that the master feared to continue the voyage. She arrived at New York at 7 a. m., was docked, stern in, on the lower side of pier 29 East river. By removal of some cargo from her upper between decks, the starboard list was reduced to 7°–8°. To gain access to the coal bunkers so as to load more coal for greater weight in the lower hold, a cargo port was opened in the lower between decks on the port side, and while hauling out cargo by means of a derrick set up at the edge of the cargo port, a sudden lurch of the ship to port carried the port opening below the water line, causing the steamer to fill and sink, to the damage of the cargo, for which the above libel was filed.

The Oneida was 200 feet long by 31 feet beam, built in 1885 with but two decks above the hold. In April and May, 1897, a few months before this accident, an additional deck, 6½ feet above the former upper deck was put in for additional cargo, thus giving her an upper and a lower between deck. At Jacksonville on the voyage in ques-

tion she was partly loaded with lumber, cypress logs and a little general merchandise, by which the hold and between decks were each partly filled. At Charleston no cargo was discharged and all the remaining cargo space was filled with cotton, domestics, lumber and some general merchandise; the fresh-water tank in the hold was full, and 125 tons of coal in the bunkers of the hold.

On leaving Charleston at 6 a. m. of September 18th, she had a list to starboard of 8° – 9° . In the evening of the same day, or the next morning (the master and mate disagree on that point) the vessel rolled over and took an equal list to port during an alleged S. E. squall. The list gradually increased until 10 a. m. of the 20th, when in an alleged N. W. squall she turned again to starboard with a list of 15° which increased gradually to 22° on the morning of the 21st, when the master turned her course to New York as above stated. I say "alleged" squalls, because the differences in the testimony of the master and the mate, the undoubted inaccuracies and misleading statements in the protest, and the differently shaded ink in which certain entries relating to the list, wind and squalls are made in the log, detract from the full credit which might otherwise be due to the defendant's contention on this point.

It is unnecessary, however, to determine the fact in that regard, because I am entirely satisfied from the behavior of the ship and the testimony of the libellant's expert, that the steamer on leaving Charleston was not in a fit condition to encounter the ordinary sea perils likely to be met on a September voyage, and that this unfitness arose from improper loading and inattention to the position of the heavy-weight cargo, having reference to the alteration in the ship and the addition of an upper between decks which was filled with cargo. The remark of the witness McLean that the vessel would be "safe" had reference only to not sinking from a mere list, though she might be wholly unfit in that condition to be navigated. The effect of this on the stability of the ship was the same as if all the upper between decks cargo had been loaded and properly secured on the upper deck of the steamer as originally built. The computations and drawings of the expert and his testimony indicate that the steamer on leaving Charleston had probably a negative metacentric height, and this best accords with her three subsequent changes. As the precise weights and all the different positions of the cargo are not ascertainable, some parts being tons of measurement instead of weight, and as the discrepancies as respects draft show that the data for computing the metacentric height are not exact, its precise position is not determinable; but making all allowance for any such uncertainties, it appears that any possible positive metacentric height was too small for reasonable stability on the voyage.

In the stowage and distribution of cargo weights, therefore, I must find the steamer unseaworthy, through instability and topheaviness in loading on leaving Charleston. This defect was the primary cause of all that followed. There was no such subsequent weather as to cause either shifting of cargo or such lists in a properly loaded ship. Neither the alleged gales nor the slight settling of cargo is

adequate to explain the heavy and repeated lists; nothing but top-heaviness and the consequent slight stability of the ship can explain them.

The Harter act I think does not afford the defendant relief. Its first section leaves as before, and confirms, the ship's absolute responsibility for any faulty stowage of cargo (*The Whitlieburn* [D. C.] 89 Fed. 526; *The Germanic* [D. C.] 107 Fed. 294); and even under the third section, the owner cannot claim "due diligence" to have been used to make the ship seaworthy, where there is negligence of his employés, whether of his land force or of his sea force, before the vessel leaves port (*Farr & Bailey Mfg. Co. v. International Nav. Co.*, 181 U. S. —, 21 Sup. Ct. 591, 45 L. Ed. —).

Even if some indiscretion or negligent act in the precise manner of endeavoring to cure the list at pier 29 were regarded as the immediate cause of the damage, by producing the last list to port; and even if that act could be held to be an act of "management of the ship," because designed for the ship's relief, still that act and the attempted mode of relief at pier 29 were very ordinary and harmless acts, if considered independently of the state of the ship. It is only by considering those acts in connection with the great instability of the ship that they can be regarded as negligent at all; so that evidently it was that extremely unstable condition of the ship that was the essential factor in producing the damage, and that alone which made the later acts harmful. *The Manitoba* (D. C.) 104 Fed. 145.

Decree for the libellant with costs.

Note.

GREENSHIELDS, CORVIE & CO. v. J. H. BACHMANN and Others.

1897 *Hanseatische Gerichts-Zeitung* 81.

(Translation.)

PER CURIAM. The defendants are receivers of the cargo of the plaintiffs' steamer *Knight of St. John*, which on the 29th of December, 1894, sailed from New Orleans with a cargo of wool bound for Bremen. On the voyage the steamer took a list first to port and then to starboard. To avoid the danger of capsizing the captain decided to put into Bermuda as a port of refuge.

After the cargo had there been restowed and ballast taken in, the voyage was continued and terminated without accident.

The plaintiffs seek to bring into a general average adjustment the expenses consequent upon bearing away to Bermuda and upon the stay of the vessel in that port. According to the adjustment, the sums mentioned in the complaint fall upon the defendants. The latter have denied that this is a proper case of general average, contending that an actual present danger to the ship did not attend the continuation of the voyage, the putting into a port of call having occurred through excess of caution; finally, that the cargo was not properly stowed, and that the ship at the time of her departure was not in a seaworthy condition, since she lay over upon her side without any unusual occurrence.

The complaint was dismissed by the *Obere Lands Gericht* on the 1st of February, 1897, upon the following grounds:

The parties are agreed that, in spite of the heavy list of the steamer *Knight of St. John* first to port and then to starboard, which list, according to the protest, continually increased, there was no direct danger of capsizing; that putting into Bermuda as a port of refuge was therefore unneces-

sary; and that the voyage might have been continued without imperiling the ship and cargo.

In the well-considered depositions of Palmers Ship Building Company in Yarrow and of Naval Architect West in Liverpool, taken on behalf of the plaintiffs, the metacentric height, which is the measure of the degree of stability of the ship, has been calculated and determined; it appearing that the height so determined, with reference to the draft of the ship and the manner of stowing her cargo, which is not to be overlooked, was sufficient. The stability of the ship at the beginning of the voyage, nevertheless, appears to have been very small, and the ship, therefore, was very tender. At the same time the testimony is that the vessel was seaworthy so far as stability was concerned, and that, with the consumption of coal on the upper deck and in the upper bunkers, the metacentric height, and consequently the stability of the vessel, would gradually and continuously increase.

If, upon this evidence, it is to be concluded that there was no danger, objectively considered, for ship and cargo, nevertheless, since the captain decided to seek a port of refuge, it does not follow that the deviation is not to be looked upon as an act of a general average character.

A case of general average occurs when sacrifices are made, or a port of refuge sought, in order to avoid a common danger, threatening both ship and cargo. The decision of the question, however, whether in the concrete such a danger does exist and is to be deemed sufficiently serious, must be left to the intelligent judgment of the master. On the one hand, indeed, acts undertaken from overanxious caution to avoid fancied dangers or merely out of considerations of expediency form no basis for general average. On the other hand, the limits of human foresight and the uncertainty as to what the outcome of any particular occurrence will be, render impracticable any purely objective standard in determining when a danger is present.

In case, therefore, the shipmaster in a critical position believes that a serious danger threatens, and takes measures calculated to avoid it, where in doing so no accusation of breach of duty can be made against him, in such case the danger must be deemed an actual one and the conditions necessary to a general average adjustment are present, and cannot be defeated simply because it appears by subsequent investigation that the existing circumstances would not have brought about the disaster apprehended.

It is not to be doubted that this is also the prevailing view of the English law here made applicable as the law of the flag. See Lowndes, *General Average*, p. 29, ff. and for the corresponding statement of German law, *R. O. H. G.* 8, p. 298; *Id.* 23, p. 344.

These general principles of general average, however, are not altered by the York-Antwerp Rules, for rule 10, in accordance with the Liverpool Resolutions of 1890, contains no definition as to when a danger is to be deemed present, and we must therefore fall back upon the law of the country.

Now in the present case it is not to be doubted that according to the principles of the question above stated the master was justified in assuming that there was danger. To judge rightly how far the ship could be inclined and yet retain the power of righting herself, and exactly when the limit of her stability was reached, presupposes that the shipmaster was in a position to calculate the so-called metacenter of the ship and the metacentric height. This requires special technical knowledge which is not to be attributed to the master.

It was therefore natural that the master, with the continually increasing list of the ship, doubted her power to right herself, namely, in case the weather should grow worse, and therefore he feared the possibility of capsizing. He is therefore not to be held culpable because under these circumstances he made for a port of refuge in order to make the ship stiffer by restowing her cargo and taking on ballast.

Although otherwise there may be here a proper case of general average, nevertheless if the danger, in averting which expenses were incurred by the plaintiffs, was brought about in consequence of a fault attributable to them they are not in a position to exact from the defendants, as cargo owners, any contribution under a general average adjustment.

This is also a well-established principle in English law. Lowndes, pp. 28, 34.

Now it seems clear from the foregoing considerations that no fault is to be attributed to the master in seeking a port of refuge under the existing circumstances, but that, even though there was no danger considered from a purely objective point of view, nevertheless he was entirely justified in assuming that such a danger existed. Nevertheless the fact that the ship came into such a position that danger was to be apprehended for the vessel and cargo is a fault to be attributed to the plaintiffs.

In this case it is shown on the part of the plaintiffs that the captain was making his first voyage with the ship and had as yet no exact knowledge of her qualities.

If the fact was that the captain at the time of his appointment received no instruction from the owners as to the qualities of his ship, particularly as to her tender model (instructions which ought to have been given him), or if the fact was that he knew her qualities, but paid no sufficient attention to them, in the one case as in the other, there was a defect which could have been and ought to have been avoided by proper care and by taking suitable precautions in the manner of loading the ship, by means of which a lower center of gravity, and therefore a greater stability, could have been attained. That this was possible appears, without further proof, from the fact that through restowing of cargo and taking on of ballast in the port of refuge a greater stability was actually attained, and the ship afterwards had no list.

It follows, therefore, that the peril which intervened is to be attributed to want of proper care in the loading and stowing. For such failure, however, the shipowner is responsible, and from the consequence of negligence "in proper loading, stowage," etc., he cannot escape liability in accordance with the provisions of the American act of congress of the 13th day of February, 1893 (the so-called "Harter Act") which provisions are conclusive in respect of the question of his liability. Even if, in accordance with the proofs of the parties, the defective stowing of the cargo of the ship did not, according to a purely objective standard, give rise to unseaworthiness of the vessel, nevertheless it is sufficient, in order to establish the fault and liability of the plaintiffs, that the ship was brought into a position in which the master was justified in supposing the vessel to be unseaworthy.

Since there is here no question as to any "faults or errors in navigation and management of the vessel," for which, under the Harter act, the shipowner is not liable in case his duty is fulfilled of using due diligence in loading the cargo and preparing the ship for the voyage, especially as there was here a fault as to the manner of loading, it follows that in no wise can any claim be made to impose upon the other interests their respective shares in general average.

MERCHANTS' & MINERS' TRANSP. CO. v. HOPKINS et al.

(Circuit Court of Appeals, Fourth Circuit. May 7, 1901.)

No. 395.

1. COLLISION—STEAMER AND SAILING VESSEL—PRESUMPTION OF FAULT.

In case of a collision at sea between a steamer and a sailing vessel, the presumption is that the steamer was in fault, since it was her duty to keep out of the way; and the burden rests upon her to rebut such presumption by evidence showing that she kept an efficient lookout, and took all reasonable precautions to prevent the collision.

2. SAME—CONTRIBUTORY FAULT OF SCHOONER.

A schooner cannot be held in fault for a collision with a steamer because after she had been placed in a position of peril through the fault of the steamer, and after collision had become inevitable, she changed her course for the purpose of easing the blow.

3. SAME—VIOLATION OF RULES—FAILURE TO SOUND FOG HORN.

Under the navigation rules (26 Stat. 320), which require sailing vessels to use the fog horn "in fog, mist, falling snow or heavy rain storm, whether by day or night," a schooner which fails to observe such requirement while sailing before a 60-mile wind on a dark and rainy night must be held guilty of contributory fault for a collision with a meeting steamer, unless it affirmatively appears that the neglect could not have contributed to the disaster.¹

Appeal from the District Court of the United States for the Eastern District of Virginia.

Robert M. Hughes (Daniel H. Hayne, on the brief), for appellant.
Edward R. Baird, Jr., for appellees.

Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

SIMONTON, Circuit Judge. A libel was filed in the district court of the United States for the Eastern district of Virginia by the owners of the schooner Darlington against the Merchants' & Miners' Transportation Company, claimant of the steamship Howard, because of a collision between the schooner and steamship. The claimant answered. The evidence on behalf of libelant was taken by deposition out of court. The claimant offered no testimony. The court below hearing the cause entered a decree for libelant in the sum of \$3,193.72, with interest from April 1, 1900, and costs, but filed no opinion stating the grounds for decree. Claimant excepted, and the cause is here on appeal.

It is to be regretted that we are not assisted in deciding this appeal by the reasons of the learned judge who heard the case below. It is still more to be regretted that there is in the testimony no evidence on the part of the claimant showing how, from its standpoint, the collision occurred. Collisions at sea, involving as they do loss of life and of property, have received special attention of all maritime nations. They have by mutual consent adopted and proclaimed an elaborate system of rules, whose purpose is not only to prevent collisions at sea, but to compel an avoidance of all risk of collision. Every case of collision which comes before the courts is an object lesson, requiring the construction and application of these rules. In passing upon it, the courts inquire whether there was a violation of these rules, how such violation could be avoided, or what will excuse such violation. From these decisions seafaring men learn the theory and practice of the law of collision. It is therefore of supreme importance that in each case all the facts should be brought out; that the parties to the collision should detail these facts from their standpoint, so that the court can give full consideration to the rule, and a clear application of the facts thereto. More especially is this desirable when the collision is between a steamer and a sailing vessel. Of course, counsel are the best judges of the conduct of their case, and, if they prefer not to risk the evidence of their own witnesses, no one can complain. But the court, in reach-

¹ Collision rules, see notes to *The Niagara*, 28 C. C. A. 532; *The Mt. Hope*, 29 C. C. A. 368.

ing its conclusion, cannot but realize that they do this with but a part of the case disclosed to it.

The schooner *Kate Darlington*, of 128 tons burden, and in ballast, on October 30, 1899, was on her voyage from Atlantic City, N. J., to the port of Norfolk. Including the captain, she had a crew of five men. She was tight, staunch, and properly equipped. On the afternoon of that day she encountered a stiff gale from northeast, which gradually increased in violence. Her foresail was closely reefed and set, the mainsail doubly reefed and tied up, the flying and main jibs taken in and tied up, and the vessel run under reefed fore sail and fore stay sail. About 9 o'clock p. m. she sighted Cape Charles lightship, passed Cape Charles, and headed into Chesapeake Bay, towards Cape Henry. Her course was W. S. W. About 11 o'clock p. m. the lookout reported a steamship a little on the star-board bow of the schooner. She was then showing both red and green lights, as if she was going head on to the schooner. Then she shut in the green light, showing only the red light, and then there was the collision. The collision occurred just about 30 feet from the stern of the steamship; the schooner striking a glancing blow, causing little or no damage to the steamship, but tearing away the bowsprit and head gear of the schooner. Immediately after the collision the steamer blew her whistles, and apparently changed her course, and went in the direction of the schooner. But in the darkness the schooner had disappeared, and each vessel went on its way. The steamship blew no whistle as she was approaching the schooner. The schooner did not blow her fog horn. The night was dark, wind blowing about 60 miles an hour, raining very heavily, and misty.

The question is, who was in fault? We have no means of ascertaining what was done on the steamship,—whether she had any lookout; whether, if she had, was it efficient; when she first saw the schooner; what precautions she took. All of these questions but the last find no answer in the testimony. The last is left to conjecture. Nor are these questions unimportant. When a steamer approaches a sailing vessel she is required to exercise the necessary precautions to avoid the risk of a collision, and, if this be not done, *prima facie* the steamer is chargeable with fault. *The Scotia*, 14 Wall. 170, 20 L. Ed. 822; *Steamship Co. v. Rumball*, 21 How. 372, 16 L. Ed. 144. The witnesses for the libelant say that when they first saw the steamship she showed a white light, and then both red and green lights were seen. Very soon she shut out the green light, and showed only the red. The inference from this is that she ported her helm. This is all. Now, nautical rules require that, when a steamship and sailing vessel are approaching each other from opposite directions or on intersecting lines, the steamship, from the moment the sailing vessel is seen, shall watch with the highest diligence her course and movements, so as to be able to adopt such timely measures of precaution as will necessarily prevent the two vessels from coming in contact. Porting the helm a point when the light of the sailing vessel is first observed, and then waiting until a collision is imminent before doing anything further, do not

satisfy the requirements of law. *The Carroll*, 8 Wall. 302, 19 L. Ed. 392. It has not been shown on the part of the steamship when and how the lights of the sailing vessel were observed. It is to be inferred that they were seen as she ported. That is the only inference to be drawn. She certainly did not avoid the collision. When the steamship saw the lights of the schooner and ported, she must have known that she would cross the course of the latter. She had a right to do this, instead of going under her stern, which was the safer way. But when she took this course she took the risk, and must suffer the consequence. *Mars. Mar. Coll.* (2d Ed.) 362. It is the duty of the steamer to keep out of the way of the sailing vessel, giving her a wide berth, and so avoiding not only the collision, but the risk of collision. *The Louisiana v. Fisher*, 21 How. 1, 16 L. Ed. 29; article 20, International Rules of Navigation (23 Stat. 442).

As to the schooner: The story as told by her witnesses is that they first observed the steamer showing her white light, and then her green and red lights, a little on the starboard bow of the schooner; that very soon the steamer shut in her green light, showing only the red, and that almost immediately she was seen bearing down on the schooner; that the master of the schooner, fearing collision, and being certain that it would happen, gave orders to the man at the helm to starboard the wheel; that this was done to ease the blow. Then came the collision. In estimating the time between the discovery of the steamer's lights and the collision, the witnesses vary. Barnes, a deck hand, says, the port light was showing a minute or minute and a half. Payne, the mate, says, "Not over two minutes, probably three." But he also says "that the red light was just under our bow," and "the steamer changed her course, shutting in the green light and showing her red light only just before the collision, and immediately after that the collision occurred." The master of the schooner estimates that it was something like a minute to a minute and a half between the time when the green light on the steamer was shut in and only the red light was seen, and the occurrence of the collision. Barnes estimates the distance between the two vessels when the lights were first seen at about 100 yards. The master of the schooner says, in answer to a question as to the distance between the vessels when the lights were first observed: "It might have been half a mile. I would say a half mile off, if I had to say something." Just before the collision the schooner changed her course. The mate, who was at the wheel, says this was not done until they saw that there was no chance of avoiding the collision. It is very evident from this testimony that the interval between the first discovery of the steamship and the collision was very short. The witnesses attempt to estimate the time, but estimates of this sort are necessarily more or less uncertain. *The Stephen Morgan*, 94 U. S. 601, 24 L. Ed. 266. All agree that they saw the steamship bearing right down on the schooner, and that the change of course of the latter was to lighten the blow. The answer of the respondent admits that the schooner with which she collided "lightly struck the steamer on her port quarter." The maneuver of the schooner accomplished its purpose. "The

steamship being under obligation to keep out of the way of the schooner, did not do so. It approached too close to her. The steamer therefore is to blame for suffering this peril to occur; for, if it be conceded that the schooner was wrong in starboarding her helm, this cannot affect her right to recover, if she be in other respects without fault, because the steamer, having the right of way, put her in this predicament, and must answer the consequences." *The Carroll*, 8 Wall. 305, 306, 19 L. Ed. 392; *The Falcon*, 19 Wall. 76, 22 L. Ed. 98. But it cannot be said that the schooner was wholly without fault. All the testimony shows that the night was dark, the rain very heavy, and the atmosphere misty. The present international rules require sailing vessels to use the fog horn "in fog, mist, falling snow or heavy rain storm, whether by day or night." The old rule (Rev. St. § 4233) required the signal to be given in fog or thick weather. The first revision (1885; 23 Stat. 438) made it in fog, mist, or falling snow. The last revision (26 Stat. 320) added "heavy rain storms." This rule is imperative, and was not observed by the schooner. This puts her in fault. In the absence of all testimony on the part of the steamship, it cannot be ascertained how far this omission on the part of the schooner contributed to her sudden appearance. Nevertheless, the positive breach of the statute puts her in the wrong. "Where a vessel has committed a positive breach of a statute, she must show not only that probably her fault did not contribute to the disaster, but that certainly it did not do so; that it could not have done so." *The Pennsylvania*, 19 Wall. 126, 22 L. Ed. 148. In order to recover full indemnity for a collision, the suffering vessel must be without fault. *The Grace Girdler*, 7 Wall. 196, 19 L. Ed. 113.

Two more points require notice. It is charged that the steamship did not stand by after the collision. She did change her course, and blew her whistles. The darkness of the night and the heavy gale separated the vessels so that she could not discover the schooner.

It was finally suggested that there was no proof that the *Howard* was the steamship in the collision. The *Howard* did certainly leave Norfolk for New York that day, and was near the place of the collision. There is no evidence whatever that any other steamship left on that day on that course for any northern port. It is admitted that the *Howard* was in collision with some vessel that night, which "lightly struck the steamer on her port quarter." This was precisely the place and this was the character of the blow which libelants prove.

The court below awarded the libelant, as full damages, \$3,193.72, with interest and costs. Our examination leads to the conclusion that libelant, not being without fault, must bear her part. It is ordered that the decree of the district court be modified, and that the cause be remanded to that court with instructions to enter a decree for libelant in the sum of \$1,596.91, with interest from April 1, 1900, and costs in this court and the court below.

THE MUNICIPAL.

(District Court, S. D. New York. May 18, 1900.)

COLLISION—TOW AND ANCHORED STEAMSHIP—INSUFFICIENT LOOKOUT.

An incoming steamship reaching New York too late at night to pass quarantine anchored for the night only not far from the quarantine wharf on Staten Island, being about one-fourth the distance from Staten Island to the Long Island shore. She was not within the official anchoring grounds, but was not in a place to obstruct navigation by vessels coming up or down the ordinary channel way. She carried a good anchor light, and the night was not dark. During the night scows coming up in tow on a course substantially to the westward of the ordinary one came into collision with the steamer and injured her. *Held*, that she could not be charged with fault for the collision because of her anchoring outside the grounds for so brief a time, under the circumstances, but the tug must be held solely in fault for being out of the usual course without maintaining a proper lookout; it appearing that she could readily have seen and avoided the steamer, had such lookout been kept.

In Admiralty. Suit for collision.

Cowen, Wing, Putnam & Burlingham, for libellant.
Carpenter & Park, for claimant.

BROWN, District Judge. At about 1 o'clock in the morning of December 11, 1899, the steamship Yucatan, about 335 feet long, while at anchor not far from the quarantine wharf, Staten Island, was run into and damaged by some scows in tow of the steamtug Municipal coming in light from sea. The tide was strong flood, and the tow being drawn in a line somewhat crossing the bows of the Yucatan, some of the scows struck her on her port bow, while others swung round and struck her starboard bow, damaging the plates on each side. The defense is that the Yucatan was not anchored on anchorage ground, and that her anchor light was obscured by her letting off steam, and that in consequence she was not seen until it was too late to avoid her.

The evidence shows that the Yucatan had come in from sea the evening before, too late to pass quarantine, and had anchored for the night only, in order to pass inspection in the morning, and had dropped anchor at a point from a quarter to half a mile above the quarantine dock and about the same distance off the Staten Island shore, which is about one-quarter of the distance from the Staten Island to the Long Island shore. The pilot seems to have supposed he was on the so-called anchorage ground, and the answer so avers. But the chart shows otherwise, and that in that region the official anchorage ground runs very near to the Staten Island shore. Having dropped anchor for the night only, and for the purpose of inspection the next morning, I cannot find the Yucatan was under any obligation to proceed further up, or near to shore and to the waters designated for more permanent anchorage. She was not anchored in an unreasonable place, or in a position that was in any way calculated to embarrass or to obstruct the passage of vessels coming up or down the ordinary channel way through the Narrows or mislead them, but was substantially to the west-

ward of the ordinary straight course up channel, and other vessels anchored for the night still further to the eastward.

There is no doubt that the Yucatan for the space of an hour more or less before the accident had been blowing off steam. I cannot accept this fact, however, as a sufficient excuse for the Municipal's running into her. She had a good anchor light about 100 feet forward of the place where the steam was blowing off, and it is very improbable that the steam at that distance would produce a continuous obstruction to the light if any proper lookout had been kept on the Municipal. The master of the Yucatan says it could not do so. The night was not dark, and the Yucatan should have been seen even without lights at an abundant distance for the Municipal to avoid her, and the noise of blowing off steam was a further warning. The Municipal's proper course was directly up the channel, and there was no good reason for her going so far to the westward as three-quarters of the distance towards the Staten Island shore. From the engineer's statement, moreover, it appears that he reported the Yucatan to the pilot at a distance of about 900 feet, when the Yucatan was seen by him straight ahead of the Municipal. This distance was much more than was necessary for the Municipal to avoid the Yucatan by going to the right, to the eastward, as she might and should have done. Evidently no timely attempt was made to give the Yucatan proper leeway. The engineer's estimate of the distance may have been too great, though the error is usually the other way. But the fact that the earliest notice of the near presence of the Yucatan should have come from the engineer, who had none of the duties of a lookout, and who only accidentally saw her, as it would seem, on coming out of the engine room to the starboard side of the tug, points strongly to great remissness in the lookout on the Municipal. This furnishes an all-sufficient explanation of the collision, and fixes the blame upon the Municipal.

The effort to charge the Yucatan with fault because she was to the eastward of the official anchorage ground, cannot be sustained. The cases cited of *The Aller* (D. C.) 59 Fed. 491, *Id.*, 20 C. C. A. 79, 73 Fed. 875, and *The Heipershausen* (D. C.) 56 Fed. 619, do not apply, since the Municipal was not in the least misled, nor embarrassed by the position of the Yucatan. Had the Yucatan known that the Municipal could not avoid her, and thereafter failed to let out more chain, she might have been held also to blame for not doing so. But the tug was coming up at considerable speed, and the Yucatan is not chargeable with any such knowledge in time to be of any use. She could not have had any reason to suppose that the tug would not keep out of her way, as the tug could have done with perfect ease had she properly observed the Yucatan, until it was too late.

Decree for the Yucatan with costs.

MAYO v. DOCKERY.

(Circuit Court, E. D. North Carolina. May 22, 1901.)

1. REMOVAL OF CAUSES—FEDERAL QUESTION—HOW SHOWN.

A cause not removable on the ground of diverse citizenship, and not otherwise specially provided for, cannot be removed under the judiciary acts of 1887 and 1888 (25 Stat. 433), as one arising under the constitution or laws of the United States, unless such fact appears by the plaintiff's own statement, and, if it does not so appear, the want cannot be supplied by any statement in the petition for removal, or in any subsequent pleading.

2. SAME—ACTION AGAINST MARSHAL—PROCEDURE FOR REMOVAL.

A United States marshal, sued for trover in a state court by a citizen of the same state for the seizure of property under process issued by a federal district court in a private cause, cannot have such action removed into the circuit court by applying to such court for a writ of certiorari, but it can only be removed on petition filed in the state court, and upon some ground provided for by the general removal act.

At Law.

Battle & Mordecai and W. B. Rodman, for plaintiff.

C. M. Bernard, U. S. Atty., and F. H. Busbee, for defendant.

SIMONTON, Circuit Judge. This is a motion to remand the cause to the state court from which it has been removed. The plaintiff, L. R. Mayo, filed his summons against H. C. Dockery in the superior court of Beaufort county, N. C., on 15th May, 1900. The complaint was filed on the second day of the term of said court, 29th May, 1900. It alleges that on 20th April, 1900, the plaintiff was the owner of certain premises in the town of Washington, being a brick store, warehouse, and outbuildings, and of a large stock of goods, wares, and merchandise stored therein; "that on said 20th April, 1900, the defendant, by his servants, agents, and employes, unlawfully and with force broke and entered into said store and warehouse, and unlawfully took from plaintiff's possession and carried away said stock," etc., "and still unjustly detains the same from plaintiff, and prevents plaintiff from carrying on his lawful business in said store," etc., "to his damage \$10,000." It prays judgment for that sum. The defendant appeared by his attorney, and was allowed 45 days within which to answer or demur. On June 6, 1900, the defendant presented his petition to the circuit court of the United States for the Eastern district of North Carolina, setting forth that this suit had been commenced against him; that he is and was for some time last past marshal of the United States for said district, and that the suit so commenced against him was on account of an act done by him under color of his office,—that is to say, under an order of the district court of the United States for his district, issued by the judge thereof, in the matter of Hoyt & Mitchell, bankrupts, commanding the seizure of the goods and property referred to in said suit. He prays that the said suit may be removed from the state court to the circuit court of the United

States, and that a writ of certiorari may issue for that purpose. Thereupon the district court entered an order that the suit of L. R. Mayo against H. C. Dockery, now commenced in the superior court of Beaufort county, be removed to the United States circuit court for the Eastern district of North Carolina, and that all proceedings therein be certified to said court. When this order was served upon the presiding judge of the superior court of Beaufort county, he directed his clerk to certify the record in the cause to the United States circuit court for the Eastern district of North Carolina. The cause, having been so certified, is now on the docket of this court, and so this motion to remand is made.

It is the duty of this court to remand a cause, if, at any time after its removal, it be made to appear that the suit does not involve a suit or controversy properly removable. *Ayres v. Wiswall*, 112 U. S. 187, 5 Sup. Ct. 90, 28 L. Ed. 693. In deciding upon this motion to remand, we must inquire, is this suit removable? and then, was it properly removed?

The action in the state court was between citizens of the same state. The complaint nowhere discloses the fact that the defendant is a marshal of the United States, or that the act complained of was done in his official capacity or under the color of his office. The act of 1887, corrected in 1888 (25 Stat. 433), has made an important change in the removal of causes from the state courts. Previous to that, under the act of 1875 (18 Stat. 470), if a defendant, sued in the state court, should, in his petition to that court, show that the suit involves a federal question, the case can be removed, although this fact appear for the first time, the pleadings of the plaintiff ignoring that fact. A case illustrating this is *Bock v. Perkins*, 139 U. S. 630, 11 Sup. Ct. 677, 35 L. Ed. 314, decided at October term, 1890. But, under the act of 1887-88, no case can be removed from the state court into this court, unless the federal question appears in the pleadings of the plaintiff. Its omission cannot be aided by the averments of the petition. This matter is fully discussed, and the change in the provisions of the act of 1875, made by the act of 1887, clearly and distinctly shown, in *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511. This case was followed and affirmed in *Chappell v. Waterworth*, 155 U. S. 102, 15 Sup. Ct. 34, 39 L. Ed. 85, and was again confirmed and applied in *Walker v. Collins*, 167 U. S. 58, 17 Sup. Ct. 738, 42 L. Ed. 76. That case was an action brought in a state court against a defendant to recover damages for an alleged seizure of goods and chattels, property of the plaintiff. The defendants answered, averring that during the times mentioned in the complaint the defendant Walker was the marshal of the United States for the district of Kansas, and that the other defendants were his deputies; that the seizure complained of was made under the authority of an order of attachment issued out of the circuit court of the United States for the district of Kansas, in an action therein pending, in which Van Ingen & Co. were plaintiffs, and H. Cannon defendant; and it was averred that the goods were liable

to be seized, by virtue of said order of attachment, as the property of Cannon. The cause was then removed into the circuit court of the United States, upon petition for removal, with bond. It was heard, and judgment had by plaintiff, which was set aside by the circuit court of appeals. 1 C. C. A. 642, 50 Fed. 737. It was again heard, and judgment again had for plaintiff. This was sustained by the circuit court of appeals. 8 C. C. A. 1, 59 Fed. 70. The cause was carried to the supreme court, the judgments below were reversed, and the cause was sent back to the circuit court, with instructions to remand it to the state court as improperly removed. The rubric is: A case not depending upon the citizenship of the parties, not otherwise specially provided for, cannot be removed from a state court into the circuit court of the United States, as one arising under the constitution, laws, or treaties of the United States, unless that appears by the plaintiff's own statement, and, if it does not so appear, the want cannot be supplied by any statement in the petition for removal or in any subsequent pleadings. This case is on all fours with the case at bar, and shows that the case was not removable.

The other question, was it properly removed? is practically decided. The petitioner evidently overlooked a distinction in the acts of congress, and supposed that he came among the cases specially provided for. But he was not an officer in the revenue service of the United States, nor was he acting under the authority of such an officer. Had this been the case, he could have applied to and have had an order from the circuit court of the United States ordering the removal of the cause, and enforcing it with a certiorari. Rev. St. § 643. Nor was he acting under title 26, "The Elective Franchise," in which case he could have obtained the same relief. Nor is his claim for removal based upon prejudice or local influence, for an indispensable prerequisite to this is diversity of citizenship between the parties. If this had been fulfilled, the circuit court of the United States could have of its own will ordered the removal. His petition discloses the fact that he was acting as marshal, obeying the order of the district court. This could have raised a federal question. *Bock v. Perkins*, supra.

Now, the act of 1887-88 prescribes the mode in which a party sued in a state court can remove his case into the circuit court of the United States. This mode and this relief are the creation of statute, and the statute must be followed. It gives jurisdiction to the federal court, and, to be effective, all the provisions of the statute must be fulfilled. In order to obtain such a removal, the defendant must, before the time for answering expires, file his petition in the state court, and accompany it with a bond, with a certain condition. These are the terms prescribed. They were not followed in this case. So it is clear that the case was not properly removed. This court feels the full force of the argument that the marshal should be protected when he acts in obedience to the orders of the United States court. The question, however, is, can this circuit court in this proceeding protect him? Has it jurisdic-

tion? This jurisdiction must appear affirmatively in the pleadings (Robertson v. Cease, 97 U. S. 646, 24 L. Ed. 1057); otherwise, the court cannot act (Mail Co. v. Flanders, 12 Wall. 130, 20 L. Ed. 249). Speaking only for the circuit court and in this proceeding, this cause is not properly here, and it is remanded to the state court.

EMPIRE MIN. CO. v. PROPELLER TOW-BOAT CO. OF SAVANNAH.

(Circuit Court, D. South Carolina. April 27, 1901.)

1. REMOVAL OF CAUSES—JURISDICTION OF FEDERAL COURT—NONRESIDENCE OF DEFENDANT.

The right given a defendant by the judiciary act of 1887-88 to be sued only in the district where he resides, or where the plaintiff resides, is a personal privilege, which he may waive, and does not affect the jurisdiction of the court over the cause; and while it cannot entertain original jurisdiction of an action against a nonresident defendant, brought by two or more plaintiffs, one of whom is also a nonresident of the district, if timely objection is made, that fact does not prevent it from acquiring jurisdiction by removal where the action is brought in a state court, since the act of removal by defendant is a conclusive waiver of the privilege of objecting to the jurisdiction, which he has himself invoked, and the plaintiffs cannot raise the objection.

2. SAME—REMAND—JURISDICTION TO RESCIND ORDER.

After a federal court had entered an order remanding a cause forthwith, but during the same term, it set aside such order on its own motion and refused the motion to remand. Meantime plaintiff had filed a copy of the first order with the state court, which resumed jurisdiction, and subsequently rendered a judgment, which was affirmed on appeal by the supreme court of the state, on the ground that the order of remand became immediately effective, and deprived the federal court of further jurisdiction, and its subsequent order was therefore void. *Held*, that a motion by plaintiff in the federal court, based on the same ground, to strike the cause from its docket, would not be passed on until defendant had opportunity to remove the judgment of the state court into the supreme court of the United States for review, that the question of jurisdiction might be finally determined by the only court having authority to enforce its decision.

At Law. On motion to strike cause from the docket.

Mitchell & Smith, for plaintiff.

Nathans & Sinkler, for defendant.

SIMONTON, Circuit Judge. This is a motion to strike this case from the docket, upon the ground that it is no longer within the jurisdiction of this court. Proceedings in attachment were commenced in the court of common pleas for Charleston county by W. B. Chisolm and E. B. Addison, who carry on business under the name of the Empire Mining Company, against the Propeller Tow-Boat Company of Savannah, a corporation of the state of Georgia. W. B. Chisolm is a citizen and resident of the state of South Carolina. E. B. Addison is a citizen and resident of the state of Virginia. The complaint having been filed, the defendant, before the time for

answering had expired, entered a special appearance and filed its petition, with bond, praying that the case be removed into this court, upon the ground of diversity of citizenship. Thereupon the state court granted the prayer of the petition, and the transcript of the record was filed in this court. After the cause was docketed here, the defendant gave notice of a motion to vacate the attachment theretofore issued in the cause, and to dismiss the summons and complaint. This motion the plaintiffs met with a motion to remand. The case came on to be heard, and this court, after argument, on May 22, 1899, entered an order remanding the case to the state court. Thereupon, on the same day, the plaintiffs filed a copy of the order remanding the cause in the state court, it being then in vacation. As soon as this order was filed, the plaintiffs presented their affidavit to the clerk of the state court that no demurrer or answer to the complaint had been filed or served on them, and the clerk, pursuing the practice in such case made and provided, entered the cause on the default docket. After the 22d of May, the term not having expired in which the order for remand had been made, this court re-examined the question, became satisfied that the order to remand had been improvidently issued, and revoked it by an order filed June 7, 1899, at the same time refusing to remand the cause. The cause, being on the default docket of the state court, was called up on April 18, 1900, and, being an unliquidated demand, was submitted to a jury, and a verdict had for plaintiffs in the sum of \$3,070.66. A motion was made to set aside the verdict upon the ground that the cause had been removed into the federal court. The motion was denied. An appeal was taken to the supreme court of the state, and the judgment below was affirmed, upon the ground that, the case having been remanded, the state court reassumed jurisdiction, and that the order revoking the remand came too late. 38 S. E. 156. The remittitur from the supreme court having gone down to the court below, the plaintiffs came into this court and entered the motion stated above. This motion proceeds upon two grounds: (1) That the cause was not removable into this court; (2) that, if it were removable, the order made on May 22, 1899, remanding it, went immediately into effect, and could not be revoked by this court.

The first ground was passed upon by the court in its order of June 7, 1899; but, inasmuch as the court then came to its conclusion upon a re-examination of the case, without further argument from plaintiffs' counsel, the matter will be further investigated, aided by the arguments on this motion. The jurisdiction of this court is challenged upon this ground: The statutes of the United States do not confer jurisdiction because of diversity of citizenship, where, as in this case, the plaintiffs are citizens and residents, one of the state of South Carolina and the other of the state of Virginia, and the defendant is a citizen and resident of the state of Georgia; that for some reason this state of facts is *casus omissus*. There can be no doubt that, in a cause brought within the original jurisdiction of this court, it must appear in the record that each plaintiff, if sev-

eral plaintiffs, must be capable of suing, and each defendant, if several defendants, must be liable to the suit, in the federal court. *Strawbridge v. Curtiss*, 3 Cranch, 267, 2 L. Ed. 435. The act of 1887-88 provides that no civil suit can be brought in any circuit court of the United States against any person by original process in any other district than that whereof he is an inhabitant; but, where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant. This is the personal privilege of the defendant. It can be waived. *Trust Co. v. McGeorge*, 151 U. S. 129, 14 Sup. Ct. 286, 38 L. Ed. 98. It therefore is not jurisdictional. Consent of parties cannot give jurisdiction. A fortiori, waiver cannot. *Toland v. Sprague*, 12 Pet. 300, 9 L. Ed. 1093. See, also, *Ex parte Schollenberger*, 96 U. S. 369, 24 L. Ed. 853; *Martin v. Railroad Co.*, 151 U. S. 688, 14 Sup. Ct. 533, 38 L. Ed. 311. If, therefore, suit be brought in which there are several plaintiffs, citizens and residents of different states, against a defendant not an inhabitant of the state in which the suit is brought, he has the privilege of saying that he cannot be sued in that state, because the action is not brought in the state of his residence; nor can it be said to have been brought in the state of which plaintiffs are residents, as they reside in different states. *Smith v. Lyon*, 133 U. S. 315, 10 Sup. Ct. 303, 33 L. Ed. 635. But, inasmuch as this privilege does not affect the jurisdiction of the court, the defendant in the case supposed must seasonably interpose it by plea or otherwise, else he will be held to have waived it; and he surely can formally submit himself to the jurisdiction. This being so in a cause originally brought in this court, a fortiori the same result follows a case removed into the court. The supreme court of the United States in *Railroad Co. v. Davidson*, 157 U. S., at page 208, 15 Sup. Ct. 563, 39 L. Ed. 672, hold that the second section of the act of 1887-88, giving the right of removal, refers to the first part of section 1, by which jurisdiction is conferred on the circuit courts, and not to the clause of that section relating to the district in which suit is brought. This part of the first section defines the jurisdiction of the circuit courts in terms broad and without qualification. They, among other things, are given jurisdiction of all suits of a civil nature, at common law or in equity, "in which there shall be a controversy between citizens of different states in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid [\$2,000]." So the cause is removable.

But can the defendant, when the cause is removed, interpose his privilege and dismiss the suit, and so defeat the jurisdiction of both courts? He cannot. We have seen that this privilege is not reserved to the defendant in removal cases. Besides this, he has waived this privilege, if it be reserved to him. He has by his own volition bound himself by his bond in the state court to come here at the earliest opportunity to enter his record therein, upon which entry the cause shall proceed in this court in the same manner as if it had been originally commenced therein. So he has come in and has

invoked the jurisdiction of this court. Could he be heard now in saying that a court into which he has come of his own motion and from which he seeks relief has no jurisdiction over him, solely because he is a nonresident? In *Sherwood v. Valley Co.* (C. C.) 55 Fed. 4, Judge Hammond held that an act like this was a waiver of the personal privilege. The general proposition, showing the distinction between the jurisdiction in original cases and in removal cases, is discussed by Mr. Justice Brown, in *Kansas City & T. R. Co. v. Interstate Lumber Co.* (C. C.) 37 Fed. 6, 7. The conclusion that the petition to remove is in itself a waiver of all personal privilege is clearly shown in *Bushnell v. Kennedy*, 9 Wall. 393, 19 L. Ed. 736, and *Seward v. Comeau*, 14 Sup. Ct. 1209, 26 L. Ed. 438. To the same effect is *Fisher v. Shropshire*, 147 U. S. 145, 13 Sup. Ct. 206, 37 L. Ed. 116, in which a motion was made by a party removing a cause, after removal, to dismiss for want of jurisdiction. The court says:

"We are not prepared to say that the circuit court should be deprived of jurisdiction at the request of the party who voluntarily invoked it."

In the present case the defendant's first act was to test before this court the validity of the attachment, and this itself brought the case within the jurisdiction. It is said, however, that when a cause is removed into this court every objection to the action can be made by the defendant in the federal court which he could have made had it been brought originally in that court. This states the proposition too broadly. When a case is removed from a state court into the federal court, it comes over precisely in the same plight in which it left the state court. *Duncan v. Gegan*, 101 U. S. 812, 25 L. Ed. 875; *Goldstein v. City of New Orleans* (C. C.) 38 Fed. 626. If there be any inherent defect in the cause in the state court, the defendant does not, by removal, lose his right to object to it in the federal court. *Goldney v. Morning News*, 156 U. S. 525, 15 Sup. Ct. 559, 39 L. Ed. 517. So if the state court for any reason did not rightfully acquire jurisdiction over the person of the defendant, and the defect be not cured by a general appearance, the objection can be made in the federal court. But this is a different thing from the proposition that a defendant can file his petition for removal, and seek the jurisdiction of the federal court, obtain a favorable answer to his prayer, and pray relief, and then say that the federal court has no jurisdiction over him because of a personal privilege. He is estopped by his own act from saying that the court of his choice has no right to decide his case. Mr. Justice Brown, in *Cowley v. Railroad Co.*, 159 U. S. 569, 16 Sup. Ct. 127, 40 L. Ed. 263, states the doctrine clearly:

"The case having been removed to the circuit court upon the petition of the defendant, it does not lie in its mouth to claim that such court had no jurisdiction in the case, unless the court from which it was removed had no jurisdiction."

There remains one question only, and that by far the most difficult and important. At the hearing in this court, May 22, 1899, upon the motion of plaintiff to remand, the court, after argument,

entered its order to remand the cause forthwith. A certified copy of this order was on the same day filed in the state court; and also, on the same day, upon the affidavit of the plaintiff, in accordance with section 267 of the Code of Civil Procedure of South Carolina, the case was entered on the default docket of that court in vacation. Subsequently this court, no application for a rehearing having been made, of its own motion reconsidered its order remanding the cause, and on June 7, 1899, entered another order revoking the remanding order and canceling it. Could this court, under the circumstances stated, reconsider the order remanding the cause, revoke it, and recall the case? It is a well-established general rule that all courts have control of orders passed at a term during that term, and may alter, add to, or rescind any such order. *Bronson v. Schulten*, 104 U. S. 410, 26 L. Ed. 797; *Union Trust Co. v. Rockford, R. I. & St. L. R. Co.*, Fed. Cas. No. 14,401. This control and supervision ends with the term. As expressed by Waite, C. J., in *Ayres v. Wiswall*, 112 U. S. 190, 5 Sup. Ct. 92, 28 L. Ed. 694:

"The parties were not in law discharged from their attendance in the cause until the close of the term, and the decree, although entered, was in the breast of the court until final adjournment."

See *Bronson v. Schulten*, 104 U. S. 415, 26 L. Ed. 797; *Amy v. City of Watertown*, 130 U. S. 301, 9 Sup. Ct. 530, 32 L. Ed. 946.

Bronson v. Schulten, discussing the rule, states that the rule is equally well established that this control does not exist after the term has ended, "and this is placed upon the ground that the case has passed beyond the control of the court." *Brooks v. Railroad Co.*, 102 U. S. 107, 26 L. Ed. 91.

Does the action of the court upon a motion to remand a cause come within an exception to this rule? This depends upon the construction of the act of 1887-88, amending the act of 1875, on the same subject. The act of 1875 (18 Stat. 472) provides for remanding a cause at any time during its progress, but "the order of the circuit court remanding the cause to the state court shall be reviewable by the supreme court on writ of error or appeal as the case may be." The language of Act 1887-88 differs widely from this:

"Whenever any cause shall be removed from any state court into the circuit court of the United States, and the circuit court shall decide that it was improperly removed, and order the same to be remanded to the state court from whence it came, such remand shall be carried immediately into execution, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed."

This act of 1887-88 was intended to restrict, and does restrict, the right of removal from the state court. *McDonnell v. Jordan*, 178 U. S. 238, 20 Sup. Ct. 886, 44 L. Ed. 1048. The difference in this particular point under discussion is significant. Under the act of 1875 a case removed from a state court might remain in the federal court, notwithstanding an order to remand, until such order could be reviewed in the supreme court. In the meantime the cause was stayed and great delay occurred. To remedy this, not only was the decision of the circuit court upon the question of remand

made final, not subject to writ of error or appeal, but it was also declared that it shall be carried into effect immediately. It seems, therefore, very plausible that, when a motion to remand is made, heard, and determined favorably, the order must be carried into execution immediately, not being subject to review in any appellate court or in the court itself which made the order. At common law no judgment could be enforced by execution until the end of the term. *Union Trust Co. v. Rockford, R. I. & St. L. R. Co.*, Fed. Cas. No. 14,401. For this reason, probably, the court retained control over its judgment. This construction of the act of 1887-88, as designed to prevent delay, is strengthened by the provision in the same act that the party removing must docket his cause in the circuit court of the United States on the first day of its session next after removal. The opportunity is thus afforded the plaintiff to enter and press his motion to remand at the earliest day, and of getting a decision thereon to be carried into execution immediately. Every provision looks to a speedy decision of the question and the restoration of the jurisdiction of the state court. Without doubt, these reasons pressing him, the judge who signed the order to remand directed that it should be carried into effect "forthwith," making use of a word which in practice and pleading is usually construed to mean within 24 hours. *Dickerman v. Trust Co.*, 176 U. S. 193, 20 Sup. Ct. 311, 44 L. Ed. 423.

It may be said, however, that, when the statute speaks of an order of this court, it must be construed in the light of the law, which holds that no order is beyond the control of a court during the term in which it is made; that, when the plaintiff filed in the state court the order to remand, he did so with notice and knowledge that it could be revoked; that the act of the clerk of the state court in putting the case on the default docket was with the same notice and knowledge; and that, if the statute intended to change the law and to deprive the court of this well-known and established right, it would have said so in terms and not have left it to inference. And evidently a court of the United States acted upon this in *Shearing v. Trumbull* (C. C.) 75 Fed. 33. But it may be said that when the order was made to remand the case forthwith, which order was filed here and a certified copy of it filed in the state court, the jurisdiction of that court attached at once; that the state court took action; and that its course was confirmed by the tribunal of last resort in the state. In *Union Trust Co. v. Rockford, R. I. & St. L. R. Co.*, Fed. Cas. No. 14,401, a bill had been filed in the circuit court of the United States asking for a receiver. To this bill was filed a demurrer. The demurrer was heard on July 20th, was sustained, and the bill was dismissed. On July 22d, two days after, one Nickerson filed his bill in the state court, praying the appointment of a receiver; and on July 25th a receiver was appointed by the state court. On July 24th, the day before this appointment was made, and during the same term, the complainant in the federal court obtained an order setting aside the order sustaining the demurrer and dismissing the bill. The case was reinstated, an amendment to the bill

was allowed, and a receiver appointed. The court held that, although it had dismissed the bill, it could reconsider and recall its act, and that the state court could not, during the interval, oust or supersede the jurisdiction of the federal court; that the case stood precisely as though no order of dismissal had been made.

The question is full of difficulty, and should be decided by a tribunal whose voice is imperative. As has been said, the state courts, including the court of last resort, have held that the jurisdiction was surrendered finally by this court and restored to the state court. This state court has gone on and is adjudicating the controversy. Its action is not subject to review in this court, nor can its judgment be controlled by any order of this court. The plaintiffs may be here; but, as they are actors, they cannot be compelled to try their cause here, and the only penalty they can incur is its dismissal, with costs. The defendant can have his writ of error to the supreme court of the United States to the decision of the state court, and, if that tribunal sustain its contention, the state court must obey. Under these circumstances it is best for this court to stay its hand, and await the action of the supreme court. There is another fact to be considered. If the action of the state court be reviewed in the supreme court of the United States, and there reversed, the plaintiffs can get no relief in the state court. If, in the meantime, the cause be dismissed from this court, they can get no relief in this court, and justice may fail. It is ordered that the motion to dismiss be continued, without prejudice, until the further order of this court.

ELLSWORTH TRUST CO. et al. v. PARRAMORE et al.

(Circuit Court of Appeals, Fifth Circuit. May 14, 1901.)

No. 942.

1. JURISDICTION OF FEDERAL COURT—CORPORATION—SERVICE OF PROCESS.

Jurisdiction is not acquired by a federal court over a corporation defendant shown by the bill to have been organized under the laws of another state, and to have its place of business in such state, by service of process in a third state upon an officer of the corporation there found.¹

2. APPEARANCE—WAIVER OF SERVICE—SPECIAL APPEARANCE.

A special appearance by defendants to object to the court's jurisdiction over their persons on any ground is not a waiver of legal service.

Appeal from the Circuit Court of the United States for the Southern District of Florida.

E. P. Axtell, for appellants.

W. L. Palmer and J. Parker, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

¹ Service of process on foreign corporations, see note to *Eldred v. Palace Car*, 45 C. C. A. 3.

PARDEE, Circuit Judge. This is a bill to remove clouds from and to quiet title to certain real estate in Volusia county, state of Florida, and was filed in the circuit court May 4, 1893. It was sworn to by John M. Bradshaw, who made oath that he was the agent of the complainants, and that the defendant E. S. Ellsworth was a nonresident of the state of Florida, residing in Hardin county, state of Iowa; that his business address was "521 Chamber of Commerce, Chicago, Illinois," and that the Ellsworth Trust Company was a corporation organized and existing under the laws of the state of Iowa; that it was a nonresident of the state of Florida, and that its place of business and post-office address were Iowa Falls, Iowa. On the 3d day of June, a subpoena was issued, directed to the said Ellsworth Trust Company and E. S. Ellsworth, commanding them to appear before the court on the next rule day, and was directed to the marshal of the United States to execute and return. On this subpoena a return was entered the same day, as follows: "Received this within subpoena on the 2d day of June, 1893, at Jacksonville, Florida, and failed to find the within-named defendants in this district,"—signed by the marshal; and again, this further return:

"Northern District of Illinois. I have served the within writ upon the Ellsworth Trust Company, therein named, by delivering a true copy thereof to E. S. Ellsworth, president of said company, on the 5th day of June, A. D. 1893. And also on the same day I served said writ upon E. S. Ellsworth personally by delivering to him a true copy thereof.

"Frank Hitchcock, Marshal, by Geo. N. Jones, Deputy."

On the 3d day of July the following motion was entered:

"And now, on this rule day, in July, A. D. 1893, come the defendants herein, appearing by their solicitor, Arthur F. Oldin, specially, only, and for the sole purpose of presenting this motion, and move the court to grant an order dismissing the bill herein filed for want of jurisdiction apparent upon the face of the record herein; and for ground of said motion said defendants say: First. It appears from the bill herein filed that one of the complainants herein, to wit, Lucy C. Finegan, is, and was at the time of the filing of said bill, a resident and citizen of the state of Tennessee, and the defendant E. S. Ellsworth was a resident and citizen of the state of Iowa, and the defendant the Ellsworth Trust Company was a corporation created under the laws of the state of Iowa, and this suit was not brought in the district of the residence of either the complainant Finegan or of these defendants. Second. It appears from the bill herein that one of the defendants, to wit, the Ellsworth Trust Company, is a corporation created under the laws of the state of Iowa, and that, therefore, it is liable to be sued in a federal court in the state of Iowa only. Third. And for other good and sufficient grounds apparent upon the face of the record herein. Wherefore these defendants pray that the said bill may be dismissed for want of jurisdiction.

"Arthur F. Oldin,

"Solicitor for Defendants, Appearing Specially
for the Sole Purpose of This Motion."

The next entry appears to be nearly five years later,—on June 8, 1898,—to wit:

"This cause came on to be heard upon motion by defendant to dismiss bill for want of jurisdiction, and upon due consideration thereof it is ordered that said motion be dismissed upon the strength of Greely v. Lowe, 155 U. S.

58, 15 Sup. Ct. 24, 39 L. Ed. 69, and defendants allowed until the rule day of July in which to plead, answer, or demur. James W. Locke, Judge.

"June 8th, 1898."

On February 6th a decree pro confesso was entered in the chancery order book, and on the 3d of March following the court made the following:

"A decree pro confesso having been entered in the above-entitled cause, it is ordered that the same be referred to J. N. Bradshaw as special master to take the testimony in said case, and he is ordered to report the proceedings with all convenient speed to this court.

"Ordered in Jacksonville, Fla., this 3rd day of March, A. D. 1899.

"James W. Locke, Judge."

On June 2, 1899, the special master, John N. Bradshaw, filed a report. This was followed on November 1, 1899, by a final decree granting all the relief prayed for in the bill. From this decree this appeal is sued out, and numerous errors assigned.

There is much discussion in the briefs as to the effect to be given to the appointment of the complainant's agent as special master to take testimony, and on several assignments of error as to whether the relief granted goes beyond the scope of the bill and the testimony adduced in support thereof. The view we take of the preliminary proceedings in 1893 renders it unnecessary for us to consider these matters. The service made upon the defendants E. S. Ellsworth and the Ellsworth Trust Company was void (see *Pacific R. Co. v. Missouri Pac. R. Co.*, 3 Fed. 772), particularly upon the Ellsworth Trust Company, which was shown by the bill and the affidavit attached thereto to be a corporation of the state of Iowa, and its place of business at Iowa Falls, in said state of Iowa, and yet was returned as served in the state of Illinois. See *Goldey v. Morning News*, 156 U. S. 518, 522, 15 Sup. Ct. 559, 39 L. Ed. 517. We think that the authorities on this point are undisputed. The appearance made on the rule day in June, 1893, was a special appearance for the sole purpose of presenting an objection to the jurisdiction of the court over the persons of the defendants. The first ground of the motion under this limited appearance was that the suit was not brought within the district of the residence of the complainants nor of the defendants (see *Smith v. Lyon*, 133 U. S. 315, 10 Sup. Ct. 303, 33 L. Ed. 635), and the second was that the Ellsworth Trust Company, a corporation of the state of Iowa, could only be sued in the federal courts of that state. Both of these grounds refer to personal jurisdiction, and the limited appearance thus made cannot be held to be a waiver of legal service. See *Construction Co. v. Fitzgerald*, 137 U. S. 98, 11 Sup. Ct. 36, 34 L. Ed. 608. The record shows no attempt to secure service under the eighth section of the act of March 3, 1875, which provides for substituted service in suits commenced in a circuit court of the United States to enforce legal or equitable liens upon or remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought. As the defendants to the bill were not properly served, and entered no general appearance,

nor in any way pleaded to the merits of the case, the decree pro confesso and the final decree rendered were improperly entered, and the same should be reversed. The decree appealed from is reversed, and the cause is remanded to the circuit court, with directions to set aside the same and the decree pro confesso, and thereafter proceed as equity may require.

METCALF v. AMERICAN SCHOOL-FURNITURE CO. et al

(Circuit Court, W. D. New York. May 13, 1901.)

CORPORATIONS—SUIT BY STOCKHOLDER—MULTIFARIOUSNESS OF BILL.

A minority stockholder in a corporation may maintain a suit in equity in behalf of himself and all other stockholders similarly situated to set aside an alleged unlawful transfer of the property of the corporation in pursuance of a conspiracy between its officers and the transferee in restraint of trade and commerce, where it is alleged that the corporation, on demand, has refused to bring such suit; but a bill for such relief which also seeks the recovery of treble damages under the anti-trust act of July 2, 1890, is multifarious, since such damages are only recoverable in an action at law by the plaintiff as an individual, and not as a stockholder, while the equitable relief prayed for is in behalf of the corporation, and, if granted, would inure to the benefit of all the stockholders.

In Equity. On motion for temporary injunction and demurrers to bill.

Seymour, Seymour & Harmon, for orator.

Davies, Stone & Auerbach (Joseph Auerbach and Brainard Tolles, of counsel), for defendants American School-Furniture Co. and Oakman and Turnbull, trustees.

Maulsby Kimball, for defendants Buffalo School-Furniture Co. and others.

HAZEL, District Judge. The orator, Caroline Metcalf, holder of 569 shares of stock in the Buffalo School-Furniture Company, is a citizen of Connecticut. She brings this bill in equity in behalf of herself and all other stockholders having like interests with her, not citizens of New York, against the Buffalo School-Furniture Company, incorporated in the state of West Virginia, but transacting its business and having its property in the state of New York; Oliver S. Garretson, Henry R. Hoffeld, Frederick C. Garretson, Edward C. Shafer, Robert L. Cox, and Albert D. Garretson, directors of that corporation, owning 80 per cent. of the capital stock, all of whom are residents of the state of New York; the American School-Furniture Company, a corporation of the state of New Jersey; and Walter G. Oakman and George R. Turnbull, residents of the state of New York, who claim to have an interest in the property described in the complaint, as trustees for the holders of bonds of the defendant American School-Furniture Company. She alleges that the directors of the defendant Buffalo School-Furniture Company, without her consent,

and the defendant American School-Furniture Company, on the 2d day of March, 1899, entered into an unlawful combination and conspiracy whereby it was agreed that there should be no competition in the United States in the purchase and sale of school furniture and similar articles, and that the defendants contracted, combined, and conspired to restrict, restrain, monopolize, and control trade and commerce among the several states in school furniture; that this was done to increase and control the price in contracts for the delivery of school furniture and the like among the several states and with foreign nations, and within the several states. The bill, at great length, alleges conspiracy, and after stating that the nominal capital of the defendant American School-Furniture Company is \$10,000,000, all of which, after the formation of that corporation, was issued for property, or for options for property, held by promoters of the company, not exceeding \$3,000,000 in value; that the defendant American School-Furniture Company borrowed \$1,000,000, which still constitutes a liability, and which loan the promoters were able to obtain on the property acquired; that a large secret profit was made out of the transaction; that the consideration for the transfer of the property of the Buffalo School-Furniture Company to the American School-Furniture Company was the sum of \$137,461 in cash, \$15,000 in notes, 1,300 shares of the common stock, and 1,300 shares of the preferred stock, of the American School-Furniture Company,—it is further alleged that no business whatever has been actually carried on by the defendant Buffalo School-Furniture Company since the transfer; that its board of directors, acting beyond their power, intend to wind up and dissolve the company and distribute all of its assets, including the stock of the American School-Furniture Company, among its stockholders, pro rata, although the American School-Furniture Company and the aforesaid directors know said stock to have no value. It is further alleged that the total capital stock of the Buffalo School-Furniture Company is \$350,000, divided into 3,500 shares, of the par value of \$100 each; that the complainant requested the Buffalo School-Furniture Company to bring an action in equity to undo the transactions herein complained of, and recover its real estate and other assets from the defendant American School-Furniture Company; that she has exhausted all the means within her reach to obtain within the corporation itself the redress of her grievances; that the property and earning capacity of the Buffalo School-Furniture Company will be destroyed; and that she brings this bill for the benefit of herself and all the stockholders of the Buffalo School-Furniture Company who may be similarly situated who are not residents of the state of New York. It is further alleged that this fraudulent combination and scheme were fully consummated by the defendant directors and the American School-Furniture Company, and that complainant has never consented thereto; that she, being without remedy by the strict rules of the common law, prays that the American School-Furniture Company and the defendants the directors of the Buffalo School-Furniture Company may be decreed to be personally liable to her in the premises for treble

the damages which she has sustained, and that the transfer of the real estate and all of the property and assets of the Buffalo School-Furniture Company may be set aside; that it be restored, reconveyed, and again vested in the Buffalo School-Furniture Company, and that her damages may be ascertained and trebled; that a receiver be appointed; that the treble damages that may be adjudged and awarded to her may be charged as a lien upon said real estate formerly of the Buffalo School-Furniture Company; that the lien may in this proceeding be foreclosed; and that she be paid the damages and treble damages awarded and adjudged to her out of the proceeds of such sale.

The defendants have all demurred to the bill on grounds of multifariousness and want of equity. This suit is properly brought by the plaintiff as a shareholder in the Buffalo corporation, suing, as she alleges, for herself and for and on behalf of all other stockholders not residents of the state of New York. The Buffalo School-Furniture Company is under control of the guilty parties, and they have refused to sue when requested by the complainant so to do. *Hawes v. City of Oakland*, 104 U. S. 450, 26 L. Ed. 827; 2 *Cook, Corp.* § 701; *De Neufville v. Railroad Co.*, 26 C. C. A. 306, 81 Fed. 10; *Porter v. Sabin*, 149 U. S. 478, 13 Sup. Ct. 1008, 37 L. Ed. 815; *Weir v. Gas Co. (C. C.)* 91 Fed. 940.

The primary question immediately arises whether this individual demand for damages is not inconsistent and antagonistic to the equitable relief sought in the bill, and whether these are not demands for equitable and legal relief upon distinct and independent grounds. Innumerable acts are alleged to have been committed in pursuance of the conspiracy. It is also claimed that the conspiracy formed and carried out by the directors was and is in violation of the act of congress of July 2, 1890. Her grievance for which she demands relief is that of a minority stockholder suing for herself and several other stockholders. The damages alluded to in the bill, which she demands for her sole and individual benefit, appear to be the treble damages awarded to a person who is injured in his business or property by the acts of any other person or corporation forbidden or declared to be unlawful by the federal anti-trust law. It is strenuously insisted that the subject-matter of this case, because of the diverse citizenship of the parties, is properly before the court, irrespective of the act of 1890, and that, as the bill states a cause of action in favor of the dissenting stockholder without reference to that statute, a court of equity, having thus obtained jurisdiction of the subject-matter, may administer all the relief which justice demands; that the damages sought are incidental to the demand for equitable relief, and the court has power to completely adjust all the rights of the parties. *Madison Ave. Baptist Church v. Oliver St. Baptist Church*, 73 N. Y. 96. It is a general rule that a court of equity, having acquired jurisdiction of the subject-matter, may mold its decrees according to the circumstances of each case. The damages, however, sought to be recovered in this suit, in the light of the demand set out in the complaint, at paragraphs 24, 26, 28, and 31, cannot be re-

garded as supplemental to the revesting of the property or incidental to the relief sought by the bill. The relief sought, other than the individual demand for treble damages, is in equity. Section 7 of the federal act of 1890 is declaratory of a common-law right which existed in favor of parties injured by wrongs enumerated in other sections of that act, and confers jurisdiction to seek a remedy, and with treble damages, in a federal tribunal. The character of the right of action is in no way changed, and still remains one in tort. *Blindell v. Hagen* (C. C.) 54 Fed. 40; *Pidcock v. Harrington* (C. C.) 64 Fed. 821; *Gulf, C. & S. F. R. Co. v. Miami S. S. Co.*, 30 C. C. A. 142, 86 Fed. 407; *Block v. Distributing Co.* (C. C.) 95 Fed. 978. It inures in the case at bar to the complainant individually, and not to her as a stockholder, as an additional asset of the corporation. All other relief sought, if granted, must in the end belong and come into the hands of the corporation, to the advantage of the stockholders thereof. *Cook, Corp.* § 701, and cases cited; *Church v. Railroad Co.* (C. C.) 78 Fed. 526; *Whitney v. Fairbanks* (C. C.) 54 Fed. 985. This case is clearly distinguishable from *De Neufville v. Railroad Co.*, 26 C. C. A. 306, 81 Fed. 10, cited by counsel for complainant. In that case the relief was demanded in form in favor of the complainant individually, but in law belonged to the corporation of which the complainant was a stockholder, while in this case the treble damages sought by virtue of the anti-trust act would belong to the individual complainant, and not to the corporation of which she is a stockholder. In the case of *Pidcock v. Harrington*, *supra*, Judge Coxe said, in relation to the anti-trust act:

"It is clear that the right to maintain in such a suit [in equity] is not expressly conferred by the act. Indeed, such right is by implication denied: * * * First, because a private person is given (section 7) the right to maintain an action at law; and, second, the district attorneys of the United States, under the direction of the attorney general (section 4), are charged with the duty of commencing suits in equity. If it were the intention of the lawmakers to vest in every irresponsible individual who may deem himself aggrieved the right to invoke the drastic and far-reaching remedies conferred by the act, is it not reasonable to suppose they would have said so in unambiguous terms?"

To the same effect is the decision of Judge Baker in *Southern Indiana Exp. Co. v. United States Exp. Co.* (C. C.) 88 Fed. 659, affirmed by the circuit court of appeals in 35 C. C. A. 172, 92 Fed. 1022. The learned district judge said:

"The anti-trust law of July 2, 1890, has wrought no such change in the law as will enable the court to enforce its provisions in favor of a private party by a bill in equity. Under this act, the only remedy given to any other party than the government of the United States is an action at law for three-fold damages, with costs and attorney's fees; and the only party entitled to maintain a bill in equity for injunctive relief for an alleged violation of its provisions is the United States, by its district attorney, on the authorization of the attorney general."

Without deeming it necessary to specifically set out all of the grounds of demurrer of the various defendants interposed herein, it may be said that the chief grounds argued by counsel were the multifariousness of the bill, and want of equity in favor of the orator gen-

erally. The bill, at great length, alleges conspiracy in restraint of trade and commerce, negligence, and ultra vires acts of the directors of the Buffalo School-Furniture Company, resulting in the depreciation of the value of its stock and property. I think that the bill, with its inferences, sufficiently avers a conspiracy in restraint of trade and commerce to enable the complainant to give proof of the charge in support of her allegation. If these alleged unlawful acts are proven, injury has been sustained by the corporation, and therefore equity will afford relief. This would entitle the plaintiff, as a stockholder, to equitable relief.

The objection that the bill is demurrable because it lacks equity fails. The defendants Oakman and Turnbull have filed a plea in addition to their demurrer. It is not strictly necessary for the court to pass upon the sufficiency of this plea, having come to the conclusion that the demurrer filed by these same defendants must be sustained. The court is of the opinion, however, that the benefit of the plea should be saved to the hearing, in accordance with the rule laid down in Story, Eq. Pl. §§ 697, 698. The motion for a temporary injunction is denied. Demurrers sustained, with costs to the various defendants; complainant having leave to amend within 30 days.

METROPOLITAN TRUST CO. et al. v. RAILROAD EQUIPMENT CO. et al.

RAILROAD EQUIPMENT CO. v. MERCANTILE TRUST CO. et al.

(Circuit Court of Appeals, Sixth Circuit. May 7, 1901.)

Nos. 870 and 886.

1. RAILROADS—CONTRACT FOR EQUIPMENT—CONDITIONAL SALES.

A contract, purporting to be a lease of equipment to a railroad company, which executes so-called "lease warrants," payable monthly during a specified time, and on payment of the last of such warrants is to become the owner of the equipment, is in legal effect a sale; the seller retaining title to the property sold as security for the payment of the price.

2. SAME—NOTES FOR EQUIPMENT—OHIO USURY STATUTES.

The effect of Rev. St. Ohio, § 3287, authorizing railroad companies to borrow money at a rate of interest not exceeding 7 per cent., and to issue bonds or notes for the same, and of section 3290, which provides that the directors may sell or negotiate such bonds or notes at not less than 75 per cent. of par, is to exempt railroad companies from the operation of the general usury statute; and notes or lease warrants issued by a railroad company for deferred payments on equipment bought are valid, although their amount is greater than the sum due on the price of such equipment with the legal rate of interest, but not greater than would have been required if they had borne interest at 7 per cent. and been discounted at 75 per cent. of par.

3. SAME—AUTHORITY TO ISSUE NOTES—OHIO STATUTES.

Under Rev. St. Ohio, § 3287, which authorizes railroad companies to issue bonds or notes and secure the same by a pledge of their property or income, a railroad company has power to issue so-called "lease warrants" for deferred payments on equipment, the title to which remains

in the seller until all such warrants are paid, and then passes to the company.

4. SAME—CONDITIONAL PURCHASE OF EQUIPMENT—RIGHTS OF SELLER.

The Ohio act of May 4, 1885 (82 Ohio Laws, p. 238), relating generally to conditional sales of personal property, and requiring the seller, before taking possession on condition broken, under penalty of criminal prosecution, to tender to the purchaser repayment of at least 50 per cent. of the amount paid thereon, does not apply to conditional sales of equipment to railroad companies, which were specially provided for by Act March 16, 1882 (79 Ohio Laws, p. 45), recognized as remaining in force after the passage of the general act of 1885 by its amendment by Act April 12, 1889 (86 Ohio Laws, p. 255).

5. SAME—FORECLOSURE OF GENERAL MORTGAGE.

A corporation making a conditional sale of equipment to a railroad company, retaining title until the full payment of notes given for the price, on the foreclosing of mortgages covering all the property of the company before full payment, is entitled to take back the equipment, or, in case the mortgagees elect to retain it, to a first lien thereon for the amount still due, without any deduction on account of expenditures made by the railroad company or its receiver for the preservation or improvement of such property.

Appeal and Cross Appeal from the Circuit Court of the United States for the Southern Division of the Eastern District of Ohio.

This appeal and cross appeal are from so much of a general decree in a consolidated railroad-mortgage foreclosure case as awarded to the Railroad Equipment Company a decree for \$51,400.65 as the aggregate sum due, with interest upon 20 so-called "lease warrants" issued upon renewals and extensions of several equipment contracts entered into with the predecessors of the Columbus, Sandusky & Hocking Railroad Company, the mortgagor railroad company defendant in said consolidated cause. The complainant in the principal of the consolidated causes, the Metropolitan Trust Company of New York, for the purpose of selling the mortgaged railroad free from all liens or charges, brought in various persons and corporations claiming liens upon said railroad or its equipment. Among those thus brought in was the Railroad Equipment Company. Priority in the proceeds of sale over the mortgagees and over the holders of receiver's certificates issued in said cause was accorded to the claim of the equipment company, except in so far as the proceeds of such certificates had been "expended in preserving or improving the said equipment," conditionally sold to the railroad by the equipment company or its assignors. The mortgagees in the case docketed here as No. 870 appealed from so much of said decree as found any sum to be due to the equipment company, and the equipment company has, in cause No. 886, appealed from so much of the decree as awarded to the receiver's certificates priority over its claim and lien. The "lease warrants" held by the equipment company purport to have issued for rentals for equipment furnished to one or other of the railroad companies to which the present company has succeeded by the equipment company or some company to whose rights it has succeeded. The original and renewal contracts are very lengthy. They are well summarized by the court below as follows:

"In each of the equipment contracts under which these lease warrants were issued the company furnishing the equipment agreed to lease it to the railway company for the period of 60 months from a certain date. The value of the equipment was stated. A cash payment of 25 per cent. or 30 per cent. was to be made upon delivery, and the balance was to be provided for in 60 consecutive monthly payments of a certain amount, each making the total agreed to be paid, a sum exceeding the stated value of the equipment and 8 per cent. interest thereon. The deferred payments were to be represented by so-called 'lease warrants,' dated in Ohio (with two exceptions, where they were dated New York), made by the railway company to the order of the equipment company, and all payable at the city of New York

(with one exception), and referring to a contract of lease of even date therewith. In case of default in payment of any of the lease warrants, the lessor was to have the right to take immediate and exclusive possession, and to sell the same at public or private sale, and apply the proceeds to the payment of any and all installments of rent for the whole of said term of 60 months, whether the installments had fallen due or not, less interest at 5 per cent. per annum. If the proceeds were more than sufficient to pay the unpaid installments of rent, with interest and expenses, then the surplus was to go to the railway company; but, if there was a deficit, the railway company was liable therefor. If the installments were all paid, then the equipment, without further conveyance or transfer, was to become the absolute property of the railway company. The company defaulted on a number of the lease warrants, and in December, 1893, an extension agreement in regard to them was made. This agreement recites the failure of the railroad company to pay the lease warrants under the contracts, the forbearance of the equipment company to take possession, and its willingness to accede to the request of the lessee, and to grant, upon certain terms and conditions hereinafter set forth, an extension of time for the payment of all the said lease warrants outstanding and unpaid under said contracts, including those past due and in default. The agreement provided that the equipment company would take up the outstanding lease warrants amounting to \$116,338.39, and that the railway company would pay the equipment company, at its office in the city of New York, as rentals or otherwise, for the equipment, a cash payment of \$5,857, and, in addition thereto, 60 consecutive monthly payments of \$2,347.52 each, beginning February 20, 1894, and ending January 20, 1899, making in all, for the deferred payments, \$104,851.20. The new lease warrants were dated Columbus, Ohio, and referred to the contract. The lease warrants under the earlier contracts were to be taken up and acquired by the equipment company, and held as security for the payment of the new one, and were to continue in existence, with all the rights under them, until the new contract was completed."

**R. R. Rogers, for Mercantile Trust Co. and Metropolitan Trust Co.
Judson Harmon, for Railroad Equipment Co.**

Before LURTON, DAY, and SEVERENS, Circuit Judges.

LURTON, Circuit Judge, having made the foregoing statement of the case, delivered the opinion of the court.

The principal defense urged against these claims is, that they include interest in excess of the interest allowed by the law of Ohio, and that the railroad companies entering into said contracts were corporations created under the law of Ohio, and had no power to agree to pay more than 7 per cent. interest. The transactions evidenced by the several equipment contracts are nothing more than contracts for the sale of the equipment, the title being retained as security for the purchase money. The immense verbiage employed to give these schemes the semblance of a leasing and rental is in vain. Their true character cannot be disguised. Contracting Building Co. v. Continental Trust Co. (decided by this court November, 1900) 108 Fed. 1. The notes called "lease warrants" do not bear interest before maturity. If the "value" stated in the original contracts be regarded as the "price" for which the property was sold, these notes include interest in excess of 9 per centum per annum, and in the case of two of the contracts the interest exceeds 12 per cent. per annum. Is such a rate of interest permissible under the law of Ohio?

It is difficult to add anything to the opinion of Judge Taft construing the statutes of Ohio in respect to the powers of Ohio railroad companies to borrow money. The opinion of that very able judge is contained in the record and is reported in 93 Fed. 702, 704. Upon this matter Judge Taft said:

"By section 3287, Rev. St. Ohio, the defendant company was permitted to borrow money at a rate not exceeding 7 per cent., and to issue bonds or notes for the same, and to secure them by a pledge of its property or income. By section 3290 it is provided that the directors may sell or negotiate such bonds or notes at not less than 75 per cent. of par. It has been held by the supreme court, in the case of Junction R. Co. v. Bank of Ashland, 12 Wall. 226, 20 L. Ed. 385, that section 3290 (which was the first section of the act of the legislature of Ohio passed December 15, 1852 [51 Ohio Laws, p. 286]), was tantamount to a repeal of the usury laws as to such companies. It is said that this statement by Mr. Justice Bradley, in delivering the opinion of the supreme court in that case, was merely obiter dictum, and ignored the effect of section 3287. It is true that the question of usury was eliminated from the case by the holding that the contract was a New York contract, but the particular language was used in discussing the question whether an Indiana corporation, which had been reincorporated in Ohio, had power, under the law of Ohio, to issue bonds drawing 10 per cent. interest. The question was, therefore, directly presented to the court, and had to be decided, whether an Ohio corporation could, under Act Dec. 15, 1852, issue bonds drawing 10 per cent. interest, and the question was answered in the affirmative. Since that decision, Act Dec. 15, 1852, has been amended to its present form, as it appears in section 3290, which limits the power to a sale or negotiation of its bonds or notes at not less than 75 per cent. of par. Taking sections 3287 and 3290 together, this would really restrict the borrowing power of railroad companies to loans with annual interest at the rate of \$7 on \$75, or something more than 9 per cent. It is not claimed that the loans here in controversy exceed such a rate. It is said that the case of *Coe v. Railroad Co.*, 10 Ohio St. 372, 75 Am. Dec. 518, overrules the construction put upon section 3290 in *Junction R. Co. v. Bank of Ashland*. I do not think so. It was held in the *Coe Case* that the issue of bonds drawing 7 per cent., payable semiannually, was not a violation of section 3287, limiting the power of railroad companies to the issue of bonds bearing 7 per cent. or less, and that under section 3290 such bonds might be sold by the company issuing them at a discount. If this implies that bonds drawing more than 7 per cent. may not be issued, it only refers to the form of the obligation, and not to the essence; for it is palpable that the sale by the obligor of the bond drawing 7 per cent. interest at a discount is nothing more than the borrowing of money at a greater rate than 7 per cent. In the case at bar the obligations are not, on their face, obligations drawing more than 7 per cent. interest, and I should hesitate long to declare them void, either as usurious or as ultra vires the defendant railroad company, on a mere objection to their form, when the railroad company really has the power to do that which is, in effect, the borrowing of money at a greater rate of interest than is stipulated for in such obligations. In so far as sections 3287 and 3290 permit railroad companies to borrow money at a greater rate than 8 per cent., they do repeal the usury laws as to such companies."

When Judge Taft said that sections 3287 and 3290 of the Revised Statutes of Ohio, construed together, "restrict the borrowing power of railroad companies to loans with annual interest at the rate of seven dollars on seventy-five dollars, or something more than nine per cent.," and that it was "not claimed that the loans here in controversy exceed such a rate," he did not consider that the rate would be affected by the discount for the use of the money actually received, and that the rate admissible upon his construction of the statutes

must be found by apportioning the discount to the time of the loan and adding it to the running interest. His attention was called to this, but he denied a rehearing, although the rate thus determined much exceeded 9 per cent. upon two of the contracts involved, saying that the rate thus determined did not exceed the power of the companies to allow under the statute. If these Ohio companies might have made their notes bearing interest at 7 per cent., and then sold them at a discount of 25 per cent. to raise the means to pay for this equipment, we see no reason why they may not execute their notes direct to the seller, and include therein a rate of interest which they might lawfully pay if the form of the transaction had been somewhat different. That the Ohio statutes, thus construed, permit very extortionate terms to be exacted from railroad companies must be admitted. The effect is that Ohio railroad corporations are virtually outside the usury laws of the state. Every dollar of the large decree in favor of the Railroad Equipment Company represents interest in excess of 7 per cent. upon the aggregate of the original contracts, when the payments made are applied to the agreed value of the equipment furnished, with interest at 7 per cent. We see, however, no escape from the conclusion that in agreeing to pay such excessive rates of interest the companies did not violate the usury laws of Ohio or exceed their corporate powers under the law of Ohio. A like result would follow if the notes or "lease warrants" be regarded as governed by the law of New York in respect to usury, so far as they are payable there. By the statute law of that state the defense of usury may not be made by a corporation. *Bank v. Hoge*, 35 N. Y. 65.

Another view of these contracts has been pressed upon us in support of their validity. It is said that the agreed "value" fixed upon the equipment sold by each contract does not constitute the "price" at which the property was sold, and that the "price" which the railroad company agreed to pay was the aggregate of the cash payment and the monthly payments for which notes were given. The fact that the value of the property sold is stated in the agreement, and that the cash payment to be made is stated as a given per cent. of this agreed value, has a strong tendency to indicate that the notes given for deferred payments include the balance of this agreed value plus an agreed amount as interest for forbearance. This suspicious appearance is not controverted by evidence tending to show that the value agreed upon and the price to be paid were not identical. In such circumstances we are not disposed to rest our affirmance of the action of the court below upon any other ground than that already given.

The next objection is that the equipment company cannot maintain a suit to recover the equipment conditionally sold without complying with the Ohio conditional sales act of 1885. Rev. St. Ohio, § 4155. That act requires such a vendor to tender back to the purchaser or lessee not less than 50 per cent. of the price received. We quite agree with the circuit court, and for the reasons stated in the opinion of Judge Taft, that the act of 1885 does not apply to sales of railroad equipment. The purchase and sale of railroad equipment by

conditional contracts is regulated by the acts of March 16, 1882, and of April 12, 1889, being sections 3378b-3378d, Rev. St. Ohio, inclusive. 93 Fed. 702, 705. The title to the equipment sold under the contracts here involved remained in the vendors until fully paid for. The interest of the railroad companies and their mortgagees was but an equitable interest, and subject to the terms of the conditional sale.

The court below did not award to the equipment company a separate sale of this incumbered property, but directed that it should be sold as the property of the railroad company, and that out of the proceeds of sale the equipment company should be paid next after costs and receiver's debts so far as such debts were created "in preserving or improving said equipment." We think this reservation of priority to receiver's debts incurred in preserving or improving this equipment was erroneous. The purchasers were contractually obligated to preserve and repair the property. If they saw fit to place improvements thereon, it was at their own risk. The purchasers will get the benefit of the improvements by the enhanced value of the property. Yet under this decree, if the property should sell for only the amount expended thereon, the vendors would go unpaid, having been improved out of their property without their consent. The decree will be modified in this respect, and in all others affirmed. The costs in No. 886 will be paid by the receiver out of any funds in his hands.

KURSHEEDT MFG. CO. v. NADAY et al.

SAME v. ADLER et al.

(Circuit Court of Appeals, Second Circuit. April 24, 1901.)

Nos. 116, 117.

COSTS—APPELLATE PROCEEDINGS—PRINTING BRIEF.

Unless provided for by special rule, the cost of printing briefs on appeal will not be allowed as part of the taxable costs or disbursements.

Appeals from the Circuit Court of the United States for the Southern District of New York.

On motion to tax cost of printing brief.

For former opinions, see 103 Fed. 948, 107 Fed. 488.

Antonio Knaust, for appellants.

Benno Loewy, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. The rule in this court for many years has been not to allow the sum paid for printing briefs or arguments as part of the taxable costs or disbursements, except when specially provided for by rule. In this respect the practice conforms to that of the supreme court.

NELSON v. COOPER.

(Circuit Court of Appeals, Fifth Circuit. May 14, 1901.)

No. 1,001.

1. LIMITATIONS—COLOR OF TITLE TO SUPPORT PLEA—DEED NAMING NO GRANTEE.

A certified copy of the record of a deed which contains the name of no grantee, although a marginal entry by the clerk on such record gives the name of grantor and grantee, is inadmissible in evidence to show title or color of title from the government in a defendant claiming under subsequent conveyances not otherwise connected with the title of the patentee, to entitle such defendant to rely on the three-year limitation in Rev. St. Tex. 1895, arts. 3340, 3341; and in the absence of such connecting link the subsequent deeds are also inadmissible to support such plea of limitation.

2. SAME—NECESSITY OF PLEADING—PROVING IN REBUTTAL.

Where defendant in an action of trespass to try title, under a plea of not guilty, offered in evidence an outstanding title acquired by him pending the suit, plaintiff was entitled in rebuttal to introduce evidence to make out limitation in his favor as against such title under the five-year limitation of Rev. St. Tex. 1895, art. 3342, although he did not plead such statute.

In Error to the Circuit Court of the United States for the Northern District of Texas.

A. C. Prendergast, for plaintiff in error.

J. W. Davis, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. J. D. Cooper, the defendant in error, on February 2, 1900, brought this action of trespass to try title to land described in the petition against C. O. Nelson, Jr., the plaintiff in error. The essential averments in the petition were the formal ones prescribed by the statute. The defendant answered by plea to the jurisdiction, the plea of "not guilty," and a special plea of the three-year statute of limitations. The trial resulted in a verdict and judgment in favor of the plaintiff.

The defendant submits that the trial court erred in 14 particulars, set out in the assignment of errors. We do not find in any of these ground for a reversal of the judgment. The thirteenth and fourteenth specifications relate to the refusal of the trial judge to give a requested charge on the subject of the three-year limitation, and his refusal or failure to give any charge on that subject. To support the plea of the three-year statute of limitation it was necessary for the defendant to have shown title, or color of title, from the government to himself. Rev. St. Tex. 1895, arts. 3340 (3191), 3341 (3192). The land in controversy is embraced in a grant that was made by the government to William H. King on July 29, 1846. The defendant introduced the patent evidencing this grant. He then offered a certified copy of an instrument in writing in the form of a deed to land, perfect in every particular except that it named no grantee.

This paper was executed by W. H. King in the presence of two witnesses, and had been properly acknowledged and duly recorded in the deed records of the county which then embraced the land, in 1852. In the body of this writing there was no grantee named, but on the margin of the record, opposite the entry of this instrument, the clerk who made the record had written these words: "W. H. King to J. R. Craddock." Objection to the introduction of this paper as a deed, on the ground that it named no grantee, was sustained by the court. Thereupon the defendant offered in evidence, for the purpose of supporting his plea of the three-year limitations, 13 other mesne conveyances from John R. Craddock, through successive grantees, to the defendant. This consecutive chain of conveyance to the defendant from Craddock includes the deed from C. A. Poulson to C. O. Nelson, the deed from C. O. Nelson to E. Hauke, and the deed from E. Hauke to the defendant,—the 3 deeds which had been introduced by the plaintiff to prove a common source of title. Each of these 13 instruments, when offered by the defendant as links in a chain to show title or color of title, was excluded by the court on the objection of the plaintiff that the instrument offered as a deed from W. H. King to J. R. Craddock had been excluded, showing a complete link lacking in this chain of title. This action of the trial court was manifestly correct. The defendant had shown no title or color of title from the government to himself, acquired prior to the institution of this action. There was, therefore, no basis to support the plea of the three-year statute of limitations, and the judge rightly refused the requested charge, and rightly refrained from giving, or refused to give, the jury any instruction on that issue, thus properly withdrawing it from the jury.

It was admitted by the parties that the patentee, W. H. King, died on January 8, 1861, and left as his only heirs his children, C. M. King and Mrs. M. E. Dumble. The defendant offered in evidence a deed from C. M. King to G. J. Gibbs, dated July 17, 1893, and duly recorded July 31, 1893, purporting on its face to be given in consideration of the sum of one dollar paid, and to bargain, sell, release, and forever quitclaim unto the grantee, his heirs and assigns, all the grantor's right, title, and interest in and to that certain tract or parcel of land lying in the county of Bosque and state of Texas, embracing the land in controversy, being described as 1,652 acres, more or less, of the William H. King survey, near the town of Clifton, being the same tract deeded by William H. King, deceased, to J. R. Craddock, on or about the 21st of April, 1852. The interest conveyed is the entire right, title, and interest in the said tract of land to which the grantor may be entitled as an heir at law of the said William H. King, deceased, and the deed recites that:

"This deed is made for the purpose of correcting an error in the deed from William H. King, deceased, to the said J. R. Craddock, which said deed is recorded in McLennan county. * * * The deed so recorded fails to show the name of the grantee, J. R. Craddock, and this conveyance is made for the purpose of correcting said omission, and to ratify and confirm the deed from the said William H. King, deceased, to said J. R. Craddock."

The defendant then introduced in evidence a deed from G. J. Gibbs to the defendant to the property in controversy, dated April 27, 1900. This was a quitclaim deed, and expressed a consideration of \$10. In rebuttal the plaintiff was permitted to introduce in evidence, over the defendant's objection, for the purpose of making out limitation in the plaintiff's favor, the deed from C. A. Poulson to C. O. Nelson for the lots in controversy, dated March 31, 1886, properly acknowledged, and recorded in the deed records of Bosque county, Tex., on the same day. This deed had been admitted for another purpose. There was in evidence undisputed testimony that C. O. Nelson had occupied and used the land in controversy for more than five consecutive years next before the date of his sale to E. Hauke, and that he paid the taxes thereon each and every year from the time he purchased it from Poulson in 1886 until he sold it to Hauke. As applicable to this chain of title, acquired after the bringing of this suit, the defendant requested the court to charge the jury that:

"The chain of title introduced by defendant from the state of Texas down to him shows that he is the owner of an undivided one-half of the lots sued for, regardless of all other questions in this case, and you are therefore instructed to find for him an undivided one-half interest in the lots sued for, regardless of all other questions in this case."

This request was refused. C. O. Nelson having begun to hold the land in controversy on March 31, 1886, under a deed duly recorded on that day, and having continuously held the same thereunder from that date until November 7, 1895, and regularly paid the taxes thereon from the time he acquired it until he sold it to E. Hauke on November 7, 1895, had acquired a perfect title thereto under the statute of five years' limitation against C. M. King and G. J. Gibbs, or persons holding under either of them; thus making an effective break in the chain of title between the original patentee, William H. King, and the defendant, C. O. Nelson, Jr. Rev. St. Tex. 1895, art. 3342 (3193).

It is said in the tenth assignment of error that the plaintiff in the court below could not rely upon the statute of limitations in this case, because he had not pleaded the same. In the printed brief submitted for the plaintiff in error we find no reference to this tenth assignment, and we conclude that the learned counsel abandoned it. We therefore do not discuss the suggestion that, in the state of the pleadings in this case, the plaintiff could not rely upon the title acquired under the five-year limitation by C. O. Nelson to defeat the title subsequently acquired by the defendant below from G. J. Gibbs, further than to say that the unsoundness of this suggestion is shown by the following cases: *Rivers v. Foote*, 11 Tex. 671; *Hannay v. Thompson*, 14 Tex. 144; *McSween v. Yett*, 60 Tex. 183; *Hines v. Lumpkin* (Tex. Civ. App.) 47 S. W. 818. These material issues having been correctly resolved by the court in favor of the plaintiff below, there remained only the issue raised by the plea to the jurisdiction, and the issue between the parties as to the bona fides of the transactions between C. O. Nelson, E. Hauke, and C. O.

Nelson, Jr., in the respective transfers from Nelson to Hauke, and from Hauke to C. O. Nelson, Jr.

The eleventh error assigned is the refusal of the court to give a requested charge on the subject of jurisdiction. But the substance of the request was fully covered and more correctly expressed in the charge which the court on its own motion gave to the jury. The instructions on the issue as to the bona fides of the transactions between Nelson, Hauke, and C. O. Nelson, Jr., are not criticised in the assignment of errors, and we may assume that they were satisfactory to the defendant, as they are sound and sufficient. The judgment of the circuit court is affirmed.

HAUKE v. COOPER.

(Circuit Court of Appeals, Fifth Circuit. May 14, 1901.)

No. 1,003.

RES JUDICATA—PERSONS CONCLUDED BY JUDGMENT—PERSON PROMOTING AND CONTROLLING ACTION.

A decree in a suit involving the title to land, sustaining the validity of a defendant's title, is conclusive on one who, although not nominally a party, was directly interested in the subject-matter, and by agreement controlled the suit on behalf of the adverse party through counsel employed by him, and, if successful, would have shared in the benefits of the decree; and the defendant is entitled to plead such decree as an estoppel against the plaintiff in a subsequent action brought to recover the same land by one to whom such person conveyed his interest after the decree was entered, the question of fact as to the interest in and control of the prior suit by plaintiff's grantor being one for the jury.

In Error to the Circuit Court of the United States for the Northern District of Texas.

This action was instituted by J. D. Cooper, grantee of M. A. Cooper, to recover 258 acres of land situated in Bosque county, in the state of Texas. The common source of title was one C. O. Nelson, who was a merchant doing business in Clifton, Tex., and whose property was seized and sold at the suit of various creditors. The defendant, Hauke, acquired title at a sheriff's sale, made December 30, 1895, in the suit of Baer, Seasongood & Co. against C. O. Nelson, under a writ of attachment levied on the 1st day of December, 1893. M. A. Cooper acquired his title under a sale made by the sheriff, October 6, 1896, in the case of M. A. Cooper & Co. against C. O. Nelson, under a judgment foreclosing an attachment levied January 1, 1896. Both Hauke and Cooper received sheriff's deeds to the land in controversy, which were properly acknowledged and recorded. On January 20, 1900, M. A. Cooper sold and transferred the lands in controversy, warranting title against all persons claiming through or under himself only, to his brother, J. D. Cooper, the present plaintiff, which deed was duly filed for record and properly recorded. The real point of contest in this case is whether or not the deed to Hauke, which is prior in time and title, is void, because Hauke was only a substituted person for C. O. Nelson; the charge being that the purchase money was furnished by Nelson and the title was for him, and it being directly charged that the whole transaction by which Hauke became the purchaser was a conspiracy between Hauke and Nelson to hinder, de-

lay, and defraud Nelson's creditors. In his first amended answer Hauke makes several defenses to the suit. First, he suggests a fraud upon the jurisdiction of the court by the simulated transfer of M. A. Cooper, a citizen of the state of Texas, to his brother, J. D. Cooper, a citizen of the state of North Carolina, in order that the present suit might be brought in the United States courts. He next demurs to the allegations in the plaintiff's petition, because not sufficiently specific, and because the allegations are contradictory and in the alternative. He then pleads the general issue, and follows that with pleas of the statutes of limitation of three and four years. On the trial before the court and jury, and to prove an estoppel against the plaintiff, the defendant introduced in evidence all the papers and record in the case of the J. S. Brown Hardware Company against Olaf Westgaard, C. O. Nelson, and E. Hauke, which was a case heard and tried in the district court of Bosque county, Tex., wherein, among other matters, was in issue the genuineness and validity of the sheriff's deed to the lands in controversy made to Hauke December 30, 1895, and wherein the said Hauke, party defendant, fully set up his title, and wherein, among others, the Provident National Bank of Waco intervened and attacked the title of said Hauke on the same grounds as it is attacked in the present case, and wherein, further, the court, after full hearing and a verdict by a jury, rendered a judgment declaring that the deed from the sheriff of Bosque county, Tex., to the defendant, E. Hauke, of date December 30, 1895, was not made for the purpose of hindering, delaying, or defrauding the creditors of the defendant C. O. Nelson, and that the plaintiff, the J. S. Brown Hardware Company, and the intervener, the Provident National Bank of Waco, trustee in bankruptcy of the estate of C. O. Nelson, take nothing as against the said Hauke by reason of the deed and note of Olaf Westgaard, read in evidence, and that the defendant E. Hauke is hereby declared to be the legal and equitable owner in fee simple of the land in controversy, and it is further decreed that all the deeds and notes read in evidence by the plaintiff and interveners constitute a cloud upon the title of the defendant E. Hauke, and that, so far as the said deeds and notes affect the title of the said Hauke, they are hereby canceled and held for naught, and the cloud so cast upon his title be, and the same is hereby, removed, and that the said Hauke recover from all the parties all costs, etc. The defendant, Hauke, then introduced evidence tending to show that M. A. Cooper, then claiming title to the lands in controversy, which title was only good in case the sheriff's deed to Hauke should be declared fraudulent, joined with the Provident National Bank of Waco in bringing, filing, and prosecuting the intervention in the name of said bank in the said suit of Brown Hardware Company against Olaf Westgaard, Hauke, and Nelson under a distinct agreement by which the counsel of the said M. A. Cooper should be employed and have charge of the litigation, and that the said M. A. Cooper should pay his share of counsel fees and expenses in the same, and should have a share of the proceeds, if successful, and that, in pursuance thereof, said counsel of M. A. Cooper filed the intervention in the name of said Provident National Bank and duly prosecuted the same to final judgment. On the submission of the case to the jury, the defendant requested the following: "The defendant moves the court to charge the jury on the question of res judicata as follows: The papers in the case of the J. S. Brown Hardware Company against O. Westgaard et al., which was in the district court of Bosque county, Texas, and all of which is in evidence before you, show that the title of said Westgaard to the land in controversy in this case was litigated and settled in said suit in favor of the defendant E. Hauke's title to said land, and said Westgaard's title was removed as a cloud on defendant E. Hauke's title. You are further charged that the plaintiff got nothing by the deed from Westgaard to him in evidence before you, and you will therefore find for the defendant as to said Westgaard title, and not consider the said Westgaard title, or any other evidence pertaining thereto, in arriving at your verdict herein. On this subject of the plaintiff's claim of title to the land in controversy from M. A. Cooper, you are further charged that there is evidence before you tending to show that said M. A. Cooper was interested in the said suit of the J. S. Brown Hardware Company against

O. Westgaard et al., and that, while he was not in name a party to said suit, he was in fact really interested therein, because of his claim to the said land in controversy. If you believe from the evidence that the said M. A. Cooper was interested in the said Brown Hardware Company case, and that because of his claim of title thereto, if the Provident National Bank, who was an intervener in said cause, had been successful therein, the said M. A. Cooper would have been interested in said recovery because of his said claim of title, then he, or whatever claim of title he had thereto, would also be concluded by said litigation; and, if you so believe, you will find for the defendant, even though the said M. A. Cooper was not in name a party to said suit. In this connection you are further charged that a party can be interested in and bound by a suit, although his name is not used in connection therewith, if he knows of the suit, is interested therein, and contributes to the maintenance and support of the litigation; that if you believe, from the testimony, that said M. A. Cooper was interested in, knew of, and contributed to said litigation, then he would be bound thereby, and he could convey to the plaintiff herein no greater right than he himself had; and, if you so believe, you will find for the defendant." This requested charge was refused by the court, and, so far as the record shows, the trial judge did not instruct the jury in respect to the case of Brown Hardware Company against Olaf Westgaard et al., nor in relation to the connection of M. A. Cooper therewith.

A. C. Prendergast, for plaintiff in error.

J. W. Davis, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

After stating the facts as above, the opinion of the court was delivered by PARDEE, Circuit Judge.

"Neither the benefit of judgments on the one side, nor the obligations on the other, are limited exclusively to parties and their privies. Or, in other words, there is a numerous and important class of persons who, being neither parties upon the record nor acquirers of interests from those parties after the commencement of the suit, are nevertheless bound by the judgment. Prominent among these are persons on whose behalf and under whose direction the suit is prosecuted or defended in the name of some other person. As is illustrated by the case of trustee and cestui que trust, the real party in interest cannot escape the result of a suit conducted by him in the name of another. The fact that an action is prosecuted in the names of nominal parties cannot devert the case of its real character, but the issues made by the real parties, and the actual interests involved, must determine what persons are precluded from again agitating the question, and who are estopped by the previous decision. Whenever one has an interest in the prosecution or defense of an action, and he, in the advancement or protection of such interest, openly takes substantial control of such prosecution or defense, the judgment, when recovered therein, is conclusive for and against him to the same extent as if he were the nominal, as well as the real, party to the action." Section 174, *Freem. Judgm.*

Greenleaf, in his treatise on the Law of Evidence (volume 1, § 523), states the rule applicable to this class of cases thus:

"Under the term 'parties,' in this connection, the law includes all who are directly interested in the subject-matter and had a right to make defense or

to control the proceedings and to appeal from the judgment. This right involves, also, the right to adduce testimony and to cross-examine the witnesses adduced on the other side. Persons not having these rights are regarded as strangers to the cause. But, to give full effect to the principle by which parties are held bound by a judgment, all persons who are represented by the parties and claim under them, or in privity with them, are equally concluded by the same proceedings. We have already seen that the term 'privity' denotes mutual or successive relationship to the same rights of property. The ground, therefore, upon which persons standing in this relation to the litigating party are bound by the proceedings to which he was a party is that they are identified with him in interest; and whenever this identity is found to exist all are alike concluded. Hence all privies, whether in estate, in blood, or in law, are estopped from litigating that which is conclusive on him with whom they are in privity."

The correctness of this statement has often been affirmed by this court (*Lovejoy v. Murray*, 3 Wall. 1, 19, 18 L. Ed. 129; *Robbins v. City of Chicago*, 4 Wall. 657, 673, 18 L. Ed. 427); and the principle has been recognized in many cases. Indeed, it is elementary. *Hale v. Finch*, 104 U. S. 261, 265, 26 L. Ed. 732; *Brooklyn City & N. R. Co. v. National Bank of the Republic of New York*, 102 U. S. 14, 22, 26 L. Ed. 61; *Butterfield v. Smith*, 101 U. S. 570, 25 L. Ed. 868; *Litchfield v. Goodnow's Adm'r*, 123 U. S. 549, 550, 551, 8 Sup. Ct. 210, 31 L. Ed. 199. In the suit of *Brown Hardware Company* against *Westgaard et al.*, and particularly on the intervention of the *Provident National Bank*, the validity of Hauke's title to the land in controversy was directly in issue, and as there was evidence tending to show that M. A. Cooper was directly interested in the subject-matter presented in the intervention, and had by agreement control of the proceedings through counsel employed by himself, and had the right and opportunity to, and did, adduce testimony, and had the right to cross-examine witnesses adduced on the other side, and as J. D. Cooper, the plaintiff below, after said suit was concluded, derived his title from M. A. Cooper and was in privity with him in successive relationship to the same rights of property involved in said suit, we are of opinion that the question of estoppel, by reason of the judgment rendered in the case of *Brown Hardware Company* against *Olaf Westgaard et al.*, was proper for the jury's consideration and should have been submitted under instructions substantially as requested.

The other matters contested in this case are in many respects the same as in *Nelson v. Cooper* (just decided by this court) 108 Fed. 919, and we refer to the opinion in that case for our views on the assignments of error not herein specifically dealt with. The judgment of the circuit court is reversed, and the cause is remanded, with instructions to grant a new trial.

KESTER v. WESTERN UNION TEL. CO.

(Circuit Court, W. D. New York. May 23, 1901.)

TELEGRAPHS—CONSTRUCTION OF LINE ON POST ROAD—RIGHT OF LANDOWNER TO DAMAGES.

Rev. St. §§ 5263-5268, authorizing the construction of telegraph lines along military and post roads of the United States, on compliance with certain conditions, does not affect the right of a landowner to recover damages to which he is entitled for the additional burden upon the fee caused by the erection of telegraph poles upon a public highway which is a post road.

Action at Law. On demurrer to answer.

Arthur E. Clark, for plaintiff.

Daniel H. McMillan and Maurice C. Spratt, for defendant.

HAZEL, District Judge. The plaintiff has demurred to the amended answer served by the defendant, the Western Union Telegraph Company. The demurrer is as follows: "The plaintiff, Benjamin F. Kester, demurs to the amended answer of the defendant herein, verified March 7, 1899, on the ground that the facts stated in the answer do not constitute a defense, and that it is insufficient in law upon the face thereof." This is an action at law. Therefore the rules of pleading in force in the state of New York must govern the court's determination. Rev. St. § 914. The demurrer has been taken to the whole pleading. It cannot be strictly regarded as applying to any separate paragraph or allegation. *Hollingsworth v. Spectator Co.*, 53 App. Div. 291, 65 N. Y. Supp. 812, and cases cited. Upon the argument, however, this question was not raised. The attention of counsel was directed entirely to the sufficiency of the defense raised by the answer that the highway described in the complaint is a post road of the United States, that the defendant has complied with the requirements of sections 5263-5268 of the United States Statutes, and therefore the poles of the defendant are rightfully located without damage to the plaintiff. I have examined the authorities cited by counsel, and am convinced that the plaintiff's rights are in no way affected by the statute in question. *Atlantic & P. Tel. Co. v. Chicago, R. I. & P. R. Co.*, 2 Fed. Cas. 176 (No. 632); *Postal Tel. Cable Co. v. Southern R. Co.* (C. C.) 89 Fed. 190, and cases cited. Since the argument counsel have filed authorities on the general proposition of whether the plaintiff has any cause of action for damages. The leading case in this state is relied upon by complainant's counsel. *Eels v. Telegraph Co.*, 143 N. Y. 133, 38 N. E. 202, 25 L. R. A. 640. The doctrine of that case clearly gives the plaintiff his action here. Nor has that case been affected, as to telegraph and telephone wires upon country highways, by any decisions that have been called to my attention. In *Palmer v. Electric Co.*, 158 N. Y. 235, 52 N. E. 1092, 43 L. R. A. 672, the court said, after having held that electric light poles were a public and highway purpose, and therefore not an additional burden upon the fee:

"In the *Els Case*, *supra*, ejectment was brought to remove the poles of a telegraph and telephone company which were not used in any sense for a street purpose. * * * Light is, as we have seen, an aid to traveling upon the highway. * * * All of the street purposes which we have referred to [lighting, sewers, water mains] are clearly incident to the highway, and are deemed within the grant of lands for highway purposes, whenever necessity for these uses arises. Not so with telegraph and telephone wires. They in no way preserve or improve the streets, or aid the public in traveling over them."

The demurrer is sustained with leave to the defendant to amend within 20 days upon payment of costs.

OLIVER v. RAYMOND et al.

(Circuit Court, E. D. Wisconsin. May 15, 1901.)

PLEADING—AMENDMENTS—INTRODUCING ADDITIONAL CAUSE OF ACTION.

There is nothing in the federal statutes or practice, nor in those of Wisconsin, which precludes a federal court sitting in that state from permitting the amendment of a complaint in an action at law before answer to introduce an additional cause of action of the same nature, and growing out of the same transaction, and which might have been joined with that stated in the original complaint; and such amendment will be allowed, where it will be in furtherance of justice, and tend to prevent a multiplicity of suits.

At Law. On application for leave to amend complaint before answer.

Miller, Noyes & Miller, for plaintiff.

Ryan, Ogden & Bottum, for defendant.

SEAMAN, District Judge. The proposed amendment states an additional cause of action of the same nature and arising out of the same course of transactions alleged in the original complaint; and it is tendered, as I understand the situation, within the time when an amendment is allowable as of course under the state practice. That the plaintiff could have united in the original complaints this cause of action with the one therein set up is unquestionable, and its introduction here may save instituting a second action, tending "to a multiplicity of suits, which the law abhors." *Stein v. Benedict*, 83 Wis. 603, 611, 53 N. W. 891. Its allowance would seem to be "in furtherance of justice" between the parties, and should be granted, unless it is barred by the rules of practice governing this court. Section 2830, Rev. St. Wis. 1898, authorizes the allowance of amendments at the discretion of the court when the new allegations are "material to the case," with a provision that an amendment "conforming the pleading or proceeding to the facts proved" shall "not change substantially the claim or defense." Counsel for the defendant contends that the rule is well settled by decisions of the supreme court of Wisconsin that no amendment can be thus allowed which introduces a "new, separate, and distinct cause of action," and cites *Newton v. Allis*, 12 Wis. 378; *Stevens v. Brooks*, 23 Wis. 196; *Wheeler v. Russel*, 93 Wis. 136, 67 N. W. 43;

Geary v. Bennett, 65 Wis. 554, 27 N. W. 335. But in each of these cases the amendment proposed a change of the original cause of action, which was refused by the trial court, and such ruling was approved; in other words, it was not error to deny the motion under the circumstances disclosed. The strongest expression against such amendment is found in **Stevens v. Brooks**, supra,—that “a new and different cause of action cannot be substituted for that on which the action was commenced,” except “under very extraordinary circumstances.” Yet in **Packet Co. v. Shaw**, 37 Wis. 655, 19 Am. Rep. 781, and **Vliet v. Sherwood**, 38 Wis. 159, such amendments were sanctioned as just allowances, without unusual circumstances; and in **Morgan v. Bishop**, 61 Wis. 407, 21 N. W. 263, the general doctrine of liberality in that regard is clearly stated. On careful examination of the Wisconsin cases, I am satisfied that no ruling is intended to deprive the courts of discretion in the allowance or disallowance according to the circumstances, and that the early common-law doctrine against such amendments no longer prevails in this forum. In **Tiernan v. Woodruff**, 5 McLean, 135, Fed. Cas. No. 14,027, on review of the English and American authorities, the right to introduce a new independent cause of action is clearly upheld; and this decision is cited with approval in the opinion by Mr. Justice Swayne in **Tilton v. Coffeld**, 93 U. S. 163, 166, 23 L. Ed. 858, as so holding. The same view is maintained in **Bowen v. Bank** (C. C.) 79 Fed. 49, and is well exemplified in **Hatch v. Bank**, 78 N. Y. 487, **Mason v. Whitely**, 4 Duer, 611, and **Freeman v. Webb**, 21 Neb. 160, 31 N. W. 656. In **Bowden v. Burnham**, 8 C. C. A. 248, 251, 59 Fed. 752, it is remarked that the right to allow amendments is conferred by section 954, Rev. St. U. S., and “exists quite independently of any state statute”; and in **Erstein v. Rothschild** (C. C.) 22 Fed. 61, the exhaustive opinion by Mr. Justice Matthews is of like effect. I am of opinion, therefore, that no rule of practice stands in the way of this amendment, and that it is just and equitable to have a single trial of the issues tendered by both of the alleged causes of action. The amendment will be allowed accordingly.

SANFORD v. WHITE et al.

(Circuit Court, S. D. New York. May 1, 1901.)

NEW TRIAL—TIME OF MOTION.

Where a cause was tried in the October term, 1899, and judgment rendered, a motion in the October term, 1900, for leave to file a motion for new trial for fraud in the conduct of the trial, alleged to have been discovered January, 1900, comes too late; a United States court having no power over its proceedings after the term at which such proceedings were had.

At Law.

Paul Sheldon, for plaintiff.

Thomas L. Hughes, for defendants.

WHEELER, District Judge. This cause was tried late in October term, 1899, and there was a verdict, and judgment on the verdict,

for the defendant. Now, in this October term, 1900, the plaintiff has moved, on notice, for leave to file a motion for a new trial for fraud in the conduct of that trial, and has filed an affidavit in support of this motion that he did not discover evidence of the fraud till January 28, 1900, and that he then proceeded herein at once. The whole of April term, 1900, has intervened. The proceeding invoked seems to be for leave to file a motion *nunc pro tunc*, which would be quasi pending till now, and on which the cause should be brought forward, and the motion now be heard. Such proceedings have prevailed in Vermont from the earliest times, founded upon the supervisory right of a continuous court over its own proceedings, as well of previous as of pending terms. *Scott v. Stewart*, 5 Vt. 57; *Mosseaux v. Brigham*, 19 Vt. 457; *Franks v. Locky*, 45 Vt. 395. And such proceedings, founded upon such supervisory right or upon express statutes, appear to have prevailed in the courts of New York and of other states. But this is not a form or mode of procedure adopted for the courts of the United States, and warrant for it is to be looked for in the power of those courts as such, and not elsewhere. *Fishburn v. Railway Co.*, 137 U. S. 60, 11 Sup. Ct. 8, 34 L. Ed. 585. And while the remarks of Mr. Justice Miller in *U. S. v. Throckmorton*, 98 U. S. 61, 25 L. Ed. 93, relied upon by the plaintiff, give some countenance for such a proceeding in the United States courts, they appear to have been made with reference to relief in equity, and are to be understood as so made. Otherwise the universal current of authority seems to be that the supervisory power of the United States courts over their proceedings ends with the terms at which the proceedings were had. *Hickman v. Ft. Scott*, 141 U. S. 415, 12 Sup. Ct. 9, 35 L. Ed. 775; *A. B. Dick Co. v. Wichelman* (C. C.) 106 Fed. 637. This motion must therefore be denied. This is done, however, for supposed want of power, as matter of law, and without prejudice, leaving to the plaintiff such right of review or other mode of relief as he may be advised to take. Motion denied as matter of law, and without prejudice.

JAMES et al. v. CENTRAL TRUST CO. OF NEW YORK et al.

(Circuit Court of Appeals, Fourth Circuit. May 7, 1901.)

No. 358.

APPEAL—REMAND FOR MODIFICATION OF DECREE—REMEDY FOR MISCONSTRUCTION OF OPINION.

Where the circuit court of appeals affirmed a decree of a circuit court in certain respects, but remanded the cause for its modification in other respects to conform to the court's opinion, if the circuit court errs in construing such opinion the remedy is by appeal from the modified decree, and not by mandamus.

On Motion for Writ of Mandamus.

Chas. Price, for petitioners.

A. C. Avery, for respondents.

Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

GOFF, Circuit Judge. At the November term, 1899, of this court the case of Clemye James, administratrix of W. A. James and others, appellants, against the Central Trust Company of New York and Southern Railway Company, appellees, an appeal from the circuit court of the United States for the Western district of North Carolina was disposed of. 98 Fed. 489, 39 C. C. A. 126. Said cause was remanded, with directions to modify the decree appealed from so as to cause it to conform to the opinion of this court then filed. In due time the mandate of this court issued to the court below, in the following words:

"It is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this case be, and the same is hereby, affirmed, with costs, so far as it grants the injunction enjoining the further prosecution of the bill which was filed; but the said cause is remanded to the circuit court of the United States for the Western district of North Carolina, at Charlotte, with directions to modify the said decree in accordance with the opinion of this court."

At the December term, 1899, of the circuit court of the United States for the Western district of North Carolina, at Charlotte, a proposed decree was presented to said court (Hon. H. G. Ewart, district judge, presiding) by counsel for the appellees in said cause, the object of which was to secure the modification of the decree referred to in the manner directed by the opinion and mandate of this court. The said circuit court declined to enter said decree, and adjourned without having made the modification required by the mandate of this court. Whereupon application was made to this court, by petition in due form, for a mandamus requiring the said court to enter the decree referred to, and an order nisi was entered and served, to which answer has been made from which it appears that on the 23d day of April, 1900, a decree was entered in said cause by said judge, which he insists and which counsel for respondents now claim is in full harmony with the opinion of this court, and in entire conformity to its mandate. The insistence is still made by counsel for petitioners that the court below has mistaken the opinion of this court, and misconstrued its mandate; that there was nothing left open for decision by the court below; and that it was simply directed to enjoin forever the further prosecution of the suit that had been instituted in the state court, and that there are matters adjudicated by said decree that should not have been determined by said circuit court, as they were not included in the directions of the mandate.

A careful examination of the opinion, decree, and mandate of this court, in connection with the decree of the court below, leads us to the conclusion that the modification made by Judge Ewart is in fact a compliance with the mandate of this court, in so far as it forever enjoins the prosecution of the bill mentioned in the opinion and decree before alluded to, and while his decree, so far as it concerns the further proceedings by Mrs. James and Mrs. Howard, with such other suit as they may be advised it is proper (not based upon the supposed rights of stockholders) for them to prosecute, refers to some matters not set forth in the mandate and decree of this court,

still we do not find it to be our duty, in this proceeding at least, to say that it is error. This court, in its opinion disposing of said case, said:

"Neither Mrs. James nor Mrs. Howard could be said, we think, to be in any sense a party to the foreclosure suit or bound by it. Whatever rights they have accrued to them three years after the sale, and had no connection whatever with the rights that were adjudicated by the decree. It may be, notwithstanding anything adjudicated by that decree, that under the laws of North Carolina the Western North Carolina Railroad Company was answerable to them for the damages for which they obtained their judgments, and the railroad now in possession of the Southern Railway Company also liable. Those are questions not litigated in the foreclosure suit, and which the appellees, in our judgment, could not by this supplementary ancillary proceeding compel Mrs. James and Mrs. Howard to bring before the circuit court. * * * Without passing upon any other questions argued by counsel, and which we do not consider necessary to the decision of the case before us, we hold that the injunction, so far as it enjoins the further prosecution of the bill which was filed, should be continued, and the decree, so far as it grants that injunction, should be affirmed, but that the decree should be so modified as not to prohibit Mrs. James and Mrs. Howard from proceeding as they may be advised with any other suit not based upon the supposed rights of stockholders with respect to enforcing their judgment claims. The cause is remanded, with directions to modify the decree in accordance with this opinion."

Therefore, to a certain extent, the judgment and discretion of the lower court was asked for, and relied upon, by this court. As we have said, it appears that all the positive requirements of the mandate have been respected, and it is, we think, quite clear that if in the other provisions of the decree made in an effort to comply with the opinion of this court, taken in connection with the record of the case, a mistake in recital has been made, or an error of judgment committed, the writ of mandamus is not the remedy, but that an additional appeal must be sued out to correct the same. That it was proper for the circuit court to examine the opinion of this court for the purpose of ascertaining what was intended by the mandate is without question, and if that court erred in disposing of the matters remanded to it by this court, not specified in the mandate, the remedy is by appeal, and not by mandamus. In *re* Sanford Fork & Tool Co., 160 U. S. 247, 16 Sup. Ct. 291, 40 L. Ed. 414; *Hinckley v. Morton*, 103 U. S. 764, 26 L. Ed. 458; *Mason v. Pewabic Co.*, 153 U. S. 361, 14 Sup. Ct. 847, 38 L. Ed. 745; *Supervisors v. Kennicott*, 94 U. S. 498, 24 L. Ed. 260. Writ of mandamus denied.

MULQUEEN et al. v. SCHLICHTER JUTE CORDAGE CO.

(Circuit Court, E. D. Pennsylvania. May 14, 1901.)

FEDERAL COURTS—JURISDICTION—EQUITABLE DEFENSE IN ACTION AT LAW.

A federal court cannot entertain a purely equitable defense in an action in ejectment, and, the matter being jurisdictional, the court is bound to take notice of it, although no objection is raised by the parties.

Ejectment. On motion by defendant for judgment non obstante veredicto.

Henry F. Cochrane, for plaintiffs.
Kinley J. Tener, for defendant.

J. B. McPHERSON, District Judge. The principal question raised and argued upon this motion cannot be considered by a federal court in this action. The plaintiffs have a complete legal title to an undivided $\frac{1}{41}$ of the land described in the writ, and, for the present, this title must prevail. The defense set up is purely equitable, and, while it would be admissible in a Pennsylvania court, it cannot be entertained by a court of the United States in an action at law. The precise point was decided in *Robinson v. Campbell*, 3 Wheat. 212, 4 L. Ed. 372. See, also, *Montejo v. Owen*, 14 Blatchf. 324, Fed. Cas. No. 9,722; *Snyder v. Pharo* (C. C.) 25 Fed. 398; and *Kircher v. Murray* (C. C.) 54 Fed. 626. As the point is jurisdictional, I am bound to take notice of it upon my own motion, even although it was not raised by the parties themselves: *Terry v. Davy* (C. C.) 107 Fed. 50.

The motion is refused, and judgment will be entered upon the verdict in favor of the plaintiff.

MEXICAN CENT. RY. CO., Limited, v. CONWAY.

(Circuit Court of Appeals, Fifth Circuit. April 28, 1901.)

No. 1,023.

MASTER AND SERVANT—ACTION FOR INJURY OF SERVANT—DIRECTION OF VERDICT.

Where facts, as well as their bearing upon the injury of an employé, were in issue in an action to recover from the master for such injury, and the evidence was conflicting, the court properly declined to direct a verdict.

In Error to the Circuit Court of the United States for the Western District of Texas.

T. A. Falvey and Waters Davis, for plaintiff in error.

Millard Patterson and C. N. Buckler, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. The case, as presented in the circuit court, is fairly stated in the opening of the judge's charge to the jury, as follows:

"This suit was brought to recover damages of the defendant. The accident which resulted in the plaintiff's injuries occurred in the republic of Mexico on September 20, 1899. At the time of the accident the plaintiff was a train conductor in the employment of the defendant, and was riding in the caboose attached to the engine when the derailment occurred. One P. T. Lavelle was the engineer in charge of the locomotive at that time. Briefly stated, the plaintiff claims: (1) That the engineer, Lavelle, was an incompetent employé, and that his injuries were the direct result of his incompetency, in that Lavelle recklessly ran the engine at a dangerous rate of speed down a mountain grade, and while so running the engine and caboose jumped the track, and injured the plaintiff; (2) that the triple valve of the caboose was defective and out of order, and it was, therefore, impossible

for him to use the air brake for the purpose of stopping the rapidly running train."

At the close of the evidence the defendant below requested an instruction to the jury to find for the defendant, which request was refused. From an adverse verdict and judgment this writ of error was sued out.

The only error assigned is the refusal to give the general charge, and in the assignments of error the following reasons why it should have been granted are given:

"That the proof showed that plaintiff was injured through the negligence of one Lavelle, a fellow servant of plaintiff; that the issue made by plaintiff, and the theory upon which said suit was tried was that defendant had notice of the incompetency of said Lavelle by reason of his general reputation among the employes of defendant, whereas such general reputation among the employes of defendant, if sufficient to bring notice to the officers of defendant, was sufficient to bring notice to the plaintiff in this suit, who was working with said Lavelle as the conductor on the train of which Lavelle was the engineer, plaintiff having failed to either allege or prove that he did not know of the incompetency of said Lavelle, or of his reputation, at the time he went out with said Lavelle upon the trip in which said accident occurred." "That the negligence of said engineer, Lavelle, in operating his train rapidly was the proximate cause of plaintiff's injury, and the condition of the triple valve on plaintiff's caboose was a matter and thing too remote and disconnected from the cause of the accident to warrant a recovery on that account, under the proof in this case; and for the reason that the insufficiency of said triple valve and the air-brake appliance on the caboose wherein plaintiff was riding had been for a long time, to wit, for 10 or 12 days before the accident, as shown by plaintiff's evidence, and was at the time of the accident in which plaintiff was injured, out of repair; and that plaintiff had repeatedly given notice of the condition of said triple valve, and the employes of defendant had had ample time to fix the same, but had failed to do so, and plaintiff knew at the time he went out on said run and was injured that said triple valve had not been repaired; and therefore plaintiff assumed the risk of injury by reason of the condition of said triple valve." "That under the facts and pleadings presented by plaintiff herein, the same showing that plaintiff assumed the risk of damage and injury occurring through the negligence of said Lavelle by not reporting said Lavelle to defendant as incompetent, plaintiff being charged with notice of his incompetency through the general reputation that he himself proved and showed existed, and that plaintiff also assumed the risk of injury on account of the triple valve and its condition, for the reason, as pleaded by him, and as shown by testimony offered by plaintiff, said triple valve had been out of order for a number of days, and was reported by him a number of times; that defendant had sufficient time and opportunity to repair the same, and that plaintiff knew at the time of said run that said valve had not been repaired."

In the foregoing reasons it is assumed that the incompetency of Lavelle was the sole cause of the disaster; that such incompetency was previously brought to the attention of the railway company only through Lavelle's general reputation among the railway employes; that the plaintiff below was charged with knowledge of Lavelle's incompetency through said general reputation, and, as he did not report him to the railway company as incompetent, he thereby assumed all risks of damage and injury occurring through the negligence of Lavelle; that the insufficiency of the triple valve and the air-brake appliance on the caboose was too remote a cause to have any effect on the disaster; and that, as the plaintiff below knew, at the time he went on the run and was injured, that the promises to

repair the valve had not been carried out, he assumed all risks in relation thereto. None of these assumptions are well-founded. The plaintiff, in his petition, charged that Lavelle was incompetent, careless, and reckless, and that the fact was known to the railway company, or might have been known by the use of reasonable diligence, and that the same was not known to the plaintiff. Under this issue the competency of Lavelle was contested, and, while the plaintiff below put on three witnesses who swore that he was incompetent, and that his general reputation was bad, the defendant railway company put on six witnesses, who, in the main, testified that he was a competent engineer, and that his general reputation was good. The plaintiff below also offered evidence tending to show that Lavelle had been laid off by the railway company for drunkenness, and that his incompetency in that respect had been directly reported to the superior officers of the railway company; and this was contested by counter evidence. There was evidence tending to show that the plaintiff below did not know that Lavelle was incompetent in fact, or had that general reputation. Much evidence was adduced pro and con as to the defects of the triple valve, and its value and use, and the use of the air-brake appliances in connection with stopping trains, and bearing on the question of neglect of the railway company in not keeping the said valve and appliances in working order. The court below properly declined to assume that all these disputed matters were established by undisputed evidence, and to resolve them so as to fit in and harmonize with one aspect of the railway company's defense. The case was properly submitted to the jury, and the judgment of the circuit court is affirmed.

LOUISVILLE & N. R. CO. v. STUBER.

(Circuit Court of Appeals, Sixth Circuit. May 7, 1901.)

No. 881.

1. MASTER AND SERVANT—NEGLIGENCE OF FELLOW SERVANT.

The general rule is that a master is not liable for an injury sustained by one servant through the negligence of another in the same general service, in the absence of negligence of the master in respect to those duties which he is universally regarded as having assumed toward his servants, such as the obligation to exercise care in the selection of those to be associated with him, or of a place to carry on his work, and proper tools or materials with which he is to do it; and there is no sanction in the controlling authorities for taking a case out of the general rule of nonliability for the negligent acts of another servant by refined distinctions as to who are fellow servants based upon the subordination of one servant to another or upon the circumstance that two servants are engaged in different departments of a common service.

2. SAME—INJURY OF SERVANT.

The principle underlying those decisions which hold a master liable to a servant for the negligent acts of another servant in a separate and distinct department of the service is that a servant only assumes the risk from the negligence of those so closely associated with him that he is presumed to have contracted with reference to such risk; and where the duties of an employé are such that he is constantly subjected to risk of injury from the negligence of other employés, although in a dif-

ferent department, such principle does not apply, but as to him such other employes are fellow servants, within the rule which exempts the master from liability for their negligence resulting in his injury.

8. SAME—RAILROAD EMPLOYEES—TRAINMEN AND EMPLOYEES RIDING IN COURSE OF DUTY.

Plaintiff was foreman of water supply on a division of defendant's railroad, his business being to supervise the tanks and pumping machinery at the water stations on such division, and to keep the same in repair. In the performance of his duties he was required to ride over the road from station to station, and was furnished with a pass good on all trains. While so riding on a detached engine to a station where his services were required, he was injured in a collision caused by the negligence of the engineer in charge of such engine. *Held*, that he was not a passenger, but was a fellow servant of the engineer, for whose negligence causing his injury defendant was not liable.¹

In Error to the Circuit Court of the United States for the Western District of Tennessee.

John W. Judd, for plaintiff in error.

J. N. Thomason, for defendant in error.

Before LURTON and SEVERENS, Circuit Judges, and CLARK, District Judge.

LURTON, Circuit Judge. The defendant in error, William Stuber, sustained a severe injury through the negligence of an engineer in charge of a detached engine upon which he was riding. Both the engineer and Stuber were at the time in the service of the railroad company. There was a judgment upon a verdict for defendant in error. 102 Fed. 421.

This case turns upon the single question as to whether the negligent engineer and Stuber were fellow servants. The facts were undisputed, and were as follows: Stuber for many years had been the "foreman of water supply" upon an extensive division of the railroad of the plaintiff in error, receiving \$80 per month. His business was to supervise the water tanks and pumping machinery at the many water stations within his division, keeping same in good repair, and in condition to furnish water for the proper movement of trains. In the discharge of his duties he was obliged to pass frequently from one water station to another, and was authorized by a superintendent's order or pass to travel free upon any and all trains, and to stop them, when necessary, at any tank. To answer a call to repair the pumping machinery at Humboldt, Tenn., Stuber boarded a detached locomotive at Guthrie, Ky., bound down the road. Through the negligence of the engineer in sole control of this engine, a collision occurred at Clarksville, Tenn., with a train, whereby Stuber sustained a severe personal injury. The learned circuit judge was of opinion that the relation of fellow servant did not exist between defendant in error and the engineer, through whose negligence he had been injured, and instructed the jury to return a verdict against the plaintiff in error. A request to instruct the jury to find for the railroad company upon the ground

¹ Injuries to servant while not on duty, see note to *Ellsworth v. Methe-ney*, 44 C. C. A. 489.

that the engineer and Stuber were fellow servants was denied. The charge given and the request denied have been assigned as error. There is no statute in Tennessee defining fellow servants. The question is, therefore, one to be determined upon common-law principles. Under the decisions of the Tennessee supreme court, the liability of a railroad company to one servant who has sustained injury through the negligence of another has been made to depend upon the subordination of the one to the other, as well as upon refinements in respect to different departments of service. *Railroad Co. v. Carroll*, 6 Heisk. 347, 364; *Railroad Co. v. Bowler*, 9 Heisk. 866; *Railroad Co. v. Lahr*, 86 Tenn. 335, 6 S. W. 663; *Mining Co. v. Davis*, 90 Tenn. 711, 719, 18 S. W. 387; *Railroad Co. v. De Armond*, 86 Tenn. 73, 5 S. W. 600, 6 Am. St. Rep. 816; *Railroad Co. v. Martin*, 87 Tenn. 398, 10 S. W. 772, 3 L. R. A. 282. The question is, however, not one of local law to be settled by the decisions of the highest courts of the state in which the cause of action arose, but one of general law. So far as the supreme court of the United States has authoritatively determined the law applicable to such a case, it is the duty of this court to follow the law thus determined. But, so far as the question has not been thus authoritatively settled by that court, the common law applicable is to be determined by a consideration of all the authorities bearing upon the relation of master and servant. *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772. There is no authority for regarding Stuber, while being carried to his work by his employer, as a passenger. To discharge the duties of his peculiar employment, it was necessary that he should be carried from one place of work to another, as occasion should require. His transportation to and from his work was part of his contract of service, and while being thus transported he was as much in the service of the company as when engaged in the repair or construction of a water tank or pump. He was traveling at the time under a single contract of service, and his right to be carried free to and from his work is inseparable from the contract to do the work, and no valid ground exists for saying that he paid his own fare, or was in any sense a passenger.

The rule is now well settled that railway employes, while being carried, as part of their contract of service, to and from their place of work, are fellow servants, and not passengers. Thus, in *Gillshannon v. Railroad Corp.*, 10 Cush. 228, laborers being carried to and from their work upon a gravel train were held not to be passengers, but fellow servants of those operating the train. In *Seaver v. Railroad Co.*, 14 Gray, 466, a carpenter, whose business it was to repair bridges and fences along the line of railroad, injured while being carried free to a place of work, was held to be a fellow servant, and not a passenger. In *Ryan v. Railroad Co.*, 23 Pa. 384, a laborer on a gravel train was injured through the negligence of the conductor or engineer while being carried from his residence to his place of work. Held, that there could be no recovery. In *McQueen v. Railway Co.*, 30 Kan. 689, 1 Pac. 139, a bridge painter, while being transported over the road to discharge the duties of his place, was held not to be a passenger. In *Railroad Co. v. Smith*, 14 C. C. A.

509, 67 Fed. 524, 31 L. R. A. 321, it was held that a civil engineer, charged with the duty of looking after the maintenance of bridges, trestles, and water tanks, was not a passenger when traveling over the road in discharge of his duties. In *Tomlinson v. Railroad Co.*, 38 C. C. A. 148, 97 Fed. 252,—an opinion by the circuit court of appeals for the Eighth circuit,—it was held that a bridge builder and repairer, whose duties called him to various places on the line of the railroad company employing him, was not a passenger when being carried over the road to place of work, but a fellow servant with those operating the train to which his car was attached. To the same effect are the cases of *Tunney v. Railway Co.*, L. R. 1 C. P. 291; *Ross v. Railroad Co.*, 5 Hun, 488, affirmed in 74 N. Y. 617, and cited in 95 N. Y. 272; *Russell v. Railroad Co.*, 17 N. Y. 134; *Vick v. Railroad Co.*, 95 N. Y. 267, 47 Am. Rep. 36; *Abend v. Railroad Co.*, 111 Ill. 203, 53 Am. Rep. 616; *Kumler v. Railroad Co.*, 33 Ohio St. 150. On this record there can be no question as to the right of the defendant in error if he had been injured while traveling for a purpose disconnected with his employment. He was not so traveling. The cases of *Doyle v. Railroad Co.*, 162 Mass. 66, 37 N. E. 770, 25 L. R. A. 157; *Doyle v. Railroad Co.*, 166 Mass. 492, 44 N. E. 611, 33 L. R. A. 844; *McNulty v. Railroad Co.*, 182 Pa. 479, 38 Atl. 524, 38 L. R. A. 376; and *State v. Western Maryland R. Co.*, 63 Md. 433,—are cases in which it appeared that at the time of the injury the employé was not in the service of the company, but was traveling for his own purposes, and therefore a passenger. The learned trial judge and the counsel for the defendant in error seem to place the liability of the railroad company upon the theory that only those servants engaged in the same department of the service of a common master are to be regarded as fellow servants.

Stuber, it is said, had nothing to do with the actual movement of trains or engines, and was, therefore, in a different department of service. The ground upon which those courts proceed which hold an employer liable to his servants for the negligent acts of other servants in a separate and distinct department is that the servant only accepts the risk of the negligence of those so closely associated with him as that he may be supposed to have contracted with reference to the possibility of their negligence, they coming through such association to some extent under his influence. *Railroad Co. v. Carroll*, 6 Heisk. 348, 362, et seq.; *Shear. & R. Neg.* (5th Ed.) §§ 237, 238. But under this rule it is difficult to see its application here. If Stuber had been hurt by those engaged in operating a train or locomotive while he was repairing a tank or pump on the side of the track, he might with more plausibility have urged that he could not foresee, when accepting employment, that he would be exposed to the negligence of servants operating trains. But in the case of *Morgan v. Railway Co.*, L. R. 1 Q. B. 149, the plaintiff was employed by the railway company to do work as a carpenter. He was injured while standing on scaffolding at work on a shed close to the line of railway, and was injured by the carelessness of some train hands in shifting a locomotive on a turntable so that it struck a ladder supporting the scaffolding, by which means the plaintiff

was hurt. It was held that the plaintiff could not recover, having been injured by a fellow servant. Pollock, C. B., said:

"It appears to me that we should be letting in a flood of litigation were we to decide the present case in favor of the plaintiff. For, if a carpenter's employment is to be distinguished from that of the porters employed by the same company, it will be sought to split up the employés in every large establishment into different departments of service. Although the common object of this employment, however different, is but the furtherance of the business of the master, yet it might be said that no two had a common immediate object. This shows that we must not overrefine, but look at the common object, and not at the common immediate object."

In the case at bar Stuber's employment required him to pass over the line of railway continuously upon all kinds of trains. Thus he was brought continuously in contact with those operating the trains, and must, upon the association rule, be regarded as having foreseen that he would be exposed, at least while being carried to and from his place of work, to the negligence of those operating trains. The general rule is that the master is not liable in the absence of negligence in respect to those duties which he is universally regarded as having undertaken; such as the obligation to exercise care in the selection of those to be associated with him, or of a place to carry on his work, and proper tools or materials with which to do it. In the decisions of the supreme court we find no sanction for taking a case out of this general rule of nonliability for the negligent acts of a fellow servant by refined distinctions as to who are fellow servants, based upon the subordination of one servant to another, or upon the circumstance that two servants are engaged in different departments of a common service. Thus, in *Steamship Co. v. Merchant*, 133 U. S. 375, 10 Sup. Ct. 397, 33 L. Ed. 656, the department theory was repudiated in respect to those in service upon the same steamship, and the ship's carpenter held to be the fellow servant of the stewardess, though in distinct departments. In *Railroad Co. v. Hambly*, 154 U. S. 349, 360, 14 Sup. Ct. 983, 986, 38 L. Ed. 1009, 1013, a section hand was held to be the fellow servant of those engaged in operating trains. Mr. Justice Brown, in delivering the opinion of the court, said:

"To hold the principal liable whenever there are gradations of rank between the person receiving and the person causing the injury, or whenever they are employed in different departments of the same general service, would result in frittering away the whole doctrine of fellow service. Cases arising between persons engaged together in the same identical service—as, for instance, between brakemen of the same train or two seamen on the same ship—are comparatively rare. In a large majority of cases there is some distinction either in respect to grade of service or in the nature of the employments. Courts, however, have been reluctant to recognize these distinctions unless the superiority of the person causing the injury was such as to put him rather in the category of principal than of agent,—as, for example, the superintendent of a factory or railway; and the employments were so far different that, although paid by the same master, the two servants were brought no further in contact with each other than as if they had been employed by different principals."

In *Railroad Co. v. Conroy*, 175 U. S. 323, 328, 20 Sup. Ct. 85, 44 L. Ed. 181, *Ross' Case*, 112 U. S. 377, 5 Sup. Ct. 184, 28 L. Ed. 787, was expressly overruled, and the last vestige of authority for sup-

posing that the master's liability depended upon the nonsubordination of the injured servant to the one negligently inflicting the injury disappeared. Distinctions based upon gradations of rank and service in separate departments stand upon the same misconceptions as to the ground upon which a master's responsibility to his servant at common law rests. Thus Shaw, C. J., in *Farwell v. Railroad Corp.*, 4 Metc. 49, 38 Am. Dec. 339, replying to the argument which had been advanced in favor of limiting the exemption of the master to his servants to injuries resulting from the negligence of those directly associated with the injured servant, said that the argument in favor of the distinction rested "upon an assumed principle of responsibility which does not exist. The master, in the case supposed, is not exempt from liability because the servant has better means of providing for his safety when he is employed in immediate connection with those from whose negligence he might suffer, but because the implied contract of the master does not extend to indemnify the servant against the negligence of any one but himself; and he is not liable in tort, as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract, express or implied." In *Railroad Co. v. Conroy*, cited above, this reasoning was approved, and the rule touching the master's responsibility to his servants was thus stated for the court by Justice Shiras:

"Unless we are constrained to accept and follow the decision of this court in the case of *Railroad Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. 184, 28 L. Ed. 787, we have no hesitation in holding, both upon principle and authority, that the employer is not liable for an injury to one employ  occasioned by the negligence of another engaged in the same general undertaking; that it is not necessary that the servants should be engaged in the same operation or particular work; that it is enough, to bring the case within the general rule of exemption, if they are in the employment of the same master, engaged in the same common enterprise, both employed to perform duties tending to accomplish the same general purposes, or, in other words, if the services of each in his particular sphere or department are directed to the accomplishment of the same general end; and that, accordingly, in the present case, upon the facts stated, the conductor and the injured brakeman are to be considered fellow servants within the rule."

Applying this principle, it is clear that Stuber and the engineer, through whose negligence he was hurt, were servants of a common master, and, though not engaged "in the same operation or particular work," they were both employed to perform duties "tending to accomplish the same general purposes." The services of Stuber in supplying trains with water were just as important to the proper movement of trains as those of the engineer upon a locomotive. The services of each in his particular sphere were directed to the accomplishment of the same general end. They were, therefore, fellow servants, without regard to the intimacy of their association, though, as we have already seen, the duties of Stuber were such as to require that he should be constantly carried to and from his work by those engaged in the operation of trains and engines. The failure to instruct for the plaintiff in error was an error, for which the judgment must be reversed.

In re WEST.

(Circuit Court of Appeals, Second Circuit. May 7, 1901.)

No. 145.

BANKRUPTCY—INVOLUNTARY PROCEEDINGS—BURDEN OF PROOF AS TO INSOLVENCY.

Under Bankr. Act 1898, § 3, where a petition in involuntary bankruptcy is based on subdivision 1 of the section, alleging a transfer of property with intent to hinder and delay creditors, the solvency of the alleged bankrupt is a matter of defense, and the petitioners need not prove insolvency.

Appeal from the District Court of the United States for the Southern District of New York.

This is an appeal from a judgment of the district court of the United States for the Southern district of New York, whereby, upon a proceeding in involuntary bankruptcy at the instance of a sufficient number of creditors, James West was adjudged bankrupt. The Trenton Oil-Cloth & Linoleum Company, an attaching creditor, answered and defended against the petition.

E. P. Lyon, for appellant.

I. Gainsburg, for appellee.

Before LACOMBE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The act of bankruptcy which was most specifically stated in the involuntary petition was alleged as follows:

"On or about the 28th day of August, 1900, the said James West conveyed, transferred, and disposed of all of his said stock of goods, or a portion thereof, to or by way of certain auctioneers, having their place of business in Worth street, borough of Manhattan, New York City, for a sum much less than the costs or value thereof, with the purpose and intent to hinder, delay, and defraud his creditors, and to prevent them from participating in his estate and assets in accordance with the provisions of said act of congress."

It was proved that West was a carpet dealer in Hudson street, in New York City, and on the morning of the day on which the goods were removed he told two of his employes, on their way to his store and a few doors therefrom, to "get their tools and get out." This was the first notice of a proposed change. They went to the store, and found men inside and trucks outside, into which the entire stock of goods was being removed, and in which it was carted away to an auction store, where it was soon after sold for \$4,000; and the money was paid to West, who transferred some real estate, mostly in the neighborhood of Peekskill, to his brother, upon a parol trust for the creditors of James West, and disappeared. The opposing creditor offered no testimony on the subject of West's solvency. From the testimony it sufficiently appears that the alleged bankrupt, without previous notice to his brother, with whom he seems to have been intimate, or to his employes, removed his stock of goods to an auction store, where they were sold; that he received and kept the avails, and conveyed, without consideration, his real estate to his brother, with instructions to hold it in trust for his

creditors; and that he thereupon left his wife and children and disappeared. There was testimony to show that the stock was sold for much less than its value. His conduct conclusively shows an intent to hinder and delay his creditors, and the act of bankruptcy was clearly proved.

Two objections are urged against the validity of the decree, the first being that the petitioners did not prove the insolvency of West. It is not necessary for the petitioning creditors to prove the insolvency of the bankrupt, when the alleged act of bankruptcy is that contained in subdivision 1 of section 3, which is, in substance, the conveyance of property with intent to delay or hinder his creditors; for by paragraph "c" of the same section solvency at the time of filing the petition is made a defense to proceedings in bankruptcy instituted under subdivision 1, and the burden of proving solvency is on the bankrupt. This burden devolved upon the opposing creditor. The construction of the provision of section 3 in regard to the necessary allegations and the defenses in a petition in involuntary bankruptcy was examined by the supreme court in *West Co. v. Lea*, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098. The only approach to the subject of solvency which the opposing creditors made was upon the cross-examination of the brother of James West, and resulted in nothing.

The second objection is of a jurisdictional character,—that, while the averments in the petition were sufficient, there was no proof that the unsecured claims of the petitioning creditors amounted to \$500. The attorneys for the respective parties stipulated in writing that the petitioners and answering creditor are, and each was at the time of the commencement of this proceeding, creditors of James West, but the stipulation was silent in regard to the amount of their claims. It was undoubtedly supposed by the district judge, from the silence of the parties, that no question was to be made on this subject; but the question is now made, apparently for the first time, that, while the answer compels the petitioners to make proof of an indebtedness, the stipulation does not admit the requisite amount. There is a technical defect, resulting from the omission in the stipulation; and the judgment must be reversed, and the case must be remanded to the district court, with liberty to that court to take, upon a proper application for that purpose, new proofs upon the subject of the amount of the petitioners' unsecured claims, and, if the requisite amount is proved, to reinstate the decree. The decree of the district court is reversed, without costs, and the case is remanded to that court, with liberty to take further proceedings and receive new proofs in accordance with the foregoing opinion.

In re DI SIMONE.¹

(District Court, E. D. Louisiana. March 2, 1901.)

No. 13,641.

1. ALIENS—DECISION OF IMMIGRATION OFFICERS—REVIEW OF JURISDICTIONAL QUESTIONS.

The finality and conclusiveness of a decision of immigration officers refusing a person entry into the United States, and ordering his deportation, depend upon the jurisdictional question whether such person is in law and fact an alien immigrant; and, where he claims a status of citizenship under the naturalization laws of the United States, the courts have jurisdiction to determine such claim, notwithstanding its adverse determination by the executive officers of the government.

2. SAME—HABEAS CORPUS PROCEEDINGS—ISSUES AND PROOF.

Petitioner, a child, applied to the circuit court for a writ of habeas corpus, alleging that she was illegally held by respondent, the collector of the port, who was about to deport her to Italy. She claimed rights of citizenship on the ground that her father and mother were residents of the United States, and her father, before sending for her, had taken out his first citizenship papers. Respondent in his answer alleged that petitioner was an alien immigrant, and that it was his duty to deport her, under Act March 3, 1891 (1 Supp. Rev. St. [2d Ed.] c. 551), because it was disclosed, on legal and proper official authority, that she had trachoma, which was "a loathsome or a dangerous contagious disease." Petitioner offered evidence in support of her petition, but no evidence was introduced by respondent. Certain papers were, however, pinned to his answer, and referred to therein as "annexes," consisting of a copy of his report, giving "the facts and circumstances of the case, and a copy of the telegraphic order from the commissioner general of immigration" directing petitioner's deportation. Such papers were unverified, and were not filed or offered in evidence. *Held*, that such papers could not be considered as in evidence, but, even if so considered, while they might be sufficient to justify the action of respondent under the rules of the department, they were not competent evidence in a court of any proceedings which authorized him to hold petitioner for deportation.

On Petition for Writ of Habeas Corpus.

Fernando Estopinal and Jos. P. Derbes, for Di Simone.

W. W. Howe, U. S. Atty., for collector.

BOARMAN, District Judge. The petitioner claims that she is not an alien immigrant, under the statute, and resists, in these proceedings, the purpose of the respondent collector to deport her to Italy. Respondent, in showing cause for his action, alleges that the child is an alien immigrant, and as such it is his duty, under an act approved March 3, 1891 (1 Supp. Rev. St. [2d Ed.] c. 551), to cause her deportation, because it is disclosed, on legal and proper official authority, that she has trachoma, which is "a loathsome or a dangerous contagious disease."

"An act in amendment to the various acts relative to immigration and the importation of aliens under contract or agreement to perform labor.

"Be it enacted," etc., "that the following classes of aliens shall be excluded from admission (2) into the United States, in accordance with the

¹ Reversed on confession of error.

existing acts regulating immigration, other than those concerning Chinese laborers: (3) All idiots, insane persons. Paupers or persons likely to become a public charge. Persons suffering from a loathsome or a dangerous contagious disease. Persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude. Polygamists.

* * *

There is jurisdiction in the court to pass determinatively on the mixed issue of law and fact as to whether or not petitioner is an alien immigrant. If she is an alien immigrant, in the meaning of the statute, the court must, on a proper state of case, recognize as authoritative and final the action of the officials upon which respondent grounds his action in the premises, notwithstanding it may be clear enough upon the facts that the child is afflicted with trachoma, which appears to mean only commonplace sore eyes. The power of local inspectors over immigrant passengers is confined to alien immigrants. The question as to whether a person ordered to be returned is an alien immigrant, under the policy of the naturalization laws, is jurisdictional in these proceedings. The rights of such an alien immigrant are not civic privileges. They are said to be merely of a statutory character. The quality or degree of such rights is treated of and determined by congress as involving political questions. Congress may treat, as it seems to have done, their rights, if they have any, as being "outside of the constitution," and forbid the complaints of such an alien immigrant, seeking to reside here, for relief, to be heard or passed upon in a judicial forum. On the other hand, if the child is not such an alien immigrant as the statute contemplates, the court, under these proceedings, on a proper case, may vindicate her civic privileges and give her the relief sought. On the issue as to petitioner being an alien immigrant *vel non*, it seems to be conceded that the father and mother of the child have been for several years, and are now, residential citizens of the city of New Orleans; that they, on leaving Italy, left their child, the petitioner, there with her relatives; that some time ago the father, before sending for the child to come to him, made his first declaration of intention under the naturalization laws. Citizenship in the United States seems to be a doubtful quantity. It may be of several qualities. In one person it may be full and complete, and of an inchoate and conditional character in another. The naturalization laws are made up of a series of statutes of old and new dates. The system does not, so far as judicial opinions in the federal and state courts have been expressive of their meaning, seem to be clearly understood. The state as well as the federal courts have found it difficult to establish uniform jurisprudence as to the civic rights of aliens who invoke the aid of our laws. In *Boyd v. Nebraska*, 143 U. S. 177, 12 Sup. Ct. 375, 36 L. Ed. 103, matters bearing in some degree on the legal issues in this case were considered by Mr. Chief Justice Fuller. The plaintiff therein was seeking, among other things, to avail himself of a civic privilege which he claimed the law vested in him because his father, an alien resident, had made, during the minority of his son, who was born here, his first declaration under the naturalization laws. In discussing section 2168, Rev. St., which is as follows:

"Sec. 2168. When any alien, who has complied with the first condition specified in section twenty-one hundred and sixty-five, dies before he is actually naturalized, the widow and the children of such alien shall be considered as citizens of the United States, and shall be entitled to all rights and privileges as such, upon taking the oaths prescribed by law."

—The chief justice says:

"The statutory provisions leave much to be desired, and the attention of congress has been called to the condition of the laws in reference to election of nationality, and to the desirability of a clear definition of the status of minor children of fathers who had declared their intention to become citizens, but had failed to perfect their naturalization, and of the status gained by those of full age by the declaration of intention. 2 Whart. Int. Dig. 340, 341, 350. Clearly, minors acquire an inchoate status by declaration of intention on the part of their parents."

A cursory consideration of the federal and state courts' decisions in cases involving the civic rights or privileges of aliens will demonstrate the appropriateness of the suggestions quoted from the opinion of Mr. Chief Justice Fuller.

Under the views which United States courts as well as state courts have expressed, while engaged in the purpose to judicially differentiate or classify such civic rights as congress has conferred on aliens living as residential citizens in this country, it may be that the father of the child on whose behalf this writ is sued out, by operation of law, on the state of facts conceded to be true, is vested with such "inchoate status" of citizenship as should forbid the treasury officials to impose the status of an alien immigrant on the petitioner. The force of the suggestion that the child, under the policy of the naturalization laws, may not be an alien immigrant, is not without some degree of authority in the United States courts, and in the declarations and contentions of eminent officials of the United States to whom have been confided the consideration of the gravest of our international questions. A review of such authorities will show a liberal tendency towards enlarging the rights of minors who claim, under the policy of our law, to share with their alien parents the benefit of such civic rights as may be, as Mr. Chief Justice Fuller says, "impressed upon them" by operation of the naturalization laws on the fact that the father has made his declaration of intention. Clearly, if the petitioner, on coming here to join her father, had found him a naturalized citizen, she could not, under the policy of the law, have been treated as an alien immigrant, so as to prohibit her from entering this city, however loathsome, contagious, or dangerous a disease her sore eyes might prove to be. Of course, the state, exercising police power, might have subjected her to quarantine. The naturalization of the husband who died, leaving a widow who never resided in the United States, confers citizenship on her. *Kane v. McCarthy*, 63 N. C. 299; *Burton v. Burton*, *40 N. Y. 359. A wife becomes a citizen after the husband's preliminary declaration, and before his naturalization, in case of his death. His minor children, under similar circumstances, if living here, would become citizens. *Schrimpf v. Settegast*, 38 Tex. 96. In *Campbell v. Gordon*, 6 Cranch, 176, 3 L. Ed. 190, it was

held substantially that the daughter, living abroad, of a naturalized citizen, who came to join him two years after his naturalization, became on her arrival a citizen. A minor child not in this country when the father is naturalized may, on coming here as a minor, take the civic status of the father. See *Foreign Relations of United States*, vol. 1884.

To generalize as to conclusions from such authorities, I think it may be shown that if the father, in this case, had gone, with the intention of returning, on a visit to Italy, after he had taken up his residential citizenship here, and before he had made his said declaration, he would not, under the policy of the naturalization laws, have been treated as an alien immigrant on his return here. In *re Panzara* (D. C.) 51 Fed. 275; In *re Maiola* (C. C.) 67 Fed. 114. If after making said declaration he had gone to Italy, to bring his child home with him, the child, on coming to this port to live with him on his return, could not have, under the statute, been denied the right to come into this country free from inspection under the statute. Under such a condition she would have been the beneficiary, to that extent, of her father's inchoate citizenship. What difference, under the policy of the law, would or should it make if he had, instead of going to Italy for his child, sent for her, as he did in this case? If a child's mother, after a residential citizenship here, had given birth to a child while the parents were on a visit to Italy, such a child, on returning with them, would not be an alien immigrant. If an alien father should become a naturalized citizen of the United States, his minor children, though living in a foreign country at the time of his naturalization, would become citizens of this country on their arrival here to live with him. If an alien widow brings a minor son of deceased alien husband to this country, and marries a citizen of the United States, both she and the son become citizens. If an alien residential citizen who has taken out his said declaration papers should go abroad, and be subjected to pains or penalties imposed unlawfully upon him by the foreign government of which he was native, the United States could not interpose for his relief; but if the same person had, while remaining in some other government than that of his origin, complained of and sought relief from afflictions, such as that of unlawfully impressing him into the army, imposed upon him in that government, the United States would have been justified, on proper showing, to interfere for the protection of his inchoate citizenship. *Foreign Relations of United States* (1884) p. 552. These illustrations, selected from such authorities as I have referred to, show that, under the policy of the naturalization laws, alien residential citizens, though not naturalized, may possess an "inchoate status" of citizenship, which may, under the policy of the naturalization laws, vest such rights of citizenship in this petitioner on her arrival at this port, which should forbid her deportation as an alien immigrant, even though, in the opinion of the local inspectors, she may be afflicted with a dangerous contagious disease. Such illustrations show that the petitioner, though an alien, may not be an "alien immigrant," under the statute.

I began this review of authorities under the impression that it would be necessary for the court to determinatively pass upon the issue that petitioner is an alien immigrant, raised by respondent's answer; but, on looking further into the state of case presented on the hearing, it occurs to me that when a proper deference is given to the due processes of law to which she is entitled in the United States courts even though she be an "alien immigrant," the case may be disposed of favorably to her without passing upon any of the legal issues as to her being an alien immigrant, to which matters the authorities I have cited may apply. The matter as to such alienage vel non of the petitioner was not put at issue on the hearing by either side, except so far as the child's father, in his evidence, said that he and his wife, the child's mother, came to the United States about four years ago, and that they have continued during that time to reside as residential citizens in this city; that when they left Italy their child, the petitioner, was left by them with some relations; that lately the child came to this city, at his instance, on board of the steamship Sempione, accompanied by her said relatives; that several weeks ago, before the child left Italy, he took out his first naturalization papers, a copy of which is filed in this suit. There were two witnesses, inclusive of the father, heard on behalf of the petitioner; the other witness, Dr. Duggan, testifying over objections which are evidenced by a bill of exceptions on the part of the respondent's counsel. The doctor said, substantially, that the child had sore eyes, or granulated eyelids,—a very common disease with children; that the disease was not a loathsome disease, but is a dangerous contagious disease if other persons were allowed to use the towels with which the child had wiped her eyes; that the disease was readily curable in a few days or weeks. Respondent's counsel, in closing his bill of exceptions, said correctly that "the foregoing was substantially all the testimony in the cause,"—meaning the evidence of the two witnesses named. Under my view of the matters occurring on the hearing, there was neither oral nor documentary evidence filed, or tendered for filing, on behalf of respondent. The clerk's minutes show no filing of documents on behalf of respondent, other than the answer. On examination of the papers filed on the hearing, it appears that the clerk's filing mark is on the back of respondent's answer. To the answer copies of certain papers are annexed. None of those copies were filed, or tendered to the court for filing, on the hearing. The said copies are mentioned in the recitals in the answer as "annexes." Respondent in his answer says he annexes "a copy of his report February 28, 1901, giving the facts and circumstances of the case, and a copy of the telegraphic order from the commissioner general of immigration, above referred to." It seems that the said copies were pinned in or to the answer on which the clerk's filing mark appears. They were not offered or read to the court as exhibits. I knew nothing of their existence until I found them, after the hearing, among the papers. There is nothing in the allegations of the answer to suggest that the respondent appropriated or tendered their contents as a part of his answer to the writ of habeas corpus;

nor does it appear from the recitals in the affidavit verifying the answer that the affiant intended to swear to the truth of anything in relation to such copies, except as he said that such copies show "the facts and circumstances of the case" which was passed upon by the local inspectors. Under such a state of case, should such copies or "annexes" be given any legal effect in support of respondent's contention that the child may be legally deported? As between the commissioner general of immigration and the collector, such papers, or copies, may be abundant official authority to cause the child to be deported in accordance with such telegraphic orders; but I think no legal effect adverse to the petitioner, on the hearing of petitioner's writ, can be given to them. It is recited in the annexes that an appeal suspending the action of the local inspectors was taken on behalf of the petitioner. What has become of her appeal? Respondent, proposing to show the dismissal of petitioner's appeal, and to vindicate his purpose to deport the child, says that the following telegraphic order accompanying the annexes was directed to him:

"Appeal dismissed in case Grazia Di Simone. Deport her in accordance with law. Suggest that one of her grown relatives accompany child.

"F. H. Larned, Acting Comm'r Gen'l.

"Approved: H. A. Taylor, Asst. Secty."

Conceding that all of said copies were seasonably tendered as exhibits in evidence on the hearing without objection, and conceding, further, that the local inspectors were fully authorized, under the statute, on "the facts and circumstances of the case," as such facts and circumstances appeared to them on their investigation, to cause the child to be deported to Italy, I do not think it will be seriously contended that either the petitioner or the respondent official has been advised by an authentic mandate or in a legal way, as between the parties to this proceeding, that the decision of the local inspectors has been determinatively passed upon by the official at Washington, D. C., to whom the law directs the appeal may be made. So far as we have been advised by any authentic or legal authority, petitioner's appeal may still be pending. Certainly during the pendency of the child's appeal she cannot be legally deported. It is true that zealous local officials often unrestrainedly arrest and deprive citizens of their liberty, and bring them to trial before courts of inferior jurisdiction, on such telegraphic orders as upon which respondent now offers to vindicate his purpose to deport the child. But it is equally true that such an order is not entitled to the legal effect on the hearing of this case which is sought to be given to it in respondent's answer. An alien immigrant desiring to come into and reside in this country is not privileged, under the law of the land, to have the issue of fact as to whether or not he may have a loathsome or dangerous contagious disease passed upon in a judicial forum. As to such an inquiry he is "outside of the constitution." Possibly, when such material issues of fact are to be passed upon determinatively by zealous officials, his civil privileges may be only those of an "Indian not taxed." All such issues, vital as they may be, as to him, it seems, must be heard and passed upon

finally on the bridgeway of a ship, by such local inspectors as the treasury department may select to make such investigation. There were two different issues presented to the inspectors investigating "the facts and circumstances of the case"; one of them involving grave questions of both domestic and international law, which have not since the organization of the national courts been free therein from plaguing difficulties (that is, as to whether the petitioner, notwithstanding the "inchoate status" of the father's citizenship, on her coming to this port, is an alien immigrant). The other is an issue of fact, as to whether her granulated eyelids showed a loathsome or dangerous contagious disease. Certainly the former, however readily the local inspectors disposed of it adversely to the petitioner, is a serious and perplexing judicial question, for the decision of which, I think, an alien immigrant should justly be entitled to invoke the aid of judicial process. The inspectors had to decide that judicial question adversely to the petitioner before they could take up and pass on the character of her malady. They seem to have had no difficulty in disposing of the law issue,—probably less than they had in holding that granulated eyelids constituted a loathsome or dangerous contagious disease, under the policy and purpose of the statute. It seems that the local inspectors, under the rules of practice prevailing in the treasury department, exercise prerogative powers to the extent that, on their finding adversely to the petitioner, a child of tender years may be separated from and deported away from her father, whatever his legal or civic status may be, and that on appeal from their finding, on the bridgeway of the ship, to the higher officials of that department, at Washington, D. C., the appeal which took up both of the serious and difficult issues may be decided so as to cause the deportation of his child on the authority of a copy of an unverified telegraphic order. Such methods of official practice, however satisfactory they may be to the department, or however much it may "speed the cause," or indemnify the collector as between himself and the department, should he now be free to obey it, are not admissible in judicial inquiries under such due process of law as even an alien immigrant is entitled to in the national courts, to show that final action has been had in the treasury department on petitioner's appeal. Such an order, disposing of an appeal, for instance, to the commissioner of the land department, involving an issue simply of an acre of government land, could not legally be so summarily disposed of. It does not appear to have been essential, in the public interest, that this child should be hurriedly deported, on the returning ship, because, as it seems, the captain thereof was urgent to leave the port. Such zealous officials as were in this case managing the public interests could doubtless have found satisfactory means of preventing contagion while holding her here, even though the ship sailed away, until a more authoritative mandate from Washington could have reached them, denying the relief sought on her appeal. But, let all of this be as it may, it is clear, when an alien immigrant submits a jurisdictional issue to a judicial forum, he has plenary privileges therein to have all such issues heard and determined under due

processes of law. It would be violative of such processes of law to give any legal effect to the copy of a telegraphic order to support the collector's purpose to deport the petitioner. Particularly should this be maintained when the contents of the copy of the telegraphic order are not verified by oral evidence on the hearing. If the contents of the other "annexes" had been appropriated as exhibits, and declared upon as a part of respondent's answer, such unverified exhibits would not of themselves be of any legal value to support respondent's claim for justification; nor could they have been considered as importing legal verity as to any of the material issues submitted in the pleadings.

The matter to be determined in this proceeding is whether the petitioner can now be held for deportation. It may be that, under rules of practice on habeas corpus, petitioner should not be discharged for defect in the method or for want of due process in the proceedings before the inspectors. But petitioner's discharge is not sought because of such defects. The contention is that there is no legal evidence to show that any thing or duty imposed on the inspectors by the law was done by them. Particularly is it contended that there is no legal evidence to show that petitioner's appeal has been disposed of. Until such a state of case is shown, the appeal must be considered as pending, and the child cannot be legally deported. On the hearing of the issues set up in proceedings like these, a petitioner may be permitted, in an informal way, to show and make good his cause of action. The filing of a written traverse on his part of the allegations in the respondent's answer is not required in the rules of practice in most of the states. The rules of practice in this state, I think, will interpose on petitioner's behalf sufficient denials of the material matters set up by respondent for justification. Even if such allegations should, under the rules of practice, have to be traversed by the petitioner, it is clear that a formal traverse could be required only as to such exhibits as show justification, such as were declared upon as a part of respondent's answer, and such as import authenticity and legal verity.

It may not be too foreign to the best methods of stating judicial thought, or, at any rate, it may not be injudicious, for me to tender here, on behalf of the public, as well as on behalf of the alien child who is threatened with deportation, the suggestion that an exhibition of less superserviceable official zeal, or, it may be, a more considerate exercise of official authority, on the part of the local inspectors in the pending matter, might have enabled them to know that trachoma, however frightfully suggestive of loathsome things such high-sounding technicality may appear in their official report, means, as I was glad to learn later, at its worst, only a case of everyday sore eyes, which the doctor said is readily curable. A more considerate action on their part would, I may venture to say, have presented a refreshing sight for the public, even if such a sight, to use an old saying, had not proven to be "a sight good for sore eyes."

Without passing determinatively on the extent to which the petitioner may or should be treated as the beneficiary of the "inchoate status" or rights of citizenship which, under the views of Mr. Chief

Justice Fuller in the case of *Boyd v. Nebraska*, referred to herein, the father is now possessed of, I think, on the state of case presented on the hearing, and in the absence of any suggestion on behalf of respondent that she should be held to answer further, that the petitioner, though she may be an alien immigrant, should be set at liberty to join and live here with her parents, who are residential citizens of this city.

UNITED STATES v. LEE YEN TAI et al.

(Circuit Court of Appeals, Second Circuit. May 9, 1901.)

APPEAL—HEARING IN APPELLATE COURT—PROCEDURE.

On appeal from an order in habeas corpus proceedings discharging the petitioner, but requiring him to give bail for his appearance, as may be determined by any final order made on appeal, the portion of the order admitting appellee to bail will not be taken up for consideration on a motion in advance of the regular hearing, unless there are special reasons therefor.

Appeal from the District Court of the United States for the Southern District of New York.

This is a motion to vacate and set aside the order of the United States district judge, admitting the above-named Lee Yen Tai to bail.

Geo. B. Curtiss, U. S. Atty., for the motion.

Max J. Kohler, opposed.

Before LACOMBE and SHIPMAN, Circuit Judges, and WHEELER, District Judge.

PER CURIAM. On November 16, 1900, Lee Yen Tai, a Chinese laborer, was tried before a United States commissioner for the Northern district of New York, and found guilty of being unlawfully within the United States, in violation of the Chinese exclusion laws, and an order of deportation made by said commissioner, and placed in the hands of the United States marshal of that district for execution. The said marshal, in execution of said order, brought the Chinaman within the Southern district of New York, whereupon a writ of habeas corpus was issued by the district judge of said district upon the ground of lack of jurisdiction in the commissioner to make the order of deportation. Return was duly made, argument had, and on December 27, 1900, the district judge, having reached the conclusion that the point was well taken, made the following order:

"Ordered, that the prisoner be discharged, said discharge to be conditioned upon the giving of \$300 bail by defendant for his appearance, as may be determined by any final order on any appeal that may be taken herein."

No other order was made by said judge. On February 15, 1901, appeal was duly taken from this order. It is now on the docket of this court, but has not yet been reached for argument. The present application seems to be an effort to advance the hearing

upon appeal from part only of said order. There is no good reason, apparent why the single appeal should not be argued as a whole in regular course. Motion denied.

JOHNSON v. SEAMAN.

(Circuit Court of Appeals, Third Circuit. May 14, 1901.)

No. 34.

PATENTS—SUIT BY LICENSEE—INJUNCTION—TRADE-NAME.

A complainant is not entitled to an injunction restraining defendant from manufacturing or dealing in certain patented articles on the ground that such business would be in violation of complainant's rights as exclusive licensee for the sale of such articles under a license to which defendant is not a party, where the suit is not one for infringement of the patents; nor can complainant for the same reason be granted an injunction restraining defendant from the use of the name by which such articles are designated by the patentee and known to the trade, his only right to the exclusive use of which is derived from the same contract.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 106 Fed. 915.

Horace Pettit, for appellant.

Waldo G. Morse, for appellee.

Before ACHESON and DALLAS, Circuit Judges, and BUFFINGTON, District Judge.

DALLAS, Circuit Judge. Emil Berliner, patentee of inventions relating to machines for reproducing speech and other sounds, coined the word "Gramophone," which he adopted as a name for the machines made under the patents, and by that name they are distinctively known. The Berliner Gramophone Company, having acquired control of these inventions, entered into a written contract, dated October 10, 1896, with Frank Seaman, the plaintiff below and appellee in this court, whereby he was exclusively licensed to buy, sell, and deal in gramophones and gramophone goods throughout the United States, except in the District of Columbia, and wherein the licensor agreed that, as long as the licensee should punctually perform his covenants, the licensor would sell exclusively to him in the territory allotted to the licensee, and would not sell in that territory to any other person or corporation. Eldridge R. Johnson, the defendant below and appellant here, was not a party to that contract, nor to the litigation in Virginia and West Virginia, wherein, upon the complaint of Seaman, preliminary injunctions were granted restraining its violation by the Berliner Company, or by its predecessor, the United States Gramophone Company. In the opinion of the court below attention is directed to the fact that the present suit is not one for infringement of patent rights, which the complainant, as sole plaintiff, could not maintain, but it was considered as "one founded upon special equities alleged to arise

out of said contract, and the preliminary injunctions in Virginia and West Virginia; temporarily declaring said contract to be still in force"; and, so considering it, the learned judge held that the defendant was chargeable with "unfair competition by the use of the name 'Gramophone,' to which, under the contract, complainant is clearly entitled in the conduct of his business as exclusive dealer in and seller of the articles to which that name has been applied by the inventor." We are unable to concur in this ruling. Seaman based his supposed right to have Johnson prohibited from using the word "Gramophone" wholly upon the contract of October 10, 1896, and yet, as was well said by the circuit judge, "there is no nexus of obligation between the said defendant and the said complainant herein by reason of said contract. As to said defendant, it is *res inter alios acta*." It was for this reason that an injunction restraining Johnson from dealing in the articles in question was refused; and we think that for the same reason the preliminary injunction which was granted should have been denied. The fact that Johnson is a stranger to the contract of the Berliner Company with Seaman is, as to the whole case, a fundamental and decisive one. Whatever its effect *inter partes* may be, Johnson is not bound by it, and consequently Seaman's only asserted title to exclude him from dealing in the articles in question is plainly nugatory. How, then, can it be said that Seaman may preclude Johnson from calling them by their true name? Nothing has been suggested as supporting his claim to do so except this same contract, and, obviously, this suggestion but invites our return to the already rejected proposition that Seaman, by virtue of that contract, acquired the right to have Johnson enjoined from dealing in them. This supposed right the court below held to be nonexistent, and therefore confined its decree to the award of an injunction restraining Johnson from the use of the name "Gramophone." But we are of opinion that the privilege of so designating gramophones and gramophone goods is incident to the right to deal in them, and that, therefore, Seaman's failure to maintain his primary assault upon Johnson's right to deal in those articles necessarily involved the defeat of his subsidiary effort to debar Johnson from correctly denominating them. The decree of the circuit court is reversed.

WESTERN ELECTRIC CO. v. WILLIAMS-ABBOTT ELECTRIC CO. et al.

(Circuit Court of Appeals, Sixth Circuit. May 7, 1901.)

No. 904.

1. PATENTS—VALIDITY—TELEPHONE CALL BOXES.

The Gray patent, No. 309,617, for improvements in telephone call boxes, which claims broadly "means" or "mechanism" for automatically breaking and holding open the short circuit during the operation of signaling, the specific device therefor invented by the patentee being disclaimed, and made the subject of a separate application, is void as to all three of its claims, in view of the disclaimer, which takes out of the patent all that was patentable in the invention, leaving it merely the equivalent of a claim for a function.

1. APPEAL—INTERLOCUTORY DECREE—DENIAL OF INJUNCTION.

Act June 6, 1900, amending section 7 of Act March 3, 1891, creating the circuit courts of appeals, relating to appeals from interlocutory orders and decrees, repealed, by implication, the prior amendment of February 18, 1895, and, as the section stands since the later amendment, an appeal does not lie from an interlocutory decree denying an injunction.

2. PATENTS—SUITS FOR INFRINGEMENT—RIGHT OF APPEAL FROM INTERLOCUTORY DECREE.

An appeal does not lie by a complainant from an interlocutory decree dismissing a bill for infringement of a patent as to one claim of the patent, but sustaining it and directing an accounting as to others; but the right to appeal from the dismissal is suspended until the final decree, when the dismissal, and any other action prejudicial to the complainant, can be brought up by a single appeal.

Cross Appeals from the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio.

This is a suit in equity in which the Western Electric Company complains of the infringement by the Williams-Abbott Electric Company, its president and treasurer, of rights secured by letters patent No. 309,617, issued December 23, 1884, to Elisha Gray, as assignor of the complainant, for improvements in telephone call boxes. The answer denies that the invention covered by the patent involved any substantial novelty or anything patentable; denies that Gray was the first and true inventor of the devices therein described; avers that they were previously described in certain former publications and patents, which are enumerated; and denies infringement. A replication to the answer having been filed, the parties took proofs, and on the hearing the circuit court dismissed the bill as to the first claim of the patent as being merely for a function, sustained the other two claims,—the second and third,—and found that the defendant had infringed the same. A decree was accordingly entered for the complainant in respect of those claims, ordering an injunction and an accounting of damages and profits (83 Fed. 842). The defendants have appealed from that part of the decree which orders an injunction against them, and the complainant has appealed from that part of the decree which denies the validity of the first claim of their patent. The subjects of the controversy are stated in the opinion which follows.

Albert Lynn Lawrence and George P. Barton, for appellant.

Charles C. Bulkley, for appellees.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

SEVERENS, Circuit Judge, after making the foregoing statement of the pleadings and proceedings in the case, delivered the opinion of the court.

The invention of Gray relates to the construction of the apparatus employed in telephone call boxes, and more particularly to certain devices for automatically opening and holding open the circuit over the shunt line, or by-path, by which the incoming current effecting the call at the particular station is taken around the magneto-electric machine which is located within the call box, and is employed for generating the outgoing or signaling current. The incoming line runs to the generator, and thence out, and the resistance of the generator is so great as to make a serious obstruction to the passage of the current through it. To obviate this difficulty a line of low resistance is connected with the main line at a short distance before the latter reaches the generator, and is carried around it to connect with the return wire out. The

generator is thereby cut out of the circuit, and the current passes easily around it, and out of the local apparatus. But, when the generator is itself actively employed in sending out the current over the main line, the current will encounter on its course greater resistance than that of the shunt, and would therefore escape by that path on reaching its point of connection with the main line unless some provision was made to prevent it. This is done by a device located on the shunt, consisting, in effect, of cutting the line, and attaching one end to the fixed end of a spring, and the other end to a contact point, on which rests, normally, the free end of the spring. The spring, being a conductor, transmits, when resting on the contact point, the current, which then passes freely. By means of a key attached to the flexible part of the spring, and having a button at its outer end, the spring may be pressed off its point of contact, and the circuit is broken. This, of course, prevents the current which is sent out from the generator from leaving the main line for the shunt. Before Gray's invention, the common method of operation was, before revolving the shaft which put the generator into activity for signaling, to open the shunt line by pressing the spring off its point of contact, and holding it off while sending the signal. This was done by pushing the button of the key with the thumb or finger. This state of the art was recognized by Gray in his specification. The object of his invention was to dispense with this independent manipulation of the spring in the shunt line, when using the main line for signaling; and he proposed to accomplish that object automatically, by the same effort as that by which the generator is excited. The means he devised for this purpose were these: He put a screw thread upon the outer end of the main shaft carrying the gear for operating the generator, made a corresponding thread upon the inside of a prolongation of the shaft, which he called a "hub." Upon the outer end of the hub he attached a crank having a handle. Near the inner end of the hub he put a collar. On the inside of the box he affixed a flat spring, having, midway of its length, an opening to fit the hub; the spring resting against the inside of the collar. The free end of the spring pressed normally upon a point of contact in the shunt line; the fixed end being also connected with the line. Upon the extreme inner end of the hub was fixed a rigid arm, which was held normally by a spiral spring against the back side of a pin projecting laterally from the wheel on the main shaft. On turning the crank, two things happened: First. The hub was drawn in by turning it on the screw on the end of the shaft. This pressed the flat spring in also, and carried it away from its contact point at the free end, and thereby opened the circuit in the shunt line. One revolution of the hub was sufficient for this. Second. As the wheel and shaft had remained stationary during this first revolution, the arm on the hub was brought over to the other side of the pin on the wheel, and set the latter in motion to excite the generator. During subsequent revolutions, the hub, having been already drawn in, remained there, holding the flat spring out of contact, while the main shaft was revolved and the signal was being given. When the

operation was accomplished, and the crank released the retractile power of the spiral spring threw back the arm of the hub to the other side of the pin. This, of course, turned back the hub on the screw of the shaft to its original position, and allowed the free end of the flat spring to fall back upon its point of contact; the circuit was restored, and the operation was complete. It must be acknowledged that there was a good deal of ingenuity displayed in these devices, and that the invention was one of very considerable merit.

We will now take up the consideration of the legal questions in the case, to see whether, upon their proper solution, and having in view the disclaimer presently to be referred to, the patent can be sustained as one founded upon the invention. The application for the patent was dated January 3, 1881. It recites an application for another patent filed May 11, 1881; the latter, as we understand, having been carved out of the former. And it is expressly stated in the original application that in the application of May 11th the inventor had claimed the peculiar electro-magnet, and also the specific mechanism of the automatic shunting device described in the first application. Having stated that he had made the specific mechanism of the automatic shunting device the subject of an application for another patent, the applicant proceeds to say, "I therefore limit myself in this application to the general or broad claims upon the automatic shunting device." This seems a singular proceeding. By the general rule of patent law, a patent for the specific device would cover all known equivalents, the range of which would be more or less broad, according to the scope of the invention. Such equivalents represent, in legal contemplation, the same invention. One cannot divide an integral invention, or have two patents for the same thing. *Miller v. Manufacturing Co.*, 151 U. S. 186, 14 Sup. Ct. 310, 38 L. Ed. 121; *Pneumatic Tire Co. v. Lozier*, 33 C. C. A. 255, 90 Fed. 732; *Fassett v. Manufacturing Co.*, 10 C. C. A. 441, 62 Fed. 404. The present case is not one where the invention contemplates more than one congeries of parts which, separately, constitute a distinct organization. It seems a necessary inference that the applicant for this patent sought to gather in and monopolize all means which might be employed for the organization of an automatic shunting device other than such as he had chosen to represent his actual invention. This he could not do. An automatic shunting device might be constituted of any combination of means capable of performing its function. One cannot thus preclude all others from inventing means which will automatically produce the same result. The applicant followed up his disclaimer in the specification and the limitation which he had imposed upon himself by correspondingly broad and general claims. They are these:

"I claim: (1) The combination, with a magneto or dynamo electric machine, of a main circuit and a shunt or short circuit around said machine, and means for automatically breaking such short circuit upon and continuously during the operation of the machine. (2) The combination, in a dynamo or magneto electric machine, of a main circuit, a shunt of low resistance around the coils of the armature, a key in said shunt, and mechanism whereby said key is automatically opened upon and continuously during the operation of the machine; said key being closed and held closed automatic-

ally when and while the machine is not in operation. (3) The combination of the driving shaft of a dynamo or magneto electric machine, a sleeve mounted thereon in such manner as to have a determinate longitudinal movement thereon, and a circuit breaker automatically operated by the longitudinal movement of the sleeve."

The first claim was held void by the circuit court upon the ground that it was equivalent to a claim for a function. The other claims are founded on the same purpose, and are exposed to a like objection. Thus, in the second claim, after including the elements of the familiar organization,—that is to say, the generator, the main circuit, a shunt of low resistance around the coils of the armature, and a key in said shunt,—the applicant adds:

"And mechanism whereby said key is automatically opened upon and continuously during the operation of the machine, said key being closed and held closed automatically when and while the machine is not in operation."

The suggestion is that, in a machine in common use, "mechanism" be incorporated which will produce a certain stated result. But what "mechanism"? None is indicated. The peculiar mechanism invented by the applicant is expressly shut out, and there is no reference in the claim to the specification. How could the workman endeavoring to construct the apparatus know how to proceed? He is left to invent the mechanism which will produce the contemplated result. It amounts to no more than that, observing a want, a man should lay claim generally to all means which would meet it. The truth is that the kernel of the invention was taken out of this, and made the subject of another application. Having disclaimed it, the patentee cannot now claim that invention to be within the scope of the patent here in suit. *Thomas v. Spring Co.*, 23 C. C. A. 211, 77 Fed. 420.

The same observations will apply to the third claim. This claim is for a driving shaft of a generator, a sleeve mounted thereon in such manner as to have a determinate longitudinal movement on the shaft, and a circuit breaker automatically operated by the longitudinal movement of the sleeve. But what is to be the manner of the mounting of the sleeve? And what is the construction of the "circuit breaker"? And how is it organized with the sleeve? The mechanic could not understand without referring to the specification of the mechanism; and if he took that for his guide, with such variations as his own skill should suggest, he would be building within the bounds of the disclaimer. Moreover, a sleeve mounted on a shaft in such manner as to give it a determinate longitudinal movement thereon, associated with mechanism for controlling the current by opening and closing the points of contact in the line, was an organization of electrical apparatus which had been in use since 1872, as is shown by the patent to Edison, No. 131,343, for transmitters and circuits in printing telegraphs. It is true that it was not there employed for the identical use or purpose for which it is employed in this patent; but it seems clear that by a very simple and obvious modification it could be used for completely opening and closing the circuit. Of course, we are not to be understood as suggesting the Edison patent as an anticipation of Gray's.

The reference is made for the purpose of indicating that the field was not then open for a broad invention which would include all combinations which would meet the requirements of the claim we are now considering.

The complainant has appealed from that part of the decree which dismisses the bill as to the first claim; but we think the appeal was premature, and that we are not authorized to entertain it. It is contended, in support of the appeal, that the act of June 6, 1900, amended the seventh section of the act of March 3, 1891, but left standing the statute of February 18, 1895, which was an amendment of the act of 1891, and that by the act of 1895 an appeal was given from an interlocutory order or decree denying an injunction. We are of opinion, however, that the act of 1900 amended the act of 1891 as amended by the act of 1895. The act of 1900 declares that the act of 1891 "shall be amended so as to read as follows." This reference to the act of 1891 is to section 7 thereof as it stood at the date of the passage of the act of 1900, which latter gives an appeal only from interlocutory orders or decrees granting or continuing an injunction. In this conclusion we agree with the circuit courts of appeals in the Seventh and Second circuits in *Wirc Co. v. Boyce*, 104 Fed. 172, and *Westinghouse Air-Brake Co. v. Christensen Engineering Co.*, Id. 622, respectively.

It is further contended that, as the decree finally disposes of the first claim of the patent, an appeal would lie independently of the statute. But as that part of the decree did not finally dispose of the whole case, which was retained for the purpose of an accounting upon the claims held valid, the right to appeal from the dismissal of the bill as to the first claim would be suspended until the final decree, when that action and any other which might be prejudicial could be brought up on one appeal. The other course would sanction the bringing up of a case "piece-meal." In thus holding we are in agreement with the opinion of the circuit court of appeals for the First circuit in *Marden v. Printing-Press Co.*, 15 C. C. A. 26, 33 U. S. App. 123, 67 Fed. 809.

The appeal of the complainant, Western Electric Company, will be dismissed. The appeal of the defendants Williams-Abbott Electric Company, Latty, and Abbott, is sustained. That part of the decree from which their appeal is taken will be reversed, and the cause will be remanded, with directions to dismiss the bill as to the second and third claims of the complainant's patent.

AMERICAN ELECTRICAL NOVELTY & MFG. CO. v. NEWGOLD et al.

(Circuit Court, S. D. New York. June 1, 1901.)

1. PATENTS—VALIDITY—DESIGN FOR LAMP.

The Hitzelberger design patent, No. 29,939, for a portable lamp body, held void on the evidence, from which it appeared that the design was fully shown in the drawings which accompanied an application by another for a mechanical patent, filed prior to the application of Hitzelberger, and which failed to show that the latter was the originator of such design.

2. SAME-INVENTION-ELECTRIC LAMPS.

The Misell patent, No. 617,592, for an electrical hand lamp, claim 3, when considered apart from the design for the lamp body, which is not claimed to have been the invention of the patentee, is void for lack of patentable invention, in view of the prior art.

In Equity. Suit for infringement of patents. On final hearing.

Thomas Ewing, Jr., for complainant.

A. v. Briesen and Hans v. Briesen, for defendants.

COXE, District Judge. This is an equity suit for the infringement of two letters patent owned by the complainant. The first is a design patent, No. 29,939, for a portable lamp body granted to Gustave F. Hitzelberger, assignor to complainant, January 3, 1899. The application was filed December 3, 1898. The specification says:

"As shown in the drawings, the leading and essential feature of this design consists of a unitary lamp body of cylindrical shape, elongated in the direction of its axis and having a bull's-eye at the forward end thereof. The lamp body is intended for use in a portable electric lamp, and in the particular form shown in the drawings consists of an elongated cylinder A, having a bull's-eye B at its forward end and being surrounded at each end and at the middle by a metallic ring C, the cylinder having a ring D attached to one side thereof."

The second patent, No. 617,592, is for an improvement in electric hand lamps, granted to David Misell, assignor to the complainant, January 10, 1899. The application was filed March 12, 1898. The specification says:

"The invention consists in the way of assembling the parts and in the manner of making the electrical connections and in other details, all as hereinafter described and claimed."

The third claim only is involved. It is as follows:

"(3) The combination of a tubular casing a reflector located in and protected by one end thereof, a lamp located in front of the reflector and within the casing, having one of its filament terminals extending rearwardly through the reflector to the rear side thereof, a cover for the opposite end of the casing connected with the opposite filament terminal and a cylindrical battery contained within the casing the cover when shoved home making contact with one pole and end of the battery and forcing the opposite pole and end thereof into contact with the rearwardly extending filament terminal, substantially as described."

Fig. 1 of the design patent is identical with Fig. 1 of the mechanical patent.

The defenses are anticipation, lack of invention and noninfringement.

The patents have been twice before the court. On the first occasion the cause was submitted without argument or brief on the part of the defendant and the patents were held to be valid and infringed. 98 Fed. 895. On the second occasion a motion for a preliminary injunction was denied in the present action. 99 Fed. 567. It is not contended that either of these decisions is at all controlling upon any of the issues now presented. It will be observed that the application for the mechanical patent was filed nine months prior to the application for the design patent, the specification and drawings of the former describing and showing the design in its most minute par-

ticulars. In other words, the complainant has alleged and proved that Misell and not Hitzelberger was the first to make the design and there is nothing in the record to contradict this proof or to show that Hitzelberger conceived the invention prior to the date when Misell is proved to have made the design. In these circumstances the burden was upon the complainant to show that Hitzelberger's invention was actually made prior to March 12, 1898. This the complainant has failed to do. Neither Misell nor Hitzelberger was called as a witness and the court is unable to find in the record any theory to justify the assumption that Hitzelberger was the originator of the design in question. No explanation is proffered in complainant's brief. The brief contains only the following allusions to the subject:

"These two inventions were made by Misell and Hitzelberger while working together. They are so intimately associated that the court may be inclined to wonder why a joint patent was not taken out covering both the design and the electrical connections. One reason is that under our law a sharp distinction is drawn between the two classes of inventions, and the design patent is granted for a maximum term of but fourteen years, while the patent of invention is granted for a term of seventeen years. * * * The complainant's assignors, Misell and Hitzelberger, for the first time in the art, set out to make a hand lamp which should be the most convenient thing in the way of a hand lamp possible, and excel in structural simplicity and strength. This they were enabled to accomplish, because they did not undertake to make the article useful for other purposes than as a hand lamp pure and simple, or to make it look like any other article. The result is that they have produced a design which has advantages peculiar to itself, and an electrical arrangement which is so simple that no one, however ignorant of electrical matters, can fail to operate it properly."

The obvious answers to these suggestions are: First. There is nothing in the record to sustain them. Second. They fail to meet the point now under consideration that Misell, upon the record, appears to be the originator of the design. Third. If admitted to be true they defeat both patents for the reason that as both the design and the device were the result of the combined efforts of the two men the patents should have been granted to them as joint inventors. Walk. Pat. § 50. The design patent, upon this proof, is clearly invalid.

In approaching a consideration of the Misell patent care should be taken to divorce it from the design which is an attractive and an unusual one for a hand lamp. The third claim must be considered as one for mechanical devices only which will be anticipated or infringed by any other structure possessing these features irrespective of its form or appearance. The combination of the claim contains the following elements: First. A tubular casing. Second. A reflector located in and protected by one end of the casing. Third. A lamp located in front of the reflector and within the casing, having one of its filament terminals extending rearwardly through the reflector to the rear side thereof. Fourth. A cover for the opposite end of the casing connected with the opposite filament terminal. Fifth. A cylindrical battery contained within the casing. Sixth. The cover, when shoved home, making contact with one pole and end of the battery and forcing the opposite pole and end thereof into contact with the rearwardly extending filament terminal. A broad construc-

tion of the claim is impossible. The proceedings in the patent office, the prior art and the declarations of the specification limiting the patent to "the way of assembling the parts and in the manner of making the electrical connections and in other details," all compel a construction narrowing the claim to "the details" described and shown. So construed it is doubtful if infringement can be maintained. It is true that this defense is based upon slight and formal differences which, in a pioneer patent, would be promptly disregarded; but that these differences exist there is no doubt, and to construe the claim so that both the defense of lack of novelty and of noninfringement are avoided requires the exercise of judicial ingenuity which hardly belongs to "the skill of the calling."

But can the claim be upheld for any purpose? It is admitted that each of the elements as above-stated, when considered separately, was old and that several of them were previously grouped in analogous congeries. Thus, the Hoggson patent, No. 520,429, shows a cylindrical dry battery contained within a tubular casing. The complainant is licensed under this patent and its batteries are constructed in accordance with its terms. The Magee patent shows a cylindrical casing with an electric lamp located in front of a reflector within the casing. The Hoffman patent shows a cylindrical battery within the casing, a lamp having one of its filament terminals extending rearwardly and a cover for the opposite end of the casing connected with the opposite filament terminal. The hinged cover makes contact with one pole of the battery and forces the opposite pole into contact with the rearwardly extending filament terminal. The Paget patent shows almost the exact structure of the Misell patent with the single exception that the lamp and reflector are located on the side of the casing instead of within the end. Other patents, showing several of the more minute details of construction, have been introduced, but it is not necessary to consider them, as it must be conceded that any skilled electrician knew enough to connect a lamp and a battery in almost every imaginable environment.

The following question naturally suggests itself: Did it require the genius of the inventor, in the spring of 1898, to place the Magee reflector and lamp in the end of Paget's cylindrical casing when Hoffman, Meyer and the rest, described exactly how the connection could be made? But Misell's task was far more simple than is indicated by this question, for he had the design for the casing also ready before him. It is not pretended that the patent covers this design and there is no proof that Misell invented it. In contemplation of law, therefore, he had upon the work bench before him all the prior art, plus the portable lamp body with its bull's-eye, metallic rings and all. Misell was not required to suggest or originate anything; all this had been done by others; he was simply asked to arrange a lamp and reflector like Magee's in a case which was placed in his hands ready to receive the lamp and reflector. The connection of the battery with the translating device was a very simple matter within the knowledge of any intelligent workman, but if Misell needed assistance in this particular he had only to turn to the prior art where several patents told him precisely what to do. If the patent

did not deal with an electric light it is hardly probable that it would have survived the attacks of the examiner. If, for instance, an employer having in his possession a new and attractive design for a candlestick should hand it to a workman with the request that he fit it to a candle in an artistic manner, could it be maintained for a moment that this act of fitting the two together required anything but the skill of the workshop? Again, take the same illustration with a novel form of lantern substituted for the candlestick, would not any competent mechanic know enough to place a lamp within the cage and connect it properly? That it would not involve invention to do this is too plain a proposition to discuss. And yet how is the question altered because the light is produced by electricity instead of oil? Given the lamp, the casing, the battery and the connecting mechanism, and the question of invention seems to be the same. The device in question is one of many similar novelties where electricity is used to produce new and attractive effects, but it is not a device entitled to protection as an invention. The bill is dismissed.

A. B. DICK CO. v. WICHELMAN.

(Circuit Court of Appeals, Second Circuit. May 7, 1901.)

No. 142.

PATENTS—ANTICIPATION—STENCIL SHEETS.

The Dick patent, No. 562,590, for a duplicating stencil, the essential feature of which is the mixing of lard or lard oil with paraffine to form a coating for the paper of which the stencil sheet is made, was anticipated by the Broderick patent, No. 377,706, which is sufficiently broad to cover the coating of the sheet with any gummy or waxy substance, the best material for the purpose being a matter to be determined by mechanical experiment.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Appeal from a decree of the circuit court (106 Fed. 637), which dismissed a bill in equity brought by the owner of letters patent No. 562,590, applied for December 27, 1887, and issued on June 23, 1896, to Albert B. Dick, assignor to the complainant, for an improved means for producing duplicating stencils. The bill was founded upon an infringement of the first three claims of the patent, and was dismissed on account of their invalidity.

Dyer, Edmonds & Dyer, for appellant.

Frederick A. Wichelman, pro se.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. On February 7, 1888, upon an application filed May 20, 1886, letters patent No. 377,706, for a prepared sheet for stencils, were issued to John Broderick. The present complainant became the owner of the patent, and it came before this court for examination in a bill in equity against the present defendant for an alleged infringement of its three claims, and was sus-

tained. 31 C. C. A. 530, 88 Fed. 264. The opinion of the court, after describing the waxed stencil sheets for duplicating handwritings that were in use before the date of the Broderick invention, describes the invention as follows:

"The patentee conceived the idea of employing a porous basic material for the sheet, which would not require to be cut or perforated, and coating it with a gummy or waxy substance, impervious to ink, of such a consistency that it could be displaced at the lines of impression so as to leave the inherent interstices in the paper exposed for the transmission of the ink. In his experiments with different kinds of basic materials, he found the Japanese paper known as 'yoshino' to be admirably adapted for the purpose in view, having sufficient porosity, thinness, and toughness to meet all the necessary conditions. This kind of paper had never previously been employed for stencil sheets. Among the coating substances which he tried, he found that paraffine of about 120° Fahrenheit, fusion point, was suitable. In describing the way of practicing his invention, he states that such paper and such a coating material are preferentially to be used in preparing the sheet. The patent, however, is not limited to the use of these constituents in preparing the sheet. The specification points out that any sheet of the requisite porosity, thinness, and toughness may be used, and may be coated with any gummy or waxy substance of a consistency that will yield upon pressure so as to expose the interstices of the basic material at the lines of impression without abrasion. The claims are as follows: '(1) A transmitting printing sheet, consisting of a thin, porous sheet, through which ink is readily transmitted, such as Japanese dental paper, or yoshino, filled or coated with a substance impervious to ink, as paraffine substantially as described. (2) A transmitting printing sheet, consisting of a thin, porous sheet, through which ink is readily transmitted, such as Japanese dental paper, or yoshino, filled or coated with a substance impervious to ink, as paraffine, and having this filling or coating removed at the points or lines of printing, substantially as described, for the purpose specified. (3) A prepared sheet for stencils, consisting of a sheet of Japanese dental paper, or yoshino, coated with a substance impervious to ink, substantially as described.'"

In 1887, Mr. Dick was pursuing independent investigations in search of a stencil sheet, and found that the same yoshino paper which Broderick had hit upon would, when coated with paraffine, be the required article. He also found that when the paraffine was "shortened" with lard oil a better result would be produced. He therefore applied for a patent in December, 1887, and in his specification described his alleged invention as follows:

"For preparing the stencil sheet from which the stencil is made I prefer to employ a thin, tough paper, which at the same time is very open. I have found that for this purpose the Japanese paper known as 'yoshino' in Japan, or 'dental paper' in the United States, is highly efficient; but other thin papers of equivalent openness might be employed. This paper may be coated with paraffine in the ordinary way of coating paper with paraffine for other purposes; but I have found that when this alone is done the coating is tenacious, and does not readily break when struck by the type: but, by adding to the paraffine a material which makes the coating friable, this objection is overcome. For this purpose I have found that lard or lard oil is an efficient material. When I employ paraffine as the main ingredient of the coating, I mix the paraffine and lard or lard oil preferably in the proportion of seven parts of paraffine to one part of lard or lard oil, whereby the paraffine is shortened. The paper is coated with this mixture after the manner of the usual paraffine process. The resulting coating is sufficiently tenacious to allow all ordinary handling of the paper, but is at the same time so friable that the type, in striking the surface, will break into and force the coating into the meshes of the silk bolting cloth or other covering

or backing sheet on sharply-defined lines, so that in printing the copies compare favorable in sharpness of the outline with the letters with original type-writing."

In 1896 the patent was granted, and the first three claims are as follows:

"(1) A stencil sheet or duplicating stencil of open material provided with a coating having a shortening material as an ingredient substantially as set forth. (2) A stencil sheet or duplicating stencil of open material provided with a coating of wax mixed with a shortening material, substantially as set forth. (3) A stencil sheet or duplicating stencil consisting of open material coated with a mixture of paraffine and lard oil, substantially as set forth."

Dick began to sell his prepared stencil paper in November, 1887, and thereafter, having had the Broderick patent brought to his attention, bought it, and the manufacture under both patents has been successfully continued. The question now is whether, in view of the foregoing facts, the first three claims of the Dick patent are valid. Broderick's invention was a thin, porous sheet, such as yoshino, filled with a substance impervious to ink, as paraffine. Dick's subsequent invention, made without knowledge of what Broderick had done, was a thin, open paper, such as yoshino, coated with paraffine mixed with lard oil or like material in the proportion of seven parts of paraffine to one part of lard or lard oil. Broderick's invention included the use of any gummy or waxy substance of the proper consistency. Dick found that he could make the gummy substance less tenacious by adding to the paraffine one-eighth part of lard. The mixture is gummy and waxy, is still substantially paraffine, and was the result of divers experiments to make paraffine—which was the substance apparently best adapted to coat the Japanese cloth—of the best consistency. The value and utility of the Broderick invention was dwelt upon in the record upon that patent, and the improvement which is the subject of this suit was an "advancing wave," and one which does not seem to be worthy of a monopoly. The decree of the circuit court is affirmed, with costs.

SPROULL v. PRATT & WHITNEY CO.

(Circuit Court of Appeals, Second Circuit. May 7, 1901.)

No. 127.

1. PATENTS—CONSTRUCTION OF LICENSE—ROYALTIES.

A contract granting an exclusive license to manufacture and sell separate articles, not necessarily conjointly used, covered by different patents, on which the licensee is to pay royalties, presumptively requires the payment of such royalties on any one article only during the life of the patent thereon; and the contract will be so construed, unless a contrary intention appears therefrom.

2. APPEAL—DECISION—QUESTION OF COSTS.

A decree will not be reversed on a question of costs, where it is affirmed in respect to the merits.

Appeal from the Circuit Court of the United States for the Southern District of New York.

De Lancy Kennedy was in his lifetime a citizen and resident of the state of New York, and died on or about January 16, 1893, leaving a last will and testament which was duly probated. The complainant, a citizen and resident of the state of New York, was appointed administratrix with the will annexed of his estate on September 24, 1894. The defendant is a corporation under the laws of the state of Connecticut. Prior to May 26, 1888, Kennedy was the owner of four letters patent of the United States,—the first, No. 148,566, dated March 17, 1874, for a machine for applying power in implements used either for cutting, or shearing, or punching, which could be, and was, used for shearing without a punch, and which expired June 17, 1891; the second, No. 161,968, dated April 13, 1875, for a spiral punch, which expired on April 13, 1892; the third, No. 267,751, dated November 2, 1882, for an improvement on the spiral punch, which expired on February 17, 1895, in consequence of the expiration of a prior Canadian patent for the same invention; and the fourth, dated January 3, 1888, for a coupler to attach punches of different diameters to a punching machine, which will expire in 1905. The first three patents were issued to Kennedy as inventor. The fourth was issued to Alfred H. Raynal, who assigned it to Kennedy. On May 26, 1888, Kennedy, as party of the first part, entered into a written contract with the defendant. The essential parts of the agreement, after reciting the ownership of the patents, are as follows: "The party of the first part hereby gives and grants unto the party of the second part, its successors and assigns, the sole and exclusive right, except as to parties above named, to whom license to manufacture has already been granted to manufacture in the United States of America and sell in the United States and other countries, the machines, punches, etc., under the aforesaid letters patent during the unexpired term thereof; also such other improvements therein as he may make or acquire during the continuance of this agreement. Said party of the first part further agrees to devote * * * his whole time for twelve months * * * to the introduction and sale * * * of the above-mentioned articles manufactured by the said party of the second part. * * * The party of the second part promises and agrees to manufacture at its cost and expense, in such reasonable quantity as shall meet the demand of the market of the United States and other countries, the said machines, punches, etc., and make earnest endeavor to sell them; to employ said party of the first part for twelve months * * * to introduce and sell * * * the said machines and punches manufactured by it; * * * to render to said party of the first part a full and correct report, on or about the first day of the months of July, October, January, and April in each year, of sales, wherever made, of said machines and punches, etc., during the preceding three months, and pay to said party of the first part during said four months twenty (20) per cent. of the proceeds of such sales as royalty, excepting upon sales of punches Nos. 10, 11, and 12, upon which three sizes the royalty to be paid is only fifteen (15) per cent." On March 17, 1891, the date of the expiration of the machine patent, Kennedy obtained a new patent for an improvement, No. 448,525, which defendant never used and for which it is not liable to account. The defendant ceased to pay royalties on sales of the shearing and punching machine after June, 1892, and upon sales of punches and couplers ceased after March 31, 1894. The circuit court found that the spiral punches were made under the patent of 1882, and that, as it did not expire until February 17, 1895, royalties upon sales of punches continued to be due until the date of its expiration, and that royalties upon the sales of couplers continued to be due until the date of the decree. No appeal was taken by the defendant from the decree. The circuit court's construction of the contract was that royalties expired with the respective patents, and judgment was entered for the complainant for the amount due upon sales of articles made after March 31, 1894, which were covered by the patents of November 12, 1882, and January 12, 1888, amounting to \$922. From this decree (101 Fed. 265) the complainant appealed.

J. Edward Ackley and Paul N. Turner, for appellant.

E. D. Worcester, for appellee.

Before LACOMBE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge (after stating the facts as above). The complainant construes the contract to be a continuing and indivisible agreement for the payment of the specified percentage of proceeds upon the sales of all machines and other articles made in accordance with expired or unexpired patents. Unless the contrary appears to have been the intention of the parties, the presumption is that, under a license for the exclusive right to manufacture and sell under a patent, royalties are not payable upon articles manufactured and sold after the expiration of the life of the patent. Parties may, of course, contract as they choose; but, in the absence of some provision by which a promise for the continuing payment of royalties upon expired patents may be fairly inferred, the presumption is that the contract is upon the ordinary terms as to the duration of royalty. In this case, the agreement was for the exclusive use and for payment of royalties upon four patents, one of which expired in about 3 years, and the fourth expired nearly 17 years, from the date of the contract; and the consideration for Kennedy's agreement was strictly a royalty, and not a division of the proceeds of a joint business for a term of years. The fact that the contract declares that the license is to manufacture and sell under the letters patent during the unexpired term thereof, instead of using the plural, "terms," is not significant in view of the nature of the contract, which was founded upon a license to manufacture in the United States articles under four patents for three separate articles. The argument by the complainant was founded upon the theory that these separate articles were to be used, and were used, jointly, so that the contract was in fact for the manufacture of sets of tools for joint use. The machine patent was for shearing or punching, and the circuit court found that "during the five years or more covered by the accounting only six of the machines sold, of the value of \$286," were of such a character that they could be used conjointly with the couplers and punches, while more than \$1,500 worth of such machines were sold on which a royalty is claimed, but which could not be conjointly used with the couplers and punches. "It is further found that the articles made under these various patents could readily be separately used, and are ordinarily sold for separate use." The finding of the court was supported by the testimony taken before the master.

The decree of the circuit court was silent on the subject of costs. The bill for an accounting was founded upon a single contract for the payment of unpaid royalties upon four patents after March 31, 1894, when the defendant ceased payment entirely, and the judgment was for the complainant to recover the amount due upon two patents. One of the assignments of error is based upon the nonallowance of costs. When a decree is "affirmed with respect to the merits, it will not be reversed upon the question of costs." *Du Bois v. Kirk*, 158 U. S. 58, 15 Sup. Ct. 729, 39 L. Ed. 895. The decree of the circuit court is affirmed, with costs of this court.

BROWN HOISTING & CONVEYING MACH. CO. v. KING BRIDGE CO.

(Circuit Court of Appeals, Sixth Circuit. February 12, 1901.)

No. 825.

PATENTS—INFRINGEMENT—HOISTING AND CONVEYING MACHINES.

The Brown patent, No. 300,690, for an improvement in hoisting and conveying machines, used chiefly in unloading heavy cargoes, such as coal and ore, from vessels, and conveying the same to a distance, cannot be sustained for the invention broadly stated in the claims, which is that of providing articulate connections between the truss which carries the track of the conveyor and the piers upon which it is supported at or near either end, so as to permit the end of the truss nearest the wharf and the pier supporting it to be moved laterally without straining the parts or moving the second pier, as such jointed connection was disclosed in prior patents. If sustainable at all, the claims must be limited to the specific construction shown in the specification, and, as so limited, *held* not infringed.

On motion for rehearing. Denied.

For former opinion, see 107 Fed. 498.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

SEVERENS, Circuit Judge. In the brief filed in support of this motion, this case is further elaborately argued. The discussion covers substantially the same grounds as those which were presented on the original hearing and have already been fully considered by the court. In these circumstances, while we have gone carefully over the case again, we see no reason for permitting a rehearing. It seems proper to observe, however, that counsel for the appellant misconceives the scope of our decision, and, because this has been possible, we conclude that we should make the matter clear. We did not determine the question of the validity of the complainant's patent. With the understanding that the court below had dismissed the bill upon the ground that the patent was invalid, we referred, *arguendo*, to certain considerations bearing upon that question. Those considerations were germane also to the question whether, if the patent could be sustained, it should be held that the invention was of the broad character claimed for it, or whether it should be restricted to the specific means devised by the inventor for effecting his proposed result; and by specific means we intend, of course, to include such means as are equivalent within the scope of the invention. We held that the patent could not be supported for the invention broadly stated in the claims, and that, if it could be sustained only for the means specified the defendant did not infringe. These conclusions rendered it unnecessary to determine whether the patent might be sustained for the claims as modified by reference to the means described in the specification. The motion for rehearing is denied.

JOHN R. WILLIAMS CO. et al. v. MILLER, DUBRUL & PETERS
MFG. CO.

(Circuit Court, S. D. New York. May 6, 1901.)

REHEARING—NEWLY-DISCOVERED EVIDENCE.

Where an interlocutory decree has been rendered sustaining a patent, and a motion for rehearing made because of the expiration of a British patent covering the invention, not before in the record, and which expired before suit was brought, which fact was not known to either party until after the hearing, defendant will be allowed to amend his answer setting up such patent, subject to the replication on file, and both parties allowed to take evidence in relation thereto.

On Application for Rehearing.

For former opinion, see 107 Fed. 290.

Charles C. Gill and Livingston Gifford, for plaintiffs.

E. M. Marble, for defendant.

WHEELER, District Judge. A decision having been made herein providing for an interlocutory decree sustaining the first claim of patent No. 261,849, and the first and third claims of No. 315,408, granted to Oscar Hammerstein; a motion for rehearing has been made because the object of the first patent was broader than the decision indicates in upholding it, and because of the expiration of a British patent covering the invention of the other, not before in the record. The specification of the first patent does mention wrappers for cigarettes, and "covering packages of all kinds, such as lozenges and the like," which would include paper, and claims founded upon which might be anticipated by the use of paper, but the first claim is confined strictly to wrapper tobacco for cigars, in the use of which it had not been anticipated by any such process or method. The application for the other patent was filed by Oscar Hammerstein, July 10, 1883. He made an assignment of all his "entire right in and to the said invention, and any letters patent that may be granted therefor," to Malvine Hammerstein, July 17, 1883. The British patent No. 3,611 was granted for 14 years, on a communication from abroad by Oscar Hammerstein, February 19, 1884; the assignment was recorded October 24, 1884; and the United States patent was granted for 17 years to Oscar Hammerstein, assignor, April 7, 1885; and the British patent expired February 19, 1898, before this suit was brought.

The British patent covers two other patents of Hammerstein, and question is made whether the construction of this part of the British patent, in connection with the other two, would be the same as that of this United States patent alone, and the affidavits of experts have been taken, respectively, by the parties upon that question. The devices of that part of the British patent would seem clearly to infringe these claims of this one, and the invention of this patent appears to have been well patented there, within the meaning of the statute. Commercial Mfg. Co. v. Fairbank Canning Co., 135 U. S. 176, 10 Sup. Ct. 718, 34 L. Ed. 88.

But Hobbs v. Beach (March 5, 1901) 94 O. G. 2357, 21 Sup. Ct.

409, is relied upon as showing that, after Oscar Hammerstein had assigned the invention to Malvine Hammerstein, he could not take out a foreign patent that would limit the United States patent granted to her as his assignee. That foreign patentee appears, however, to have been an "intermeddler," who had no relation to the American patentee, and was an adverse claimant. Undoubtedly, the foreign patentee must be the same in source of title, or right, or consent. Walk. Pat. §§ 162, 163; 3 Rob. Pat. § 1043. Oscar Hammerstein was the inventor and a patentee, although only as assignor, in the United States patent. Malvine Hammerstein stood in the same right from the same source. This case does not seem to fall within the principle of that, or so clearly within it that the chance to try the question should be denied. Neither party appears to have known about the British patent till after the hearing, or to have been seriously in fault in not discovering it. Under the circumstances, it seems most just that it should be admitted into the case, but not to the prejudice of the decree for an account to the time of its expiration.

Let the answer be amended setting up the British patent, subject to the replication now on file, within five days; the patent and defendants' evidence relating thereto to be filed within ten days after; and the plaintiffs' evidence relating thereto within ten days after that,—all without prejudice to the accounting.

THE UNIVERSE.

(District Court, D. Oregon. June 4, 1901.)

No. 4,544.

1. CONTRACT OF AFFREIGHTMENT—BREACH—LIEN.

Where parties in possession and control of a steamship under a contract with the owners assigned and transferred such charter and contract to libellant, under which said steamer was to proceed to a certain point, and take on a cargo, but the contract was not performed either on the part of the assignor of the contract or of the vessel, no lien exists against said vessel, as the contract of affreightment had not been entered into.

2. SAME.

Where the breach of a charter party did not take place in the state of Washington, and the offending vessel was never within the jurisdiction of that state, no lien for the breach is created by virtue of its laws.

3. MARITIME LIEN.

A state legislature has no authority to create maritime liens.

In Admiralty.

Platt & Platt, for libellant.

Williams, Wood & Linthicum, for claimant.

BELLINGER, District Judge. The libel in this case alleges that about the 15th day of November, 1900, one R. A. Graham was in the possession and control, under time charter with the owners, of the steamer Universe, and on said date chartered said steamer unto Pope & Talbot to take a cargo of lumber from Puget Sound, in the

district of Washington, to Port Pirie, in South Australia; that said Pope & Talbot, on or about the date aforesaid, assigned and transferred said charter and contract to the libelant, under which said steamer was to proceed to Puget Sound, and take on the cargo of lumber, on or before the 15th day of March, 1901; that the libelant company kept all the conditions and undertakings, on its part, of the said contract, but that neither Graham nor the vessel has performed or kept the undertakings on their part; that said vessel did not proceed to Puget Sound at all, but has gone to the port of Portland, in the district of Oregon, where she now is; for which violation of said charter party libelant claims damages in the sum of \$20,000. To this libel the owner of the Universe excepts upon the ground that it appears upon the face of the libel that no lien exists against said vessel by reason of the matters therein alleged. No lien is created under such a charter as is described in the libel, unless the contract of affreightment has been entered into. The principle governing this case is laid down in the case of *The Keokuk*, 9 Wall. 519, 19 L. Ed. 744. In that case the court says:

"The law creates no lien on a vessel as a security for the performance of a contract to transport a cargo until some lawful contract of affreightment is made, and the cargo to which it relates has been delivered to the custody of the master, or some one authorized to receive it."

The cases cited in behalf of the libelant are to the same effect. The case of *The G. L. Rosenthal* (D. C.) 57 Fed. 254, was a case where there was an agreement to tow libelant's boat on her various voyages throughout an entire season, and where there was an abandonment of this contract near the end of the season. It was held that the contract was not a separate contract for independent voyages, but a contract for services during the entire season, and so the case was one where the contract had been entered into and partly executed.

It is contended further on the part of the libelant that, inasmuch as it was provided in the charter party that the ship should go to Puget Sound, and take a cargo of lumber therefrom, the contract was one to be performed within the district of Washington, and the libelant is entitled to have the remedies provided for by the laws of that state applied as a part of the contract between the parties. But the breach complained of did not take place in the state of Washington, and, the offending vessel never having been within the jurisdiction of that state, no lien is created in virtue of its laws. Moreover, state legislatures have no authority to create maritime liens. *The Belfast*, 7 Wall. 644, 19 L. Ed. 266. The exceptions to the libel are allowed.

THE GOV. AMES.

(Circuit Court of Appeals, Fifth Circuit. May 14, 1901.)

No. 943.

SALVAGE—RIGHT TO COMPENSATION—FORFEITURE BY FRAUDULENT CONDUCT.

The fraudulent conduct of the persons in charge of salvage operations, in attempting to bribe the master of the stranded vessel to agree to an excessive payment, and in delaying the work with a view to magnifying the value of the services, when such fraudulent acts were not partici-

pated in nor known to the owners of the vessels engaged in the service, or the men employed, will not work a forfeiture of their right to fair compensation, when the services were successful, and of benefit to the salvaged vessel.

Appeal from the District Court of the United States for the Eastern District of Texas.

R. V. Davidson, F. D. Minor, and J. J. Browne, for appellant.
M. E. Kleberg, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. The five-masted schooner Gov. Ames, worth about \$30,000, burden about 1,690 tons net, laden with a cargo of 2,800 tons of coal, worth about \$10,000, on Sunday, May 28, 1899, about 6 o'clock a. m., while on her voyage from Norfolk, Va., to Galveston, Tex., ran aground on a coral reef on the Florida coast, known as "Loo Key Patches," about 30 miles eastward from Key West. She remained aground on the reef until 11 a. m., the following Wednesday, May 31st, when she was successfully floated. This result was produced by the combined efforts of the master and his crew of 13 men, and appliances of the ship, and of the libelants, composed of Thomas Pent, as master wrecker, and Osgood Acosta, assistant master wrecker, the crew of the tug George W. Childs, and the crews of several schooners, making all told 63 men. The libelants had in their service the tug George W. Childs and several small schooners, and commenced work early in the morning of May 28th, and continued their services until the Gov. Ames was floated, her outlying anchors picked up, and the vessel was ready to proceed on the voyage. During the time that the libelants were endeavoring to float the Gov. Ames, besides minor services rendered, they furnished a large 10-inch hawser, which was successfully used; carried out a heavy anchor belonging to the ship, weighing 7,300 pounds, some distance astern; and carried out another heavy anchor, weighing 6,800 pounds, on the port and seaward side of the ship; and jettisoned from 200 to 400 tons of cargo, which was taken up from the forward hold, and thrown overboard, and, to that extent, lightened the ship. These services were salvage services, and this seems to be admitted by the claimants; but it is contended that these services were not rendered in good faith, with a view to a speedy floating of the distressed ship, but rather in bad faith, and for the purpose of keeping the Gov. Ames aground as long as possible, with a view to increasing the salvage award to be allowed for services rendered. This contention was allowed in the district court, which decreed as follows:

"It is therefore ordered, adjudged, and decreed that the salvage of the libelants for their services rendered to the schooner Gov. Ames and cargo, while ashore on the Loo Key reefs, be forfeited on account of their having refused and failed to carry out the anchor on the port bow of said schooner, and having carried out the starboard anchor astern of said schooner, and pulling on her with the tug boat on the starboard side, with a fraudulent view of keeping her on the reefs until they had time to lighten her more than was necessary, and on account of their having placed her in a position

of greater peril and danger, and having unnecessarily employed a large number of men, and, in this manner, fraudulently magnified their services into greater importance than they were entitled to, with a view of a larger compensation than the true situation of the vessel and their fair and necessary services would warrant, whereas the proper manner of placing said anchors, the proper course in salving the said vessel, was evident to be seen by them at the time; and that, for these causes, it is ordered that said salvage be forfeited, and their libel be dismissed; but it appearing to the court from the testimony that the libelants rendered certain services to the said schooner, and that these circumstances make it just that the costs should be paid by the said schooner and cargo, and be adjudged against the respondents."

There is much, maybe a preponderance of, evidence to support this decree, except as to the fraudulent intent ascribed to all the libelants. The controlling libelants persistently declined and refused to carry out and locate an anchor on the port side of the ship, and did not carry it out until the afternoon of Tuesday, May 30th, when the master insisted upon it, threatening to procure other assistance; and the master testifies that prior to the libelants undertaking the salvage, and while negotiating with the master with regard to terms, the master wrecker, Thomas Pent, proposed to bribe the master of the Gov. Ames to agree to a contract for a large compensation by giving him a considerable portion of whatever amount should be agreed upon. It appears, from the soundings taken soon after the Gov. Ames went aground, that the shoal water was directly ahead and to the starboard, and the deep water was astern and to the port and seaward side, and it seems that ordinary seamanship and skill required that as soon as possible a heavy anchor should be put out astern to keep the ship from going ahead and further aground, and one also to the port to keep her from further working in, under the influence of wind and tide. The evidence shows that this was the master's view, and he urged it upon the libelants from the first. The Gov. Ames had no facilities to carry out these anchors. The libelants had a tug, which could, and afterwards did, carry them out. Before the libelants were employed at all, the master of the Gov. Ames offered Assistant Master Wrecker Acosta, who seems to have had some control of the Geo. W. Childs, then lying in the vicinity, \$500 if the tug would carry out the heavy anchor to the port side abreast of the ship, which offer, for some reason not shown, was declined, and the libelants would not undertake to do anything until they were put in charge of the ship. After they were put in charge of the ship, not thinking well of the effort, they delayed and neglected to run out the anchor to port until other measures and contrivances had failed. It seems that immediately the anchor was carried out to port, thus preventing the ship from working further in, and furnishing an opportunity to use the ship's appliances to warp her towards the open sea, the ship was able to, and did, draw off the reef at the first high water thereafter. As to the attempt at bribery, the evidence is somewhat conflicting, but sufficient appears to show that if the master wrecker, Thomas Pent, did not attempt to bribe the master to act in bad faith with his owners, he was willing to co-operate in a scheme to procure that result. He testifies:

"When I told the captain of the Ames I would float his ship for \$14,000.00, he said to me, 'How much do I get?' I answered, '\$2,000.00.' He replied he 'could not do that.' Then I said to him, 'You make a figure.' He replied, 'No; I cannot do that.' Then I told him \$12,000 would be my lowest figure. Then he asked me, 'How much are you going to give me out of that?' and I answered, '\$1,000.00.' He said, 'No, sir.' Then I said, 'Well, captain, I tell you what I'll do; I'll float your ship, and let it be tried by the admiralty court.' He said, 'No; I do not want it to go into court.' He said, 'Why not have it tried by the underwriters' agent?' I told him, 'All right,' if their figures suited me. He then said, 'Let me go and call my engineer and mate.'"

We find no evidence tending to show that libelants participated in, or knew of, the negotiations or purposes of the master wrecker.

The evidence in the case is voluminous, and we have considered it attentively. Our conclusion is that a fraudulent intent to delay matters in the interest of the salvors is not sufficiently shown by the want of skill and other conduct of the salvors to warrant the denial of all salvage compensation; and as the services rendered were valuable to the Gov. Ames, resulting in eventual success, they should be compensated in a reasonable amount.

Considering the value of the Gov. Ames and her cargo; the number of libelants and their vessels, large and small; the time employed in and about the matter,—in short, all the circumstances of the case,—we conclude that \$3,000 is a reasonable amount, and that the same should be allowed. As a distribution according to admiralty rules and principles will be necessary, the cause will be remanded to the district court for further proceedings.

The decree appealed from is reversed, and the cause is remanded, with instructions to enter a decree in favor of the libelants for the sum of \$3,000 total compensation for all salvage services rendered to the Gov. Ames, and therein and thereafter proceed in accordance with the views expressed in this opinion and admiralty rules and usages.

THE A. P. SKIDMORE.

THE CITY OF LAWRENCE.

(District Court, S. D. New York. May 28, 1901.)

1. COLLISION—FOG—LOOKOUTS.

Where a tug entering a harbor in a thick fog in the nighttime has no lookouts on the bows of two barges alongside, which run ahead of her some 30 feet, it constitutes negligence.

2. SAME—ANCHORAGE GROUND.

A steamship anchoring in New York harbor outside of the anchorage grounds, where the depth of water was so great as to indicate that such anchorage ground was considerably nearer the shore, is guilty of negligence, so as to be equally liable with a tug colliding with it in a foggy night.

In Admiralty.

Carpenter & Park and Mr. Symmers, for libelants.

Benedict & Benedict, for the A. P. Skidmore.

Wing, Putnam & Burlingham, for the City of Lawrence.

BROWN, District Judge. I was at first disposed to regard this collision as the result of inevitable accident, but upon the argument of counsel and closer perusal of the testimony, I am satisfied that both boats should be held in fault.

The Skidmore, in my judgment, could not have been as attentive as she ought to have been either to the bell sounded on the City of Lawrence, or to the ferry bells on the shore. The evidence of the City of Lawrence leaves no doubt that these shore bells were easily heard where she was. They should have been equally heard by the Skidmore approaching her. The steamer's bell ought also to have been heard earlier, and if it was mistaken through the slowness of the stroke for shore bells on the New York shore, that was abundant reason for the Skidmore to proceed much further to the eastward. Having been at the time the captain was called within 150 feet of the Brooklyn shore, as the mate told him, the tug could not have got so far toward the New York shore as the City of Lawrence lay without directing her course considerably across the river. This is not reconcilable with a prudent course if the captain were all the time aiming to make Newtown creek.

I think the Skidmore is further to blame for not having lookouts on the bows of the two barges alongside, which ran ahead of her some 30 feet, that is from 45 to 50 feet ahead of the pilot house. See *The Patria* (D. C.) 92 Fed. 411, affirmed in (C. C. A.) 107 Fed. 157. In so thick fog in the nighttime no excuses can be accepted for not having a good lookout way forward.

The City of Lawrence is I think to blame for anchoring where she did. The testimony is quite contradictory as to the place of her anchorage. Her captain states that after she swung to the ebb tide, the Nineteenth street buoy was directly astern. Several of the tug's witnesses testify that on going out to ascertain her position while she was in the flood tide, they found her considerably to the eastward of the buoy; but I think the captain's own testimony is conclusive that his position was considerably to the eastward of that buoy, and therefore to the eastward of the anchorage grounds. He testifies that in sounding he found seven fathoms of water, and no such depth is found except considerably to the eastward of the buoy. This fact itself was sufficient to indicate to him that the anchorage ground was considerably nearer the New York shore and that there was still abundant room for him to go there without danger. *The Ailsa* (D. C.) 76 Fed. 868.

For these reasons I think both are to blame, and the libelants are entitled to a decree against both, accordingly, with costs.

THE WILLIAM E. FERGUSON.

(District Court, S. D. New York. May 28, 1901.)

COLLISION—MUTUAL FAULT.

A propeller bound up the East river came in collision with a car float on the starboard side of a tug going down the river a little above the Brooklyn Bridge. The evidence showed that the tug was carrying propeller lights, but neither she nor her lights were seen until the propeller

had rounded about directly up river. The propeller gave a signal of one whistle, and then an alarm. She heard no whistles from the tug. The evidence showed that the lights of the propeller were seen from the tug, and a signal of two whistles was given to the propeller before the latter had signaled. *Held*, that the propeller was in fault for not having observed the lights of the tug earlier, and not having observed her signal of two whistles before its own whistle, and that the tug was to blame for not keeping in the middle of the river, as required by statute, and in having gone to the left under a signal of two whistles without an assenting signal, instead of going to the right, as required by the regulations, and in not repeating her signal at once and reversing.

In Admiralty.

Carpenter & Park, for libellant.

Wing, Putnam & Burlingham, for respondent.

BROWN, District Judge. The steam propeller Chelsea, 138 feet long, bound up the East river in the ebb tide, after leaving her moorings at pier 29 at the lower side of the abutment of the Brooklyn Bridge and going out and rounding up river, came in collision with the bow of a car float on the starboard side of the tug Ferguson going down river, a little above the Brooklyn Bridge.

The evidence is somewhat conflicting, but I think the weight of proof is undoubtedly that the Ferguson at the time of the collision was considerably on the Brooklyn side of mid-river. The Ferguson was carrying proper lights, namely, two vertical white lights indicating a tow, as well as her own colored side lights, though it is possible that her green light may have been obscured. Neither the Ferguson nor her lights were seen until the Chelsea had rounded about directly up river on the Brooklyn side of mid-stream. The Chelsea then gave a signal of one whistle twice and then an alarm when very near. Her witnesses say that they heard no whistle from the Ferguson at any time.

The testimony on the part of the Ferguson leaves no doubt in my mind that the lights of the Chelsea were seen and that a signal of two whistles was given to the Chelsea before the latter's signals and before she had rounded up river. No answer was received, and the two whistles were not repeated. To the Chelsea's subsequent one whistle the Ferguson gave one; but the tug was already under a swing to port towards the Brooklyn shore under her own previous signal of two whistles and her starboarding in accordance therewith. The danger signals and reversing were too late to prevent collision.

I find both vessels in fault. The Chelsea for not having observed at least the vertical lights of the Ferguson much earlier, and for not having observed her signal of two whistles before the Chelsea's own whistle. In my judgment these two omissions show the lack of a proper lookout and proper attention. Had these been observed the Chelsea ought to, and no doubt would, have given earlier signals to the Ferguson, and would otherwise have governed her own navigation so as to avoid collision.

The Ferguson on the other hand is to blame, first, for not keeping in the middle of the river as near as may be as required by statute, or upon the New York side of it under the regulations; and sec-

only in having maneuvered to go to the left under a signal of two whistles, contrary to the regulation, without an assenting signal, instead of going to the right as required by the regulations; and thirdly in not repeating her signal on getting no answer while the danger was still threatening (the Chelsea's two colored lights being still seen) and not repeating her signal at once and reversing, as required by the inland rules of navigation.

Decree for the libellant for half the damages and costs.

THE ACILIA.

THE CRATHORNE.

(District Court, D. Maryland. May 6, 1901.)

1. COLLISION—INLAND RULES—NAVIGATION OF NARROW CHANNELS.

Article 25 of the inland navigation rules, established by Act June 7, 1897, requiring steam vessels in narrow channels, when it is safe and practicable, to keep to that side of the fairway or channel which is on their starboard side, is applicable to navigation of a channel in the Chesapeake Bay, 600 feet wide, and is mandatory, superseding all prior rules and local customs.¹

2. SAME—STEAMSHIPS MEETING—VIOLATION OF RULES.

The ocean steamships Crathorne and Acilia came into collision in the Patapsco river on the afternoon of a clear day, at the point where the Ft. McHenry and Brewerton channels meet, at an angle of about 28°, the channel being at that point about 600 feet wide. The Crathorne was passing down from Baltimore at a speed of 6 miles, and the Acilia, which was a large ship, 452 feet in length, was coming up at a speed of 10 knots or more. Each was in charge of a licensed pilot. When perhaps a half mile apart, the pilot of the Acilia ordered the wheel starboarded, and two blasts of the whistle given; his purpose being to pass to the port side of the channel, in accordance with a claimed local custom, but in violation of the inland navigation rules. Owing to a derangement of the whistle, the valve would not close, and but one blast was sounded, which continued until after the collision. The pilot of the Crathorne, taking the first sound of the whistle to be a signal to pass port and port, in accordance with the rules, answered with the same signal, and ported his helm. On seeing that the Acilia meant to pass across his bows, he reversed. Shortly before collision the Acilia also reversed, but made no change of course, and was making greater speed than the Crathorne at the time of collision. She did not hear the signal of the Crathorne, owing to the sound of her own whistle. *Held*, first, that the Acilia was in fault in going at a dangerous speed under the circumstances, but chiefly because of the violation of the rules by her pilot, but for which the collision would not have occurred; and, second, that the Crathorne was not guilty of contributory fault in failing to sound danger signals, which would have conveyed no information not already in possession of the Acilia, nor because she did not sooner reverse, her pilot being justified in supposing, up to the time she did reverse, owing to the direction of the channel and the course the Acilia was then on, and in the absence of a contrary signal, that she would obey the rules, and change her course in time to avoid collision; furthermore, owing to the continued blast of the Acilia's whistle when she was manifestly not in distress, the pilot of the Crathorne was confronted by a perplexing situation, without fault of her own, in which he should not be held to the highest degree of promptness and certainty in his actions.

¹ Collision rules, see notes to *The Niagara*, 28 C. C. A. 532; *The Mount Hope*, 29 C. C. A. 368.

In Admiralty. Cross libels in a cause of collision.

Wilhelmus Mynderse and Daniel H. Hayne, for the Crathorne.
J. Wilson Leakin and Harrington Putnam, for the Acilia.

MORRIS, District Judge. The case stated in the pleadings on behalf of the Crathorne is: That she is a steamship of 1,695 net tonnage, and on the afternoon of January 16, 1901, she left Baltimore in charge of a licensed pilot, Howard Ensor, bound for Copenhagen, laden with cargo, drawing between 21 and 22 feet, and proceeded down the Ft. McHenry channel. That the weather was clear, and vessels could be seen the usual distances. When in the vicinity of Ft. Carroll, the lookout reported a steam vessel on the port bow, which proved to be the Acilia, coming up the Brewerton channel to Baltimore. That, as the vessels approached, the Acilia gave a single blast of her whistle, to which the Crathorne responded with a single blast and ported. When the vessels had approached within a short distance of each other, it was observed that the Acilia, contrary to the signal, was attempting to cross the Crathorne's bow. When this was discovered, and it was seen that there was risk of collision, the Crathorne's engines were at once stopped and reversed full speed astern, the Crathorne's previous speed having been moderate. The Acilia, however, crossed in front of the Crathorne, and they collided, with the result, owing to the great size and speed of the Acilia, that the Crathorne's bow was greatly damaged, and she had to return to Baltimore; the damages to ship and cargo amounting, as the libellant now claims, to \$50,000.

The case stated in the pleadings on behalf of the Acilia is: That she is a new steamship, built in November, 1900, 452 feet long, 52 feet beam, 5,697 gross tonnage, drawing, at the time of collision, 19 feet aft and 13 feet 6 inches forward. That on January 16, 1901, between 2 and 3 o'clock in the afternoon, she entered the Brewerton channel, and was proceeding to Baltimore in charge of a licensed pilot, Warren Garrison. That she was equipped with an electric automatic steam whistle of approved kind, which had always worked satisfactorily, and had been used several times that day. That while proceeding up the Brewerton channel, when about three-quarters of a mile from the turn into the Ft. McHenry channel, the Crathorne was seen coming down the Ft. McHenry channel, on its easternmost side, more than a mile off. That shortly thereafter the pilot of the Acilia, "knowing the custom of pilots going to and coming from the port of Baltimore of giving the laden vessel coming down the easternmost side of the channel, where the water is deeper, and of the lighter laden vessel taking the westernmost side, where the water is shallower, proceeded to change the course of his ship by putting his helm hard a-starboard, and to signal so as to head for the westernmost side of the channel." That he directed the second officer to blow two short blasts as a signal, but the whistle of the Acilia continued to blow one long drawn out blast, without stop or interruption, which continued five or six minutes, and until after the collision. That, finding that the whistle could not be shut off,

the pilot of the *Acilia* put her engines full speed astern, and they were kept so for some time before the collision, so that the headway of the *Acilia* had been entirely overcome at the time of the collision. That the *Crathorne*, not observing the unusual character of the continued whistle, apparently regarded it as an ordinary passing signal for port helm, and changed her course, and kept on at full speed, and struck the *Acilia* on her starboard bow, about 27 feet aft the stem, and turned her around nearly at right angles with the channel, putting her bow outside the channel, and striking the *Acilia* a second time about amidships. That owing to the great speed of the *Crathorne*, and to the fact that her plating was old and weak, her stem was repulsed, and turned to port. That the whistle of the *Acilia* could not be stopped until the steam had been shut off at the boiler, after the collision. That subsequently, on being taken apart, it was discovered that two small pieces of metal had apparently been carried up by the steam, and lodged on the valve seat of the whistle, so as to prevent its closing. That it is not known where the small pieces of metal came from, and no practicable care or diligence could have avoided such an accident. That the *Acilia* was navigated with great caution and skill, and complied with every rule, and the collision was wholly caused by fault on the part of those in charge of the *Crathorne*, (1) in that they assumed that the prolonged whistle of the *Acilia* was a passing signal, and so shaped her course; (2) that the sight of the escaping steam from the whistle and the change in the heading of the *Acilia* was not taken as a warning that it was not a passing signal; (3) in persisting in their mistake when it involved risk of collision; (4) in not regarding the prolonged whistle as a signal of distress, calling for special caution on their part; (5) for running at too great speed in the channel; (6) for failing to stop and reverse promptly; (7) in failing to starboard so as to avoid the *Acilia*; (8) in failing to sound danger signals. They claim that the damages to the *Acilia*, including demurrage, amount to \$60,000.

The navigation of these two steamships was governed by the act of congress approved June 7, 1897, entitled "An act to adopt regulations for preventing collisions upon certain harbors, rivers, and inland waters of the United States." This act superseded all previous legislation, and all regulations adopted in pursuance of such legislation, and contains the whole law at present in force as to the Chesapeake Bay and its tributaries, except certain amendments to rule 2 and rule 4, adopted by the board of supervising inspectors, and approved by the secretary of the treasury, January 30 and February 1, 1900, which are not material to this case.

The testimony disclosed that the licensed pilot in charge of the navigation of the *Acilia* was grossly in fault. He was bringing the *Acilia*, a steamship of 452 feet length, up the Brewerton channel, approaching the bend which unites the Brewerton with the Ft. Henry channel, and was about to pass a descending steamer in the bend, a situation plainly demanding caution, yet he continued the *Acilia* at her full ocean going speed of not less than 10 knots, and probably more. It is true that the master of the *Acilia* states that

he had about 10 minutes before the collision told the chief engineer to reduce steam in the boilers, as they were approaching quarantine, but there is no evidence that this suggestion had been acted upon or had produced any effect. The pilot gave no order at all to the engine room to lessen speed until, when the collision was imminent, he ordered the engines reversed. Full speed in these dredged channels, when about to pass other vessels, is undeniably a fault which increases every risk of navigation. *Appleby v. The Kate Irving* (D. C.) 2 Fed. 924.

Article 25 of the inland rules, established by the above-mentioned act of June 7, 1897, is as follows: "In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel." This was a dredged channel of about 600 feet width. It was therefore, in the sense of the statute, a narrow channel, and it was perfectly safe and practicable to obey the rule. For some reason of his own, but with no legal excuse, the pilot of the *Acilia* determined to disobey the rule, and endanger the ship, which, because of his supposed familiarity with the local rules, had been intrusted to him. He states that he supposed the *Crathorne*, being a laden vessel, would desire the northerly or easterly side of the channel, which is the side marked by buoys, but he had no right to proceed upon such a supposition without an interchange of signals. The testimony shows that there is no reason for such a violation of the rule. The channel is of the same depth on both sides, there is ample room to make the turn, and the pilot of the *Crathorne* expected nothing but that the rule would be obeyed. And, even after the whistle went wrong, there would seem to have been time enough to have brought the *Acilia* under a port helm to the northerly or easterly side of the channel, if her pilot had been willing to do so. It is not to be endured that certain of the pilots shall arbitrarily pursue a course in opposition to the law, and what makes it even more dangerous is that there is no agreement even among the pilots of the same association. *The Mary Shaw* (D. C.) 6 Fed. 918; *Steamship Co. v. Smith*, 20 C. C. A. 419, 74 Fed. 261-267.

If the *Acilia* had been steered for her proper side of the channel, as directed by the law, there would have been no collision, notwithstanding her speed and the accident to her whistle. It is not true, as is stated in the libel of the owners of the *Acilia*, that she was navigated with great caution and skill, and complied with every rule; but the reverse is the fact. It is true that the officers and seamen of the *Acilia* obeyed and executed with promptness and skill the orders they received from the pilot, but they did not receive proper orders. *Belden v. Chase*, 150 U. S. 674-699, 14 Sup. Ct. 264, 37 L. Ed. 1218.

It being manifest that the *Acilia* must be held in fault, it remains to consider whether the pilot in charge of the *Crathorne* is to be held in fault for the omission to do something that he might have done to avoid the collision. The *Crathorne* was going at a moderate speed, probably not over six miles an hour. She was, when the

Acilia signaled, a little to the southward of the center of the channel; that is to say, nearest to the side which was to her starboard. What was done on the Crathorne is quite fairly stated by the witness Newton, her first officer, who was the officer put in charge of the bridge to execute the pilot's directions. His testimony, reduced to narrative form, is, in substance, as follows:

"We saw the Acilia two or three miles off. When she was a little below the bend she blew her whistle. She was then two points on our port bow, showing us her starboard side. When she got to the bend we would expect that she would go around into the Fort McHenry channel, which we were coming down, and pass us port to port. I would say she was five or six ship's lengths off when she first blew her whistle. Our pilot answered with one short blast, and said, 'Port the helm,' and the man put the wheel over, and while he was porting the pilot said, 'Hard a-port.' We then observed that, contrary to her signal and contrary to the rule, instead of porting the Acilia was going off to our starboard side of the channel, and our pilot gave the order, 'Stop and full speed astern,' and I transmitted it by the telegraph to the engine room. We were then two ship's lengths from the Acilia."

He thinks it was about a minute from first hearing the Acilia's whistle to the time when they noticed the Acilia's change of course as if she was under a starboard helm, and it was not until then that he thought there was something wrong with the Acilia. The master of the Crathorne states that he had left the bridge to go to the water-closet, and while there heard his ship give one short blast; that presently he felt the engines going astern, and then he came out, passed through the saloon, and up the port side of the deck, and when he had arrived at the foot of the ladder leading to the bridge the collision occurred. The testimony of the pilot of the Crathorne is to the same effect. He says the Crathorne had just passed buoy 34 when he heard the first of the Acilia's whistle. He says he was expecting a port whistle, because he was intending to keep the starboard side, and never had any other intention, and that he kept ahead under a port helm until he made out that the Acilia was starboarding and heading across his bow, and then he gave the order to stop and reverse. The pilot of the Acilia testifies that he was abeam of buoy No. 30, and about mid-channel, when he ordered the wheel to starboard, and told the second officer to blow two short blasts; that the wheel was put to starboard, and the whistle started, and it continued to blow, and could not be stopped; that when he found the whistle was out of order he gave the order full speed astern, and that the engines were going astern for three minutes before the collision; that when he gave the order to blow the signals the Crathorne was about three-quarters of a mile off, near buoy 34.

The vessels came together just inside the southerly and westerly edge of the channel, quite close to the black buoy which marks the apex of the bend. The bow of the Crathorne struck the bluff of the starboard bow of the Acilia, and rebounded, and struck the Acilia again about midships. The bow of the Crathorne was driven in, and crushed over to port, and the plating of the Acilia was punctured in several places by the Crathorne's anchor, as it scraped along the Acilia's starboard side. The headway of the Crathorne

was stopped by the blow, and the *Acilia* kept on rubbing by the Crathorne's bow. The Brewerton channel runs W. N. W., and the Ft. McHenry channel N. W. $\frac{1}{2}$ N., so that they make an angle of two and a half points, or about 28° .

This is not the case of two steamships approaching by straight courses. The case is peculiar, in this: That those navigating the Crathorne, looking across the bend of the channel, would see the starboard side of the *Acilia*, but they would know that in order to keep in the channel when she reached the bend she must port her helm, and her bow must come to starboard, and expose to them her port side, and the fact that they continued to see her starboard side, even until she was nearly up to the black buoy at the apex of the bend, was no sure indication that she did not intend to port. It would only indicate some slowness in making the turn, or that the ship had perhaps taken a sheer which presently her port helm would overcome. As they watched her, they would every moment be expecting to see indications of the change to a port helm. The last thing they would have a right to assume would be that those in charge of the *Acilia* were persistently determined to take the wrong side of the channel. The continuing of the whistle blowing was only confusing, and without certain meaning. It did not mean that the *Acilia* was going to disobey the rule, and she was not in distress needing assistance. Article 31. Under these circumstances, it does not seem reasonable that the highest degree of promptness and certainty of action should be exacted of those navigating the Crathorne. They were confronted by a perplexing situation, brought about by no fault of their own. The *George L. Garlick* (D. C.) 91 Fed. 920-924; The *George S. Shultz*, 28 C. C. A. 476, 84 Fed. 508. The fault charged against the Crathorne amounts, I think, to this: That when the *Acilia's* whistle continued to blow for more than three or four seconds the pilot of the Crathorne should have treated it as a distress signal, or a signal which he could not understand, and should have blown danger signals, and at once have slowed his vessel, or stopped and reversed.

Rule 3 provides as follows:

"If when steam vessels are approaching each other either vessel fails to understand the course or intention of the other from any cause the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, not less than four, of the steam whistle; and, if the vessels shall have approached within half a mile of each other, both shall be immediately slowed to a speed barely sufficient for steerageway until proper signals are given, answered, and understood, or until the vessels shall have passed each other."

Now, the difference, as I understand it, between what it is contended the pilot of the Crathorne should have done and what in fact he did do, is this: It is contended that, as soon as the *Acilia's* whistle continued to blow beyond the proper duration of a passing signal, the Crathorne should instantly have stopped and reversed, while what he did do was to delay giving that order until he saw that the *Acilia* was not directing her course up the channel, but was going off to his starboard, and crossing his bow, he having in the meantime hard a-ported his helm, and gone close to his starboard side of the

channel. There was no manifest danger of collision, so far as the pilot of the Crathorne could judge, until he could see that the Acilia's course was directed towards the southerly side of the channel, and this he could not determine with certainty until the Acilia had passed the point where, in order to keep in the channel, she had to port. Until in some way warned to the contrary, the pilot of the Crathorne was entitled to presume that the other pilot would act lawfully, and keep to his proper side of the channel, and that, even if by reason of some sheer of his ship he did not enter on that course as soon as he might, he would do so as soon as he could bring his vessel's head around.

It cannot be said that the pilot of the Crathorne failed to understand the course or intention of the Acilia until he could make out that she was under a starboard helm, because he had a right to presume, until he received a signal of two blasts, that she was going to obey the statute, and keep to her proper side of the channel. Therefore it was not a fault that he did not blow danger signals. He blew one blast, and that was not heard on the bridge of the Acilia, because of the sound of her own whistle. But, even if danger whistles could have been heard, it does not seem possible that they would have afforded any information to those on the Acilia. The pilot of the Acilia says he already knew there was danger when he had starboarded his helm, and found that he could not shut off the Acilia's whistle, and so could not give notice of the altered course he had entered upon.

But the omission to give danger signals, if, indeed, they ought, under the rule, to have been given, is not sufficient to charge the Crathorne with fault, as it clearly appears that the omission in no way contributed to the disaster, as the pilot of the Acilia already knew all that danger signals could have conveyed to him. The *City of Washington*, 92 U. S. 31-37, 23 L. Ed. 600. To put upon the Crathorne the responsibility for the failure of her pilot to do all that any navigator might possibly have done if he had understood then what is understood now, after the unlooked-for intention of the Acilia's pilot has been explained, and the cause of the prolonged whistle has been discovered, is, as was said by Lord Esher, M. R., in *The Stephanotis* and *The Horton*, cited on page 428, 168 U. S., page 157, 18 Sup. Ct., and page 530, 42 L. Ed., in the case of *The Victory* and *The Plymothian*, "requiring men to do what no man ought to be expected to do under such circumstances." All the language of Lord Esher quoted in the decision above cited seems to me quite applicable to the present case. What the pilot of the Crathorne did was to port as soon as he heard the Acilia's whistle, and to give a signal of one blast, and when the Acilia's whistle continued he hard a-ported, which took his vessel more and more towards his own side of the channel, and gave more room for the use of the Acilia; and when he could be sure that the Acilia was not going to follow the channel, but under a hard starboard helm was heading him off, he stopped and reversed.

Suppose when he first discovered that there was something, he could not tell what, wrong with the Acilia's whistle, he had then either stopped and reversed, or starboarded his helm, and the Acilia

had then obeyed the law, and ported, and a collision ensued, would not the *Acilia's* proctor be justified in urging: "You should never have presumed that we were going to act unlawfully. We never gave you two blasts, and why should you infer that we did not mean to keep to our side of the channel? If you had obeyed the rule, and ported, and kept on instead of stopping merely because our whistle was out of order, there would have been no collision." In *The Thingvalla*, 1 C. C. A. 87, 48 Fed. 764-768, this reasoning was applied, and a vessel held not in fault for not changing her course as soon as she saw a mistaken maneuver of the approaching vessel, as the first vessel could not know but that the approaching vessel would change and conform to the rule. In *The Delaware*, 161 U. S. 459-469, 16 Sup. Ct. 516-521, 40 L. Ed. 771-775, the supreme court, speaking of a situation somewhat similar to that in the present case, said, "Until the last moment the tug had a right to assume that she [the *Delaware*] would comply with the rule," and the court held that there was too much doubt about the fault of the tug to justify an apportionment of the damages. The *Victory* and *The Plymothian*, 168 U. S. 410, 18 Sup. Ct. 149, 42 L. Ed. 519, was a case of collision between two steamships in a narrow channel, in which the *Victory* was held in fault for being on the wrong side of the channel; and, her fault being obvious and inexcusable, it was held (page 423, 168 U. S., page 155, 18 Sup. Ct., and page 528, 42 L. Ed.) that "evidence to establish fault on the part of the *Plymothian* should be clear and convincing in order to make a case for apportionment," and that any doubts regarding her management were to be resolved in her favor. The supreme court held (page 424, 168 U. S., page 155, 18 Sup. Ct., and page 529, 42 L. Ed.) that the *Plymothian* was not bound to stop and reverse earlier, as she had a right to presume that the *Victory* would act lawfully, and would keep to her own side, and, if temporarily crowded out of her course, would return to it as soon as possible. In the recent case of *The Albert Dumois*, 177 U. S. 240, 20 Sup. Ct. 595, 44 L. Ed. 751, the supreme court again declared that exceptions to general rules of navigation are to be admitted with reluctance, and only when adherence to the rule must almost necessarily result in collision. They held that the *Albert Dumois* was primarily in fault for trying to pass the *Argo* starboard to starboard, in disregard of the rule. The *Argo* was going down the Mississippi river below New Orleans at the unusual speed of 20 miles an hour, with the added movement of the current. The proof established that she disregarded two signals, of two blasts each, from the *Albert Dumois*, which was proceeding up the river slowly, against the current, and which were given in reply to her own signal of one blast, and the court held that she was in fault in failing to stop and reverse when it was plain, from the *Dumois's* shutting in her red light and exhibiting her green, and from her signals, that she was starboarding. The court found that the *Dumois* must have starboarded, and shown her green light, some time before the *Argo* ported, and that the *Dumois* must have run a quarter of a mile across the river, showing her green light, to reach the point of collision. Even with these strong circumstances showing fault on the part of the *Argo* in not regarding the rule with

regard to cross signals, and not acting promptly in the face of a manifestly wrong maneuver by the Dumois, two of the justices dissented, such is the reluctance to condemn the pilot who has used his best judgment in the face of a danger brought about by the violation of a plain rule of navigation by the other vessel.

There is some conflict in the testimony in the present case as to the distance apart of the two vessels when the signals were given and when the engines of each were reversed. The witnesses from the Crathorne estimate the distance at the beginning of the whistle at 5 or 6 ship's lengths apart; the witnesses from the Acilia place the vessels, the one at near buoy 30, and the other at near buoy 34, when the Acilia began to blow her whistle, and this would be a distance of about three-quarters of a mile. I think probably both are somewhat mistaken. The Acilia was probably, as her witnesses state, near buoy 30 when she signaled, but the Crathorne was probably somewhat further down the channel, and nearer to buoy 32, as her own witnesses testify; but I am satisfied they were not less than half a mile from each other when the Acilia began to blow. Their combined speed was over 15 miles an hour, so that, if that speed continued, they would require less than two minutes to come together, starting from the distance of half a mile apart. The evidence establishes that the speed of the Acilia was greater than that of the Crathorne, both before and at the time of the collision. The character of the damage tends to confirm this. The bow of the Crathorne, although she was heavily laden with cargo, and drew over 21 feet, was smashed in bodily, and her headway was stopped by the blow, while the Acilia was not cut into except by the Crathorne's anchor, as it slipped along the Acilia's starboard side. If the Crathorne's speed had been greater, it would have resulted, I am inclined to think, in her bow penetrating into the Acilia's hull. The signal of one whistle, given by the Crathorne, was not heard on the bridge of the Acilia, because of the continuous sounding of their own whistle, but men on other vessels in the neighborhood heard it, and possibly it may have been heard on the bow of the Acilia by the lookout, but he was not examined. I hold that the Acilia is solely responsible for the collision.

I cannot pronounce this decree without adding some observations with regard to some of the licensed pilots of the Chesapeake Bay. If I am right in my decision of this case, owners of the German steamship Acilia have suffered a loss, which it is said may amount to \$100,000, by the inexcusable violation of a rule of navigation by one of our own pilots, employed because he is supposed to know the local rules, and whose services they were compelled to accept. Notwithstanding the accident to the steamship's whistle, this loss could not have happened, in broad daylight, and with all natural conditions favorable for safety, if the pilot of the Acilia had not willfully disobeyed the rule prescribed by act of congress for navigating narrow channels. I have been for a long time disturbed by observing how little attention is paid by many of these members of the pilot association to the regulations prescribed by congress, and by the United States supervising inspectors under authority of congress, for pre-

venting collisions. They seem often to be arbitrary and opinionated in their notions of navigation, and indifferent to the fact that it is the owners of these large and valuable steamships, and not themselves, who have to pay for their neglects. They receive a compensation in excess of that paid to highly intelligent men of ability who are masters of steamers, and it is but fair to expect of them an equal degree of intelligence and character, and yet the truth is that admiralty lawyers often feel great concern at being obliged to put some of these pilots on the witness stand. They frequently give such an unintelligent, obviously incorrect, and biased explanation of the cause of their collisions, and the way the ships came together, and of their own maneuvers, that they put in jeopardy even a good case. I am not infrequently obliged, in order to get at the real facts, to refuse to accept what they testify to. It has more than once happened that when testifying the witness has been noticeably affected by drink, thus exhibiting a lamentable lack of any sense of responsibility for their conduct as pilots. I do not wish to be considered as speaking of all, for it is probable that it is only those who have got ships into collision that I have seen in court, and I do not doubt that there are many who are justly entitled to high reputation; but, speaking of some of those I have heard testify, I feel it my duty, in a matter of such great interest to the commerce of the port, to say that these men do not exhibit the knowledge of the rules of navigation, the education, the intelligence, and the character that is fairly to be expected of men who occupy the position which special legislation has given to these pilots. In my judgment, there should be a more rigid supervision of the members of this body, with a view to requiring of its members character, intelligence, temperance, and obedience to the rules of navigation, and of punishing derelictions by suspension and dismissal.

THE WILLIAM E. FERGUSON.

(Circuit Court of Appeals, Second Circuit. May 10, 1901.)

No. 133.

COLLISION—DAMAGES—REVIEW ON APPEAL.

The finding of a commissioner, approved by the court, as to the cost of repairing a vessel injured in collision, based on the testimony of experts, the repairs not having been made, will not be disturbed on appeal unless manifestly incorrect.

Appeal from the District Court of the United States for the Eastern District of New York.

This cause comes here upon appeal from a decree of the district court, Eastern district of New York (102 Fed. 699), in favor of libellant for \$604.51 damages and \$131.50 costs (\$736.01 in all), for damages sustained by the canal boat T. F. Accles by reason of a collision with a steamship in tow of the steam tug William E. Ferguson. An interlocutory decree referred the question of damages to a United States commissioner, and his report was sustained by the district judge, exceptions thereto being overruled. The appeal is brought solely as to the amount and extent of damages.

Le Roy S. Gove, for appellants.

N. Zabriskie, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. The testimony taken upon the reference shows that a survey was held on the injured boat, the master (libelant) pointing out what damage had been done. The results of the survey, with recommendations, were set down in writing, and the person who made it testified to its accuracy. None of the repairs called for by the survey were made, the libelant, for satisfactory reasons, having concluded to alter her over into an open boat. In consequence no proof could be given of the actual cost of making the repairs, and it became necessary to call ship carpenters to testify what would have been the fair and reasonable value of making them. Three of these experts testified. One of them (Cahill), a man of 35 years' experience in his business, and one of the two persons who made the original survey, gave such amount as \$465. Another (Bushey), who altered her into an open boat, estimated the value of such repairs at \$630.04. A third (Murphy), a man of 40 years' experience, and who examined her two weeks after the accident, and made a written report of her condition, which does not entirely agree with the survey, estimated the value of the necessary repairs at \$100.12. The commissioner found the fair value of necessary repairs to be \$524.15. All the witnesses testified before him, and there is no reason shown for rejecting his conclusion. The allowance of interest from the date of the disaster is proper, and 10 days' demurrage at \$3 a day is justified by the proof. Decree of district court affirmed, with interest and costs.

MEMORANDUM DECISIONS.

ÆTNA INS. CO. OF HARTFORD, CONN., v. LANGAN. (Circuit Court of Appeals, Eighth Circuit. April 12, 1901.) No. 1,444. In Error to the Circuit Court of the United States for the Northern District of Iowa. G. S. Steere and Walter I. Hayes (A. L. Schuyler, on the brief), for plaintiff in error. R. C. Langan and Edred S. James, for defendant in error. Before CALDWELL and SANBORN, Circuit Judges, and ADAMS, District Judge.

PER CURIAM. The opinion of Judge Shiras (99 Fed. 374), who tried this case at the circuit, is adopted by this court. The judgment of the circuit court is affirmed.

ANDERSON v. COMPTOIS. (Circuit Court of Appeals, Ninth Circuit. February 21, 1901.) No. 632. Appeal from the District Court of the United States for the Second Division of the District of Alaska. Jackson & Hatch, C. S. Johnson, E. S. Pillsbury, and K. M. Jockson, for appellant. Hubbard,

Beeman & Hume, for appellee. T. J. Geary, for receiver Alexander McKenzie. No opinion. Pursuant to stipulation of counsel, judgment of district court reversed, and decree entered upon the merits in favor of appellants.

ATLANTIC, G. & P. CO. v. UNITED STATES. (Circuit Court of Appeals, Ninth Circuit. February 21, 1901.) No. 645. In Error to the District Court of the United States for the Northern District of California. R. Percy Wright, for plaintiff in error. Marshall B. Woodworth, Asst. U. S. Atty. Upon motion of counsel for plaintiff in error, counsel for United States consenting, cause dismissed, without prejudice to any right of plaintiff in error to sue out writ of error to the supreme court of the United States.

CANADIAN PAC. NAV. CO. v. GIBSON. (Circuit Court of Appeals, Ninth Circuit. May 13, 1901.) No. 689. In Error to the District Court of the United States for the District of Alaska. W. E. Crews and R. W. Jennings, for plaintiff in error. Cause dismissed under rule 23 (31 C. C. A. clxiii., 90 Fed. clxiii.) for failure to print record, and under rule 24 (31 C. C. A. clxiv., 90 Fed. clxiv.) for failure to file brief.

CARSON et al. v. STEELE et al. (Circuit Court of Appeals, Fifth Circuit. May 21, 1901.) No. 1,042. Appeal from the District Court of the United States for the Eastern District of Texas. J. C. Hutcheson and J. C. Hutcheson, Jr., for appellant. F. Charles Hume, for appellee. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. Without adopting all the conclusions of law found by the district judge, we concur in the result reached by him, and the decree appealed from is therefore affirmed.

DICKERSON v. UNITED STATES. (Circuit Court of Appeals, Fourth Circuit. May 18, 1901.) No. 337. In Error to the District Court of the United States for the Western District of North Carolina. Charles A. Moore and Joseph S. Adams (Tucker & Murphy and Pritchard & Rollins, on the brief), for plaintiff in error. William P. Bynum, Jr., Sp. U. S. Atty. (A. E. Holton, U. S. Atty., and Spencer Blackburn, Asst. U. S. Atty., on the brief). Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

PER CURIAM. Considering the arguments made in this cause upon the various assignments of error presented by the plaintiff in error, defendant below, we are of opinion that a new trial should be granted. The case is remanded to the district court, with instructions to grant a new trial.

THE ENTERPRISE. (Circuit Court of Appeals, Ninth Circuit. 1901.) No. 652. Appeal from the District Court of the United States for the Territory of Hawaii. T. McCants Stewart and H. W. Hutton, for appellants. Appeal dismissed for failure to print record under rule 23 (31 C. C. A. clxiii., 90 Fed. clxiii.).

ERIE R. CO. v. MOORE. (Circuit Court of Appeals, Sixth Circuit. April 13, 1901.) No. 900. In Error to the Circuit Court of the United States for

the Northern District of Ohio. John H. Clarke, for plaintiff in error. A. W. Jones and D. F. Anderson, for defendant in error. Before LURTON, DAY, and SEVERENS, Circuit Judges.

PER CURIAM. This was an action for serious personal injuries sustained by the defendant in error while in the line of his duty as a brakeman in the employment of the plaintiff in error. It has been very strenuously urged that there was no sufficient evidence of negligence upon the part of the railroad company to justify the submission of the case to the jury, and that, independently of this, the evidence of contributory negligence by the defendant in error was so conclusive as to require an instruction to find against him upon that ground. We have carefully examined the whole of the evidence, and have reached the conclusion that the learned trial judge did not err in submitting the case to the jury upon both of these questions. No useful purpose can be subserved by setting out the evidence or by presenting our reasons upon the evidence for the conclusion we have reached. The charge, considered as a whole, was one of which the plaintiff in error cannot complain. Judgment affirmed.

GALE v. CHASE NAT. BANK. (Circuit Court of Appeals, Second Circuit. May 11, 1901.) No. 158. In Error to the Circuit Court of the United States for the Southern District of New York. E. B. Whitney, for plaintiff in error. Thomas B. Reed, for defendant in error. Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. The questions presented on this appeal are interesting, and some of them have not been passed upon, at least in concrete form, by the supreme court. The record, however, does not seem to present any important modifications (save only as to the number and particulars of former cashier's drafts not objected to) from that which was before this court on the first writ of error. 43 C. C. A. 496, 104 Fed. 214. We therefore deem it unnecessary to add anything to the exhaustive discussion of the questions which will be found in the former opinion. Upon that opinion, and the careful review of the new proofs which will be found in the judge's charge, the judgment of the circuit court is affirmed.

HOLMES, BOOTH & HAYDENS v. MCGILL. (Circuit Court of Appeals, Second Circuit. April 25, 1901.) No. 57. In Error to the Circuit Court of the United States for the Southern District of New York. This is an application of the plaintiff in error for leave to move in the circuit court of the United States for the Southern district of New York for a new trial of the cause, so far forth as it relates to the question of the true title and ownership of the process patent dated December 3, 1889, and numbered 416,510, upon the ground of newly-discovered evidence. For former opinion of this court, see 108 Fed. 238. Before WALLACE and SHIPMAN, Circuit Judges.

PER CURIAM. The newly-discovered evidence, which is based upon the letter of Mr. Wayland of October 4, 1889, to the defendant in error (of the existence of which we have no doubt), is not sufficient to induce this court to grant the application, in view of the history of the process patent as disclosed in the record. The letter does not substantially assist to change the conclusion that the process patent for the invention of Shipley was always owned by McGill as his own property. The application is denied.

INTERNATIONAL NAV. CO. v. BRITISH & FOREIGN MARINE INS. CO., Limited. SAME v. INSURANCE CO. OF NORTH AMERICA. SAME v. THAMES & MERSEY INS. CO., Limited. SAME v. ATLANTIC MUT. INS. CO. (Circuit Court of Appeals, Second Circuit. May 11, 1901.) Nos.

149-152. Appeals from the District Court of the United States for the Southern District of New York. Treadwell Cleveland, for appellants in first three cases. Walter F. Taylor, for appellant Atlantic Mut. Ins. Co. Henry G. Ward, for appellee. Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. Decrees of district court affirmed, with interest and costs, on opinion of district judge. 100 Fed. 304.

LAYDON v. UNITED STATES. (Circuit Court of Appeals. Ninth Circuit. May 13, 1901.) No. 686. In Error to the District Court of the United States for the Northern District of California. P. F. Dunne, for plaintiff in error; Marshall B. Woodworth, U. S. Atty. Cause dismissed under rule 23 (31 C. C. A. clxiii., 90 Fed. clxiii.) for failure to print record, and under rule 24 (31 C. C. A. clxiv., 90 Fed. clxiv.) for failure to file brief.

LINDBERG et al. v. CHIPPS. (Circuit Court of Appeals, Ninth Circuit. February 21, 1901.) No. 631. Appeal from the District Court of the United States for the Second Division of the District of Alaska. J. C. Campbell, Chas. S. Johnson, K. M. Jockson, and W. H. Metson, for appellants. Hubbard, Beeman & Hume, for appellee. T. J. Geary, for receiver Alexander McKenzie. No opinion. Pursuant to stipulation of counsel, judgment of district court reversed, and decree entered upon the merits in favor of appellants.

LINDBERG et al. v. REQUA. (Circuit Court of Appeals, Ninth Circuit. February 21, 1901.) No. 648. Appeal from District Court of the United States for the Second Division of the District of Alaska. J. C. Campbell, Chas. S. Johnson, K. M. Jockson, and W. H. Metson, for appellants. Hubbard, Beeman & Hume, for appellee. T. J. Geary, for receiver Alexander McKenzie. No opinion. Pursuant to stipulation of counsel, judgment of district court reversed, and decree entered upon the merits in favor of appellants.

LOUISVILLE & N. R. CO. et al. v. INTERSTATE COMMERCE COMMISSION. (Circuit Court of Appeals, Fifth Circuit. May 14, 1901.) No. 910. Appeal from the Circuit Court of the United States for the Southern District of Alabama. Ed. Baxter, for appellant. L. A. Shaver, for appellee. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. Considering the opinions of the supreme court of the United States in Interstate Commerce Commission v. Clyde S. S. Co., 21 Sup. Ct. 512, 45 L. Ed. —, and East Tennessee, V. & G. Ry. Co. v. Interstate Commerce Commission, 21 Sup. Ct. 516, 45 L. Ed. —, recently decided, not yet officially reported, this case is remanded to the circuit court, with instructions to set aside its decree adjudging that the order of the commission be enforced (102 Fed. 709), and dismiss the application made for that purpose, with costs; the whole to be without prejudice to the right of the commission to proceed upon the evidence already introduced before it, or upon such further pleadings and evidence as it may allow to be made or introduced, to hear and determine the controversy according to law.

MCDONNELL v. JORDAN. (Circuit Court of Appeals, Fifth Circuit. May 7, 1901.) In Error to the Circuit Court of the United States for the Northern District of Alabama. Lawrence Cooper, for plaintiff in error. R.

W. Walker, for defendant in error. Before PARDEE and McCORMICK, Circuit Judges.

PER CURIAM. The motion to dismiss this writ because, pursuant to the judgment and mandate of the supreme court of the United States, this cause has been remanded to the probate court of Madison county, state of Alabama, as appears from the certified copy filed in this court of the order and judgment of the lower court, made and entered the 20th day of October, 1900 (see *McDonnell v. Jordan*, 178 U. S. 229, 20 Sup. Ct. 886, 44 L. Ed. 1048), is granted, at the cost of the plaintiff in error.

MERCANTILE TRUST & DEPOSIT CO. v. COLLINS PARK & B. R. CO. et al. (Circuit Court of Appeals, Fifth Circuit. January 7, 1901.) No. 949. Appeal from the Circuit Court of the United States for the Northern District of Georgia. C. L. Anderson and John L. Tye, for appellant. Alex. C. King, Morris Brandon, and J. A. Anderson, for appellees. Dismissed on stipulation of counsel. See 107 Fed. 762.

MOHR et al. v. JOHNSON. (Circuit Court of Appeals, Fifth Circuit. May 27, 1901.) No. 1,066. Petition for Revision from the District Court of the United States for the Middle District of Alabama. H. H. Hall, for respondent. Docketed and dismissed.

NICHOLS v. MCGHEE et al. (Circuit Court of Appeals, Fifth Circuit. May 7, 1901.) Petition for Mandamus to the Circuit Court of the United States for the Northern District of Alabama. Lawrence Cooper, for plaintiff. Milton Humes, J. H. Sheffey, and Paul Speake, for defendants. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The petition for mandamus to the judges of the circuit court for the Northern district of Alabama to disallow and strike out an amendment making new parties to the above-entitled cause is denied.

THE N. & W. NO. 2. (Circuit Court of Appeals, Second Circuit. May 10, 1901.) No. 147. Appeal from the District Court of the United States for the Eastern District of New York. This cause comes here upon appeal from a decree of the district court, Eastern district of New York, holding both tug and tow responsible for a stranding on the north side of the main channel into the harbor of New York, and dividing the damages. Wilhelmus Mynderse, for claimant. H. G. Ward, for libellant. Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. The testimony is most conflicting, and the contradictions of fact so sharp that it is absolutely impossible to harmonize them upon any theory. Nearly all the witnesses called by the libellant were examined by deposition. Nearly all those called by the claimant were before the district judge. We have not been able out of this mass of contradictions to satisfy ourselves that his ultimate conclusions should be reversed, although we may not concur in all his findings. The weight of evidence seems to indicate that the tow was not steered with the care and prompt attention to incipient sheers which the situation called for, and that the tug laid her course closer to the northern edge of the channel than she should have done, in view of the existing conditions. Decree affirmed, without interest or costs.

POOLE v. SMITH et al. (Circuit Court of Appeals, Ninth Circuit. February 13, 1901.) No. 622. Appeal from the District Court of the United States for the Northern Division of the District of Washington. Humes & Lysons and John F. Miller, for appellant. Edward Brady, Wilson R. Gay, and Burke, Shepard & McGilvra, for appellees. Appeal dismissed for failure to print record under rule 23 (31 C. C. A. clxiii, 90 Fed. clxiii.).

TEXAS & P. RY. CO. v. WHITE. (Circuit Court of Appeals, Fifth Circuit. April 28, 1901.) No. 1,026. In Error to the Circuit Court of the United States for the Eastern District of Texas. W. T. Armistead and T. J. Freeman, for plaintiff in error. J. F. Jones, for defendant in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

MCCORMICK, Circuit Judge. This case was before us at a former term, and is fully stated in the opinion of this court reported in 42 C. C. A. 86, 101 Fed. 928. On the trial that resulted in the judgment to review which this writ of error is brought substantially the same issues were presented by the pleadings, the same proof offered with some additions of cumulative evidence, with the same instructions asked by the plaintiff in error and action of the court thereon; and, the court having carefully conformed its action to the views expressed in the opinion referred to, and we seeing no reason to change our own views as then announced, on the authority of that decision and the conformity of the circuit court thereto, the judgment of that court herein sought to be reviewed is affirmed.

UNITED STATES v. GOODMAN. (Circuit Court of Appeals, Fourth Circuit. May 7, 1901.) No. 393. In Error to the District Court of the United States for the Western District of North Carolina. A. E. Holton, U. S. Atty. Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

PER CURIAM. We find no error in the judgment complained of, and the same is affirmed.

WARE v. HART. (Circuit Court of Appeals, Fifth Circuit. May 21, 1901.) No. 1,037. In Error to the Circuit Court of the United States for the Eastern District of Louisiana. D. M. Scholars, for plaintiff in error. T. Jones Cross, for defendant in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. As the evidence offered on the trial of this case before the jury warranted an instruction to find for the defendants, we do not find it necessary to discuss the ruling on exceptions interposed by the city of Baton Rouge, nor the objections to the charge actually given resulting in a verdict in favor of the defendant, and the judgment of the circuit court is affirmed.

WARNER et al. v. CITY OF NEW ORLEANS (JACKSON, Intervener). (Circuit Court of Appeals, Fifth Circuit. May 21, 1901.) No. 1,039. Appeal from the Circuit Court of the United States for the Eastern District of Louisiana. Richard De Gray, John D. Rouse, and Wm. Grant, for appellant. B. K. Miller, for appellee. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. For the reasons orally assigned, the decree appealed from is reversed, and the cause is remanded, with instructions to overrule all exceptions to the master's report on the claim of James Jackson, and enter a decree approving and confirming the same.

WAYNE v. CARTER CRUME CO. (Circuit Court of Appeals, Fifth Circuit. May 21, 1901.) No. 1,038. Appeal from the Circuit Court of the United States for the Northern District of Mississippi. Paul Speake, for appellant. Robert B. Cooke, for appellee. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. As we find no reversible error in the proceedings in the circuit court, and the result is equitable, the decree appealed from is affirmed.

In re WETMORE. Appeal of MARKOE. (Circuit Court of Appeals, Third Circuit. April 29, 1901.) No. 16. Appeal from the District Court of the United States for the Eastern District of Pennsylvania. Before DALLAS and GRAY, Circuit Judges, and BRADFORD, District Judge.

BRADFORD, District Judge. This is an appeal from a judgment of the United States district court for the Eastern district of Pennsylvania, granting a discharge in bankruptcy to William B. Wetmore, a voluntary bankrupt. 99 Fed. 703. His discharge was resisted by Annette B. Markoe, the appellant, on the ground that he had omitted from the schedules attached to his petition and fraudulently concealed a certain supposed interest under the fourth item of the will of his father, Samuel Wetmore. This court having this day, on the petition of G. Plantou Middleton, trustee of Wetmore's estate in bankruptcy, for revision of a certain order made in the proceedings in the court below, decided that the bankrupt was not at the time of the filing of the petition in bankruptcy entitled under that clause to any right, interest, or property which could pass to the trustee by virtue of section 70 of the bankruptcy act, it necessarily follows that this appeal must be dismissed, with costs, and it is accordingly so ordered.

WIMBERLEY v. FRANCESCO DI SIMONE. (Circuit Court of Appeals, Fifth Circuit. May 29, 1901.) No. 1,049. W. W. Howe, for appellant. Wm. Armstrong, for appellee. No opinion. Error confessed, and cause reversed and remanded.